

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

**APOT No. 222 of 2023
IA No. GA/2/2023
WPO/3374/2022**

The Kolkata Municipal Corporation & Ors.

Vs

Abas Nibas Pvt. Ltd. & Ors.

Before: The Hon'ble Justice Arijit Banerjee

&

The Hon'ble Justice Apurba Sinha Ray

For the KMC : Mr. Kishore Datta, Adv.
Mr. Gurudas Mitra, Adv.
Ms. Manisha Nath, Adv.

For the Respondents : Mr. R.N. Chakraborty, Adv.
Ms. T. Das, Adv.
Ms. S. Sultana, Adv.

Judgment On : 13.10.2023

Arijit Banerjee, J. :-

1. A judgment and order dated March 30, 2023, whereby the writ petition of the respondent no. 1 herein being W.P.O. 3374 of 2022, was

disposed of by a learned Single Judge of this Court, is under challenge in this appeal.

2. The respondent/writ petitioner is the owner of premises no. 1, Rustamji Parsi Road, Kolkata-700002 under Ward No. 6 of Kolkata Municipal Corporation (in short 'KMC'). The annual valuation of the said premises was assessed by the Hearing Officer at Rs. 8,82,600/- with effect from the 2nd quarter of 1997-98 and at Rs. 10,59,120/- with effect from the 2nd quarter of 2003-04.

3. Challenging such annual valuation, the writ petitioner preferred two appeals being MAA Nos. 1121/2012 and 1122/2012 before the Municipal Assessment Tribunal. The Tribunal by an order dated May 31, 2016, reduced the annual valuation of the said premises to Rs. 1,04,530/- with effect from the 2nd quarter of 1997-98 and to Rs. 1,21,110/- with effect from the 2nd quarter of 2003-04. As required under Section 189 of the Kolkata Municipal Corporation Act, 1980 (in short KMC Act), the writ petitioner had deposited the requisite sum of money with KMC as precondition for preferring the appeals before the Tribunal.

4. On account of reduction of the annual valuation of the said premises as aforesaid, it transpired that a sum of approximately Rs. 91.39 lakh was lying to the credit of the writ petitioner in the suspense account maintained by KMC, after adjustment of the bills raised by KMC. The writ petitioner made a representation dated February 5, 2020, to the Commissioner of KMC for necessary adjustment of pending bills against such outstanding credit amount and for refund of the balance amount.

5. Such representation of the writ petitioner not having been considered, it approached a learned Single Judge of this Court by filing W.P.O. 2267 of 2022. The said writ petition was disposed of by the learned Single Judge by a judgment and order dated June 20, 2022, with the following observations and directions:-

“The petitioner relies upon the provisions of Rule 25 of the Kolkata Municipal Corporation (Taxation) Rules, 1987. The petitioner also relies upon provisions of Section 197 of the Kolkata Municipal Corporation Act, 1980.

The petitioner submits that necessary directions may be passed upon the Commissioner of the Kolkata Municipal Corporation to take consequential steps pursuant to the judgment passed by the Municipal Assessment Tribunal.

Learned Advocate representing the Kolkata Municipal Corporation submits that the consequential steps are required to be taken by the Chief Manager, (Revenue) (North).

According to Rule 25(2) it is the duty of the Municipal Commissioner to give effect to the final order or to act according to the direction given by the Tribunal in its order, when the Tribunal varies or reverses the order appealed against.

Rule 25(3) mentions that the result of the appeal shall be noted in the Register of Appeals.

Section 197 of the K.M.C. Act, 1980 mentions that if after the disposal of the appeal under Section 189, the valuation decided

under Section 174 or Section 188 is altered, then, 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 the Act.

In the present case, the petitioner paid the excess amount and presently claims refund of the excess or prays that the excess may be set off against any present or future demand of the Corporation. The petitioner has already made a representation praying for adjustment and refund of the excess amount.

