

(1985) 03 CAL CK 0024
In the Calcutta High Court
Case No : F.M.A. No. 489 of 1969

Commissioner of Asansol Municipality	APPELLANT
Vs	
Kinema Industries Private Ltd. and Others	RESPONDENT

Date of Decision : 20-03-1985

Acts Referred:

Bengal Municipal Act, 1932 — Section 128, 128(1), 128(2), 148, 149
Bengal Municipal Rules, 1932 — Rule 14, 8

Citation : AIR 1986 Cal 158

Hon'ble Judges : M.N. Roy, J; Amarendra Chandra Sengupta, J

Bench : Division Bench

Advocate : Sudhish Chandra Dasgupta and Samaresh Kumar Nandy, for the Appellant; Raman Mitra, (for No. 1) and Amal Basu Chowdhury, (for No. 4), for the Respondent

Final Decision : Partly Allowed

Judgement

M.N. Roy, J.—This appeal is directed against the judgment and order dated 29th November 1965, as made by D. Basu, J., in Civil Rule No. 53(W) of 1966. By his determination as above, the learned Judge had made the Rule, wherein the valuation and assessment in respect of the writ petitioner's holding No. 37, Hospital Road, for the period commencing from April 1964 was challenged, absolute, along with other Rules, being Civil Rules Nos. 54(W) and 55(W) of 1966. This appeal, as indicated hereinbefore, relate to the determinations made in Civil Rule No. 53(W) of 1966 and not against the determinations in the other Rules.

2. The Respondent No. 1, Cinema Industries Private Ltd. (hereinafter referred to as the said petitioner), moved and obtained the concerned Civil Rule No. 53(W) of 1966, as mentioned hereinbefore, against preparation and publication of the valuation and assessment lists in respect of their holding No. 37 Hospital Road, Asansol, Burdwan (hereinafter referred to as the said holding), claiming them to be illegal, unauthorised, inoperative and void, on the grounds as indicated

hereafter.

3. The said petitioners are the admitted owners of Gadhuli Cinema, Asansol, which is situated on the said holding, which is an old one and according to the said petitioners, there has been no addition or alterations to the structures on the same for over 10/12 years. The said petitioners have claimed that in fact, the conditions and value of the concerned structures on the said holding, have deteriorated or diminished and they are in exclusive possession of the structures and no part of them has been let out. It has also been stated that the tenants are in exclusive possession of the said holding and the said petitioners are not, and the said holding is situated in a locality, which is mainly residential.

4. It was also the case of the said petitioners that since the admitted supersession of the concerned Municipality (hereinafter referred to as the said Municipality), the Administrator of the same has been discharging the duties and functions of the Chairman and Commissioner of the same. It was also the case of the said petitioners that with effect from 1st quarter of 1959-60, the annual value of the said holding was determined at Rs. 5,400/- and a total sum of Rs. 340.47 p. per quarter was thus payable as Municipal rates for the said Holding. It was also the case of the said petitioners that the Administrator concerned appointed an Assessor for the purposes of quinquennial revision of the valuations and the assessment lists of the said Municipality for the period commencing from 1st April, 1963 and such revision of the valuation and assessment list was illegal and void, as before revision of the valuation and assessment list for 1965-68, the Administrator of the said Municipality did not determine the percentage of rate on holding of the same, which was to be levied with effect from 1st April, 1964 and the more so when such determinations were not made after 1st April 1962. It has been stated that the power and authority of a Municipality to determine and assess as in this case should be exercised in accordance with the provisions of the Bengal Municipal Act, 1932 and the Rules framed thereunder (hereinafter referred to as the said Act and the said Rules respectively) and any assessments made in contravention of them could not be deemed to (be) due, proper and legal. It has also been pointed out that in terms of Section 135 of the said Act, the Commissioners of the Municipality, at a meeting, held before the close of the next year preceding the year to which the rates will apply, must determine the percentage on the valuation of the holding, and at which rate on the annual value, the holdings shall be levied and since there was no such or any appropriate determination on the percentage for the concerned year, the entire action or levy was also irregular and void.