The Municipal Commissioner is accordingly directed to take necessary steps in the matter strictly in accordance with the provisions of Section 197 of the Act of 1980 at the earliest, but positively within a period of three months from the date of communication of this order.

It will be open for the Municipal Commissioner to delegate the power upon the competent authority to deal the issue.

The timeline as mentioned above shall be followed by the competent authority who may be delegated the power by the Municipal Commissioner. The reasoned order shall be passed by the competent authority within the time as specified hereinabove and the same shall be communicated to the petitioner immediately thereafter.”

6. The Municipal Commissioner delegated the Chief Manager (Revenue-North) to pass necessary order on the writ petitioner’s representation. An

order dated September 6, 2022, was passed by the Chief Manager Revenue (North), the material portion whereof reads as follows:-

“It appears that a sum of Rs. 91,39,846/- is lying in Suspense A/C after necessary adjustment.

In compliance with the solemn order of the Hon’ble High Court, it is ordered that this amount keep in Suspense A/C shall be allowed to be set off against future demand of the Corporation u/s. 197 of the Kolkata Municipal Corporation Act, 1980.”

7. Challenging the said order, of the Chief Manager (Revenue-North), the respondent no. 1 herein approached the learned Single Judge in the present round of litigation.

8. Before the learned Single Judge it was submitted on behalf of the writ petitioner that KMC should not be allowed to retain the aforesaid amount lying in the suspense account as the same would amount to unjust enrichment of KMC. The amount being a hefty one, it will take several years for the same to be adjusted against future bills to be raised by KMC. KMC should have refunded the amount lying to the writ petitioner’s credit and the petitioner will clear the property tax dues as and when bills are raised.

9. On behalf of the KMC it was submitted that Section 197 of the KMC Act permits KMC either to refund the excess amount or to set off the same against future bills. Since the statute has given KMC such a discretion, no writ of mandamus can be issued on KMC directing refund of the excess amount.

10. The learned Judge in essence held that although Section 197 gives a choice to KMC to either refund the excess amount or direct the same to be set off against future bills, the discretion has to be exercised properly and judiciously. In the present case the exercise of discretion by the Chief Manager (Revenue-North), was not proper or reasonable. It would take decades for the excess amount to be adjusted against future bills. The learned Judge held that the discretion that KMC has under Section 197, should be exercised upon proper application of mind and upon consideration of proper facts and figures. The decision to retain the money should not be a mechanical one. If upon calculation it is found that it will take a considerable period of time for the excess amount to be set off against future bills, then KMC should refund the money to the assessee.

11. The learned Judge further observed that KMC is "State" within the meaning of Article 12 of the Constitution and is therefore obliged to support its acts and orders with reasons. The concerned officer of KMC has not recorded any reason as to why the decision was taken to retain the money and not refund the same.

12. The decision of KMC to retain the excess money was sought to be justified by saying that several assesseees do not pay property tax in time and it becomes difficult for the civic authority to provide necessary service to the citizens. The money which is held back by KMC will be used for rendering service to the general public. The learned Judge rejected such submission as being one made in desperation. In fine, the learned Judge held that there is no rational basis for the decision not to refund the excess

amount but to direct the same to be set off against future property tax bills. Accordingly, the learned Judge disposed of the writ petition with the following observations and directions:-

“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.”

13. Being aggrieved, KMC has come up by way of the present appeal.

14. Appearing for the appellants, Mr. Kishore Dutta, learned Senior Advocate, submitted firstly, that the learned Single Judge erred in holding that it will take decades for the excess payment to be adjusted against future bills raised by KMC on account of property tax. On a correct arithmetical calculation, keeping in mind that over the next few years the property tax may be enhanced, 30 quarters or less, i.e., seven and a half years or less, would be taken for such adjustment.

15. Secondly, Mr. Dutta submitted that Section 197 of the KMC Act vests KMC with a discretion either to refund the excess amount paid by the assessee or to direct that the same will be set off against future property tax bills. Since the legislature has thought it fit to give such a choice to KMC, the learned Single Judge should not have interfered with the decision of KMC. It is nobody's case that the discretionary power has been exercised mala fide by KMC. Had the respondent/writ petitioner been able to demonstrate that the decision of KMC to direct adjustment of the excess payment against future tax bills is mala fide or tainted with oblique motive, the question of interfering with such decision may have arisen. However, the writ petitioner has not been able to show any such improper motive on the part of KMC.

16. Mr. Dutta then submitted that if a certain provision in a statute works injustice to a citizen, it is for the legislature to appropriately amend such provision. The Court cannot legislate. If the legislature has kept a void in a statute, the Court cannot fill it up. The matter must be dealt with by the

legislature. This is the principle of *casus omissus*. Mr. Dutta submitted that even a wrong decision of an authority which is bona fide, is normally not interfered with by the Court in exercise of jurisdiction under Article 226 of the Constitution.

17. Mr. Dutta Relied on the following decisions on the principle of *casus omissus*:-

(i) *Sangeeta Singh v. Union of India & Ors., reported at (2005) 7 SCC 484.*

(ii) *State of Kerala & Anr. v. P.V. Neelakanda Nair & Ors., reported at (2005) 5 SCC 561.*

(iii) *Unique Butyle Tube Industries (P) Ltd. v. U.P. Financial Corporation & Ors., reported at (2003) 2 SCC 455.*

(iv) *C.J. Paul & Ors. v. District Collector & Ors., reported at (2009) 14 SCC 564.*

18. Mr. Dutta further submitted that in interpreting a fiscal statute, there is no scope for intendment. The fact that a citizen may suffer hardship by operation of the statute, is not a relevant factor in construing such statute. In this connection learned Senior Advocate relied on the decision of the Hon'ble Supreme Court in the case of ***Shrimati Tarulata Shyam & Ors. v. Commissioner of Income Tax, West Bengal, reported at (1977) 3 SCC 305.***

19. Responding to a remark made by learned Advocate for the writ petitioner that the decision of KMC not to refund the excess payment but to adjust the same against future property tax bills, is not supported by

reasons, Mr. Dutta submitted that Section 197 does not require the competent authority to record any reason. The section does not say that the competent authority has to form an opinion or satisfaction that in the facts of a case it would be appropriate to direct adjustment against future property tax liability rather than refund the excess payment. An unreasoned decision is not vulnerable to interference by courts unless the decision is mala fide. The learned single Judge has recorded in the order impugned that the legislature has given a discretion to KMC under Section 197 of the Act. This finding has not been challenged by the writ petitioner. In this connection learned Senior Advocate relied on the decision in the case of ***B.C. Mylarappa Alias Dr. Chikkamylarappa v. Dr. R. Venkatasubbaiah & Ors., reported at (2008) 14 SCC 306.***

20. Appearing for the respondent/writ petitioner, Mr. Raghu Nath Chakraborty, learned Advocate, recounted the factual background of the case which we have already recorded above in the first few paragraphs of this judgment. He submitted that although KMC may have a discretion under Section 197 of KMC Act whether to refund the excess amount deposited or to direct adjustment of the same against future property tax, such discretion has to be exercised reasonably. According to the calculation of the writ petitioner, it will take approximately 60 years for the excess payment to be adjusted against future property tax. For this length of time, the writ petitioner will be deprived of a substantial sum of money. Hence, in the facts of the present case, the decision of KMC to direct adjustment rather than refund is unreasonable.