5. It has been pointed out that in acting in the manner as indicated above, the Assessor of the said Municipality was charged and required to act quasi-judicially and it was thus incumbent on him to follow and observe the principles of natural justice and thus to give a hearing to the rate payers and so also reasonable opportunities to them to make effective representation against the materials, on the basis whereof the annual valuation of the said holding was proposed and

made. In fact, it has been alleged that the said petitioners had a right of hearing before the Assessor, but he did not act in the manner as indicated and really, he did not hold any enquiry in the matter of making the assessment in respect of the said holding, in the presence of the said petitioners or their agents or representatives. It has been alleged that the said petitioners were not even served with any notice by the Assessor, for furnishing with him a true and correct return of rent and annual value of the said holding and as such there was no compliance with the requirements of Section 134 of the said Act, which requires that the Assessor, in order to prepare the valuation list, may, whenever he thinks fit by notice require the owners or occupiers of all holdings to furnish him within one week with true and correct returns if the rent or annual value thereof and a true and correct description of the holdings containing such particulars as the assessor may direct, and the assessor, or any person authorised by him in writing in that behalf, may enter, inspect and measure any such holding at any time between sunrise and sunset:

Provided that at least twenty-four hours, previous notice of the intention to enter, inspect and measure any holding shall be given to the occupier thereof, unless he waives his right to such notice and Rule 4 of the said Rules, as framed u/s 215(a) and (b) of the said Act. The said Rule 4 requires that the assessor shall obtain from the Chairman copies of the current assessment registers and all information as to new holdings, and may issue notices under Section 134 of the Act in Form A attached hereto to owners or occupiers of all holdings whose names appear in the said registers and to all owners or occupiers of new holdings, requiring them to submit to him, within one week of service of the notice, true and correct returns of the rent or annual value thereof and true and correct description of the holdings in Form B annexed hereto. These forms shall be printed by the Commissioners and copies shall be attached to every notice u/s 134. It was claimed that the Assessor did not determine the annual value of the said holding in accordance with law and in fact, he did not follow the provisions of Section 128(1) of the said Act, which deals with annual value of holdings and postulates that (1) the annual value of a holding shall be deemed to be the gross annual rental at which the holding may reasonably be expected to let and there was also noncompliance with Rule 8(a) and (b) of the said Rules, which are to the following effect :--

8(a). For the purpose of ascertaining the gross annual rental at which a holding may reasonably be expected to let comparison may be made with the rents of similar holdings in the vicinity. Regard may also be had to the rent which might reasonably be expected in an average year or taking one year with another, and not in any particular year. The rental of the holding in the past or in the future is immaterial, and a hypothetical tenant shall be assumed to use the property in the same way as the actual occupier, and to have the same facility for deriving profit from it, no more or no less.

(b) If such gross annual rental cannot, in the opinion of the Assessor, be easily

estimated or ascertained, he shall determine the value of the building or buildings on the holding at the time of such assessment, regard being had to the age and existing condition of the building, its description and the dimensions of the rooms, the materials used, the area covered, accommodation, environment, road facility, commercial importance, sanitary condition, water-supply facility, distance from schools and markets, present market value, and all other amenities and other conveniences. Ground rent for the land comprised in the holding shall be ascertained from the local sub-registry office or otherwise.

6. It was further alleged that the assessor, for the purpose and object of finding out the gross annual rental of the said holding had not taken any steps or made any attempt to find out the rental of similar holdings in the area or vicinity and even though there are other Cinema halls in and within the concerned Municipality, no comparison was made with the gross rental of them with the Cinema house of the said petitioners. It would appear that on 20th January 1964, the Administrator of the said Municipality, served a notice u/s 137(3) of the said Act, stating that the annual value of the said holding was increased to Rs. 12,000/- with effect from 1st April 1964 and a sum of Rs. 780/- was payable as increased tax per quarter. The increase as mentioned above, was claimed to be excessive and it was further stated that the basis or details of such increase, was not stated or disclosed in the notice. The determinations as made were claimed to be not bona fide and they were further asserted to be illegal, void, bad and irregular and it was also claimed that the computation of annual profit as made and which was the basis of the enhancement, was not legal, authorised and proper and in fact, such computation was made on extraneous considerations and not on the basis of any legal evidence. The assessment, as made, was also claimed to be void, as the Assessor did not submit any note under or in terms of Rule 10 of the said Rules, which requires that the assessment list prepared by the Assessor shall be submitted with a brief report to the Commissioners showing the basis on which he has prepared the list, e.g. it should compare different areas and streets or even parts of a street and show why properties in them differ in value. Further each actual assessment shall be accompanied by a note showing how he has arrived at it, comparing the property in question with other similar property and explaining why the assessment differs, if it does and it has also been suggested that the assessment, as made, was not proper, as on a reference to the same, it was difficult to find out whether the same was made under Sections 128(1) or (2). The terms of Section 128(1) have been quoted hereinbefore and those of Section 128(2) require that if such gross annual rental cannot, in the opinion of the assessor, be easily estimated or ascertained, the annual value of such holding shall be deemed to be an amount which may be equal to but may not exceed seven-and-half per centum of the value of the building or buildings on such holding at the time of such assessment plus a reasonable ground rent for the land comprised in the holding.

7. Section 147(2) of the said Act lays down that in all cases in which any property is for the first time assessed or the assessment is increased, the

Chairman shall also give notice thereof to the owner or occupier of the property, if known and the said petitioners have stated to have submitted a petition for review in terms of Section 145 of the said Act, against the notice intimating about the enhancement of the assessment, with much difficulty, as the necessary basis of the enhancement was neither disclosed nor made known to them. Section 149 of the said Act makes provisions for hearing and determination of such application by Committee, particularly laying down (1) every application presented u/s 148 shall be heard and determined by a committee consisting of the Chairman and not less than two and not more than four Commissioners appointed by the Commissioners at a meeting : Provided that in the case of a municipality which is divided into wards u/s 20, no Commissioner of the ward from which the application is made shall take part in the hearing or determination of such application, (2) the committee shall give notice to the applicant of the time and place at which his application will be heard, and after taking such evidence and making such inquiry as it may deem necessary, in the presence of the objector or his agent if he appears, pass such orders as it thinks fit in respect of the application, (3) the quorum shall be fixed by the Commissioners at a meeting, (4) the decision in such cases of the committee, or of a majority of the members present, shall be final and (5) in case of equality of votes, the person presiding shall have a second or casting vote and it has been alleged that the Arbitrator usurped the powers of the Review Committee and on 15th May 1965, he issued a notice under section 149(2) of the said Act, fixing the hearing of the Review application on 20th May 1965. The hearing was in fact held on the date as fixed and in the hearing, the said petitioners got their case represented and in fact, the points as indicated hereinbefore, were said to have been urged. It has been alleged that the Administrator of the said Municipality did not record any evidence and he did not in fact follow the procedure as laid down by Section 149 of the said Act and that apart, he did not also comply with the requirements of Rule 8 of the said Rules. It has been submitted that the Administrator acting as an Assessor had also the obligation to act judicially or quasi judicially, but he failed on either of the grounds and after the completion of hearing before him on 28th May 1965, the said petitioners received information from the Administrator that on consideration of the Review proceedings, the annual value of the said holding has been reduced to Rs. 10,800/- with effect from 1st quarter of 1964-65 and that as such the quarterly tax payable would be Rs. 702/-. It has been stated that on the basis as aforesaid, on 16th November 1965, a demand for a sum of Rs. 2457/- was made from the said petitioners, for the said holding, being the balance of amount due from the quarter as mentioned above to 3rd Quarter of 1965-66. Such assessment was also claimed to be improper, unauthorised, void and bad, apart from being illegal and irregular. The amount as aforesaid was said to have been deposited in fear of distress warrant being issued. It was the further case of the said petitioners that on 18th December 1965, the said Municipality had issued to them some records and therefrom they came to know that the determination was made u/s 149(1) of the said Act and in fact the Administrator did not compare the said holding No.

37 which is a cinema house with tenanted holdings of small dimensions and he never disclosed to the said petitioners the valuation of the holdings which were taken by him as comparable units. Further the Administrator, for the purpose of ascertaining the gross annual rental of the said holding did not assume the use of the said holding as a cinema house by a hypothetical tenant, but purported to determine the rental of the holdings as an accommodation for shop rooms. The administrator, it has been stated had acted illegally and in violation of the principles of natural justice, in not disclosing to the said petitioners the assessment made by him in respect of other cinema houses within Asansol Municipality. The said cinema house of the petitioners could not be compared with residential premises or with commercial premises. The said petitioners had no opportunity to show that the cinema house in the present holding was much inferior to other cinema houses within Asansol Municipality and that, its gross annual rental would be much less.

8. The assessment was made by the Assessor appointed by the Administrator, but since the suspension order was revoked, the proceedings were contested, on filing their affidavit-in-opposition by the Commissioners of Asansol Municipality, Respondent No. 2. It has been stated that considering the character, age and location of the Cinema building, the assessment as made, was due, proper and legal and such assessment was also made on due compliance with the necessary requirements of the said Act and the said Rules. It has been stated that by a resolution of 30th November 1964, duly passed, the Commissioners of the said Municipality determined the rates at which tax would be levied on the annual value of the holdings within the said Municipality at 7 1/2 per cent. It has been denied that while discharging his duties, the Assessor was charged with any quasi judicial duties and as such it was claimed that, the submissions of the said petitioners on that ground and as recorded hereinbefore, were immaterial. In any event, it has been stated that in this case there could not be any question of violation of principles of natural justice as the said petitioners were duly represented in the proceedings and were heard and the evidence as produced on their behalf was also considered. The deponent has further denied any non-service in the proceedings. It has also been stated that the assessment of valuation was completed after due opportunities to the said petitioners and on taking into consideration other comparable units. It has further been stated by the said deponent that the valuation of the said holding was done on rental basis and further taking Rs. 1,000/- per month as the reasonable rent of the said holding. The further case of the deponent was that notice u/s 147(2) of the said Act was served by the Administrator in the manner as required and that apart, a public notice of the assesment was issued and according to him the said petitioners could also have taken the assistance of such notice, if they had so intended. It was also claimed by the said deponent that the Administrator had exercised the powers of the Review Committee in terms of the provisions of the said Act and that too duly and in fact, he had acted bona fide, as on consideration of the submissions as made before him, he has reduced the