21. Mr. Chakraborty submitted that not only KMC is liable to refund the excess payment after adjustment of current dues on account of property tax, KMC is also obliged to pay interest on such amount. Under Section 217(3) of the KMC Act, KMC is empowered to charge interest when there is delay in payment of property tax. Hence KMC should also pay interest on the delayed repayment of the amount held in the suspense account to the credit of the writ petitioner. In this connection learned Counsel relied on the decision of a coordinate bench of this Court in the case of ***Abhishek Karnani v. Kolkata Municipal Corporation & Ors., reported at 2023 SCC OnLine CAL 99.***

22. Mr. Chakraborty further submitted that if KMC refunds the excess amount paid, the same can be profitably utilized by the writ petitioner. KMC will not pay any interest on the credit amount lying in the suspense account. This amounts to infringement of the writ petitioner's rights under Section 300A of the Constitution of India. That right, although no more a fundamental right, is a very valuable constitutional right.

Court's view

23. I have carefully considered the rival contentions of the parties.

24. Apparently Section 197 of the Act gives a choice to KMC to either refund or set off against any present or future demand of KMC, any excess sum paid or deposited by an assessee under Section 189 of the Act. However, on a more careful reading of the Section it does not appear that KMC enjoys such an absolute discretion. Section 197 of the Act reads as follows:-

“197. Payment of property tax in case of objection or appeal._

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: and
- (b) any deficiency shall be deemed to be an arrear of the property tax and shall be payable and recoverable as such:

Provided that –

- (i) if any premises have, for the purposes of valuation under Section 179 or Section 180, been for the first time valued or sub-divided or amalgamated with any other premises and an objection to the valuation thereof has been made under Section 186, then the property tax shall, pending the final determination of the objection, be paid on such valuation;
- (ii) If, when such objection has been finally determined, such valuation is reduced, and if the property tax has already been paid thereon, then the sum paid in excess shall be refunded or allowed to be set-off against any present or future demand of the Corporation under this Act; and
- (iii) in case of refund, if any, is to be made by the Corporation to the assessee, such refund amount shall not accrue any interest thereon.”

25. As I read the Section, the obligation of KMC is to refund the excess amount. However, if an assessee requests KMC to adjust the excess amount against present or future demand of KMC under the Act, KMC at its discretion may allow such request. The wordings are not “shall be refunded or set off”. The wordings are “shall be refunded or allowed to be set off”. To allow something means to permit to do that thing. The question of granting permission arises only when one seeks such permission. Therefore, as I read the Section, the primary obligation of KMC is to refund the excess amount. However, if for whatever reason, an assessee requests KMC to hold on to the excess amount paid by the assessee for being adjusted against any present or future demand of KMC under Act, KMC may allow such request at its discretion. In other words, the question of withholding excess payment for being adjusted against future demands, would arise only if the concerned assessee requests KMC to do so. KMC on its own cannot decide to retain the excess amount paid by the assessee for being set off against future demands.

26. One may ask as to why an assessee would under any circumstance want KMC to hold on to his funds for future adjustment rather than receiving back his valuable money? The answer is, although such a request from the end of an assessee is unlikely, yet, it is not inconceivable. It may so happen that the excess payment may amount to a paltry sum and the assessee feels that rather than taking back the money, for the sake of convenience, it should be left with KMC for adjustment against future demands. It may also so happen that a spendthrift person, in his wisdom,

may decide to keep the excess payment with KMC for future adjustment, rather than receive a refund which he would probably spend unnecessarily. Hence, one can actually perceive of a situation where an assessee in fact may prefer KMC to hold on to the excess payment for being adjusted against future property tax dues.

27. Therefore, in my considered opinion, KMC does not really have a unilateral choice to hold on to the excess payment made by an assessee under Section 189 of the Act. Indeed, it would have been strange if the statute had given KMC such an option as that would have amounted to infringement of an assessee's right under Article 300A of the Constitution, which, although no more a fundamental right, is a valuable constitutional right and has been recognized as a human right. A public authority cannot as a matter of right be permitted to withhold a citizen's money for the purpose of setting off the same against possible future claim of the authority against such assessee, which claim may or may not arise. For example, an assessee may sell off the concerned property and have such sale recorded in KMC records. In such an event obviously no future claim on account of tax in respect of such property can be raised on such assessee.

28. Another question that may arise is that what was the necessity for the statute to expressly provide that KMC can withhold the excess payment otherwise refundable to the assessee, if the assessee so requests? Even without such express provision could not KMC, in such a case, pursuant to the assessee's request lawfully retain the surplus amount for the purpose of future adjustment? The answer, I think, is that by way of abundant caution

the legislature has clarified that it will be lawful for KMC, a statutory corporation, to withhold the excess payment for future adjustment, if so requested by the concerned assessee. It is well established that while a natural person is entitled to do everything which is not prohibited by law, an artificial person like a statutory corporation can only do such things which the parent statute expressly permits.

29. In so far as the decisions in the cases of ***Sangeeta Singh v. Union of India & Ors.***, (*supra*), ***State of Kerala & Anr. v. P. V. Neelakandan Nair & Ors.*** (*supra*), ***Unique Butyle Tube Industries (P) Ltd. v. U.P. Financial Corporation & Ors.*** (*supra*) and ***C.J. Paul & Ors. v. District Collector & Ors.***, (*supra*) are concerned, the Hon'ble Supreme Court observed that legislative *casus omissus* cannot be supplied by judicial interpretative process. While interpreting a provision, the Court only interprets the law and cannot legislate. If a provision of law is misused and subjected to abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. In my considered respectful opinion, these four decisions are not germane to the facts of the present case. We are not concerned in this case with a situation of *casus omissus*. I have interpreted Section 197 of the KMC Act in the manner I have understood it.

30. Learned Senior Counsel for KMC relied on the decision of the Hon'ble Supreme Court in the case of ***Shrimati Tarulata Shyam & Ors. v. Commissioner of Income Tax, West Bengal*** (*supra*) and in particular on paragraph 35 of the reported judgment which reads as follows:-

“To us, there appears no justification to depart from the normal rule of construction according to which the intention of the legislature is primarily to be gathered from the words used in the statute. It will be well to recall the words of Rowlatt. J., in *Cape Brandy Syndicate v. IRC* at p. 71, that “in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used”. Once it is shown that the case of the assessee comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be.”

This decision also does not advance KMC’s case to any extent. One cannot possibly have a dispute with the proposition that in dealing with a taxing statute, once it is demonstrated that an assessee is covered by the provisions of the relevant Act, he must pay the concerned tax notwithstanding any hardship that he may suffer. However, in the present case, we are concerned with the power of KMC to retain the excess payment made by an assessee under Section 189 of the KMC Act, for the purpose of adjusting the same against future property tax bills. It is not a question of any hardship of an assessee that is relevant in the present case.

31. Learned Senior Counsel for KMC also referred to the Hon’ble Supreme Court’s Decision in the case of ***B.C. Mylarappa Alias Dr. Chikkamylarappa v. Dr. R. Venkatasubbaiah & Ors. (supra)*** in support

of his submission that since Section 197 of the KMC Act does not require recording of reasons in support of the decision to hold back the surplus payment for setting off the same against future property tax bills, KMC was under no obligation to record any reason. Firstly, the aforesaid decision of the Hon'ble Supreme Court was rendered in the context of a challenge thrown to the assessment of relative merits of candidates by an Expert Body in connection with a recruitment process. In paragraph 29 of the reported judgment the Hon'ble Supreme Court observed as follows:-

“It is not in dispute that there is no rule or regulation requiring the Board to record reasons. Therefore, in our view, the High Court was not justified in making the observation that from the resolution of the Board selecting the appellant for appointment, no reason was recorded by the Board. In our view, in the absence of any rule or regulation requiring the Board to record reasons and in the absence of mala fides attributed against the members of the Board, the selection made by the Board without recording reasons cannot be faulted with.”

The facts and context of the present case are completely different and in my opinion, the aforesaid decision is not germane to the facts of the present case.