assessment as made and consequently the taxes too. It has been stated that in the Review proceedings, the said petitioners tendered no further evidence.

9. The said petitioners in their affidavit-in-reply dated 12th February 1968, denied the material allegations as contained in the affidavit-in-opposition, apart from repeating and reiterating their statements as made in the petition.

10. Before the learned trial Judge, on the available pleading, it was contended in support of the said petitioners and to substantiate their claim that the entire action was unauthorised, illegal and void and that firstly, the assessment proceedings were without jurisdiction inasmuch as no percentage on the valuation of the holdings for the imposition of rate was fixed prior to the period in question (sic) cannot be accepted, as Section 135 of the said Act says that the percentage once fixed "shall remain in force until the Commissioners at a meeting shall determine some other percentage". It was, secondly submitted that the Assessor did not issue any notice requiring the said petitioners to submit return as required by Section 154 of the said Act nor hold any inspection or enquiry in their presence and thirdly, that (a) the valuation proceedings of the assessor do not state whether he proceeded under Sub-section (1) or (2) of Section 128 of the said Act, (b) the Assessor made no attempt to ascertain the gross annual rental of comparable holdings, as required by Rule 8(a) of the said Rules and (c) the valuation on the basis of the alleged net profits of the holdings, was bad.

11. The answers to the first two submissions were in favour of the said Municipality and against, the said petitioners. So far as the first submissions were concerned, the learned Judge, has on consideration of Annexure A to the affidavit-in-opposition viz. the resolution dated 30th November 1964, which had fixed the percentage had not accepted the submissions of the said petitioners on that point, more particularly when he also found and observed that the said resolution was still in force. While on the second submissions, the learned Judge has observed that the allegations as made do not appear to be true in view of the evidence as disclosed with the affidavit-in-opposition of the Respondent No. 2 and in view of the appearance of the said petitioners through (illegible) as representative, as disclosed (sic). It should be noted that these findings against the contentions of the said petitioners have neither been challenged by filing an appeal nor through any cross objection in this appeal and as such, those findings have become final. In fact, Mr. Mitra, appearing for the Respondent No. 1 made no submissions trying to assail those findings.

12. This appeal has, in fact and effect, been preferred against the finding by the learned Trial Judge, on the determinations as made or arrived at against the third submission as mentioned hereinbefore and in fact, for which findings the Rule has been made absolute. The submissions as put forward or made before the learned trial Judge have already been indicated hereinbefore.

13. The learned trial Judge has recorded the reasons and made the Rule absolute

on the third submissions as indicated hereinbefore. It has been observed by him that it has been clearly stated by the said petitioners that the valuation proceedings of the Assessor do not state whether he proceeded u/s 128(b)(1) or (2) and in fact, the Assessor made no attempt to ascertain the gross annual rental of comparable holdings in terms of Rule 8(a) of the said Rules, apart from claiming that the valuation as made on the basis of the alleged net profit of the said holding, was bad. The learned Judge has recorded that these contentions have not been properly dealt with by the Respondent No. 2 and in fact, no report of the Assessor has been produced or filed and the learned Judge has also observed that there is nothing to show whether the Assessor had acted u/s 128(1)(a) or (b) of the said Act. The learned trial Judge, while disposing of the matter, has recorded that the proper procedure to be followed in the matter of valuation under the said Act and the said Rules has been discussed by him in his judgment in Civil Rule No. 997(W) of 1965 (S. Kumar v. Commissioner of Kurseong Municipality) and he has made that determination or the findings arrived at therein, as part of his judgment in this case. Mr. Das Gupta scathingly criticised such way and manner of the disposal of the case, more particularly when, the said unreported determination as stated by him on instructions, was not shown or made available to the Respondents concerned. In that unreported judgment, it has been recorded that it has been observed that though, at common law there are alternative modes of making valuation, the valuation as made and all subsequent proceedings would become ultra vires, if statutory provisions laying down particular modes, are required to be complied with but in fact they are not complied with. The principles as laid down or enunciated by the learned trial Judge were no doubt wholesome and that too on the basis of the determinations as referred to by him. But those principles even if wholesome, cannot be allowed to be applied in this case or the case to be disposed of on that basis, as admittedly, the answering Respondents before the learned trial Judge had not had the due opportunities to consider and meet the said unreported decision, for the reasons as indicated hereinbefore.