32. Learned Advocate for the respondent no. 1/writ petitioner relied on the decision of a Coordinate Bench in the case of **Abhishek Karnani v. Kolkata Municipal Corporation & Ors. (supra)**. Strictly speaking, that case is also not relevant for the present purpose. Interpretation of Section

197 of the KMC Act was not an issue before that Division Bench. What that Division decided is that while refunding the excess payment made by an assessee under Section 189 of the KMC Act, KMC is liable to pay interest on the amount that was lying to the credit of the concerned assessee in the suspense account maintained by KMC.

33. In view of the aforesaid, I disagree with the observation of the learned Single Judge that Section 197 of the KMC Act vests KMC with a discretion to either refund the excess payment or hold on to the same for setting off the same against future property tax bills.

34. Even if we were to proceed on the basis, as KMC would like us to, that KMC has a discretion under Section 197 of the Act whether to refund the excess amount to the assessee or to retain the amount for setting off against future demands of KMC, which discretion KMC does not have as I have held earlier, still the decision of KMC to not refund the excess amount to the Respondent no. 1/ writ petitioner, in the facts and circumstances of this case, cannot be sustained. Such discretion, in my opinion, is not absolute or unconditional.

35. Whenever a statute vests discretionary power in a public authority like KMC, that authority is under an obligation to exercise such discretion reasonably, judiciously and not arbitrarily or capriciously. Absolute discretion of a public/statutory authority without any checks and balances is a concept unknown to law and is anathema to the Rule of Law.

36. The contention of learned Senior Counsel of KMC that the wordings of Section 197 of the KMC Act confer total discretion as on KMC and KMC is

free to decide whether to refund or direct adjustment of the excess payment without even supporting the decision by cogent reason, is completely unacceptable. According to us, the decision must indicate some reason, however brief it be. Otherwise the decision would be arbitrary. While KMC's decision to withhold the excess payment made by an assessee with a direction that the same will be adjusted against future property tax dues, may be reasonable in one set of facts and circumstances, it may not be so in a different set of facts and circumstances. In the present case, had the excess payment been to the extent of a few thousand rupees and if the rate of property tax payable by the writ petitioner was such that the adjustment would take a few months, perhaps the decision of KMC not to refund the excess payment but to have the same adjusted against future property tax bills, could not be faulted. However, the excess payment made in the present case is to the extent of a huge sum of Rs. 91 lakh. After adjustment of all dues, a sum of approximately Rs. 80 lakh is lying to the credit of the writ petitioner in the suspense account maintained by KMC. Given the present annual valuation of the property in question and the quarterly property tax that is leviable on the property, even according to KMC, the adjustment of the funds lying to the credit of the writ petitioner with KMC, against future property tax liability, would take around 30 quarters or seven and half years. In other words, for seven and half years the writ petitioner would be deprived of its money which it could otherwise utilize profitably. KMC does not pay any interest on the monies parked in its suspense account. In the facts of this case, KMC's decision not to refund the excess amount paid by

the writ petitioners after adjusting all current dues of KMC, is arbitrary and unreasonable, even assuming that KMC had a discretion in the matter as argued by its learned senior Counsel, which argument we have rejected in the earlier part of this judgment.

37. Hence, in any view of the matter, KMC's decision not to refund the excess payment made by the writ petitioners but to set off the same against future demands of KMC in respect of the property in question, cannot be sustained. We agree with the conclusion reached by the learned Single Judge, although we disagree with Her Ladyship's opinion that KMC has a discretion under Section 197 of the Act either to refund the excess payment or adjust the same against its future demands in respect of the property in question.

38. In the result, we affirm the order of the learned Single Judge and dismiss the appeal and the connected application. There will be no order as to costs. We extend the time period for refund of the excess amount paid by the writ petitioner by two months from date.

39. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

(ARIJIT BANERJEE, J.)

I agree.

(APURBA SINHA RAY, J.)