14. According to the learned trial Judge, the two sub-sections of Section 128 are mutually exclusive and he has recorded that Sub-section (2), which deals with cases on "Cost of Construction basis", can apply only-where "the gross annual rental" cannot be estimated or ascertained, as provided for in Sub-section (1) and since in this case the Assessor did not proceed on the basis of the cost of construction, so the merits of the case will have to be decided and determined with reference to Sub-section (1) of Section 128 of the said Act. It has further been observed by the learned trial Judge that Rule 8(a), explains and elaborates the procedure for finding out the gross annual rental under the said Sub-section (1) and postulates that steps in the matter, should be taken by finding out the rent of comparable holdings in the vicinity and where no such attempt is done, but an alternative method is adopted, the proceedings should be deemed to be ultra vires. In observing as aforesaid reliance was placed on the determinations in the case of Kalipada "Dawn v. Commr. of Vishnupur Municipality, (1964) 68 Cal

WN 949 and The Corporation of Calcutta Vs. Royal Calcutta Golf Club, It has also been observed, that in this case the Assessor, made no attempt to find out the rental of any comparable Cinema House, and as such the assessment as made, cannot be upheld.

15. Rule 14 of the said Rules lays down that for the purpose of determining the gross annual rental of a holding, the Committee shall generally follow the procedure laid down in Rule 8. It has been held by the learned trial Judge that the Administrator, who heard the Review application u/s 149, did not make any attempt to find out any comparable holding, but he compared the rent payable by small residential premises in the locality, but reduced the value as made by the Assessor. According to the learned trial Judge that even by such process, the requirements of Rule 8(a) were not satisfied, as residential premises are not or cannot be treated as comparable units to a Cinema house.

It is true and as observed by the learned trial Judge that the Administrator in his report (Annexure F), has recorded that if the said holding as a Cinema is compared with other cinema house in the town, such comparison would certainly establish that the rent per month would be Rs. 900/-. Such determination, according to the learned trial Judge, was of no assistance, because of paucity of evidence. The learned trial Judge has referred to his observations in the case of Kalipada Dawn and Others Vs. Commissioners of the Vishnupur Municipality and Others, to the effect that, the Rules framed u/s 215(a) & (b) of the Bengal Municipal Act, 1932 do not preclude the Municipality from looking into the rent payable by similar premises in the neighbourhood, though they may be outside the jurisdiction of the assessing municipality. Rule 8(a) does not say that the "similar holdings" must be within the jurisdiction of the assessing municipality. Only two tests are to be satisfied in order to bring a comparable premises within the purview of the assessable premises, namely, that it must be similar and that it must be "in the vicinity" of the assessable premises. In that case it has also been observed that Rule 8(a) is a statutory guide as to how the rent of the hypothetical tenant is to be ascertained for the purposes of Sub-section (1) of Section 128 of the Bengal Municipal Act, 1932 and the "profits" test is not altogether irrelevant in making the valuation u/s 128(1) of the Bengal Municipal Act, for it requires the authority to determine the "gross" annual rental at which the holding may reasonably be let" and Rule 8(a) says that in estimating the rent that may reasonably be expected from the hypothetical tenant, the "hypothetical tenant shall be assumed to use the property in the same way as the actual occupier and to have the same facility for deriving profit from it". Rule 8(a) does not exhaustively specify the factors that the authority will have to consider in making the assessment. Its statutory duty is to estimate the rent which a hypothetical tenant may reasonably be expected to offer, having regard to all considerations as may be relevant thereto, as required by the Rules, apart from holding that the standard of rent payable by comparable premises in the locality comes in because of the concept of letting in the open market. But this standard again is controlled by the expression "reasonably" which fixes the upper and

lower limits of the assessment which would be valid under the statute. The Supreme Court in *The Corporation of Calcutta Vs. Sm. Padma Debi and Others*, observed that the maximum limit suggested by the word "reasonably" implied that the rate prevailing in the open market could not include what is known as "black market". On the other hand, the statute does not make the actual rent the basis of valuation but the rent that may be reasonably expected from the hypothetical tenant. Hence, where the actual rent is considered as lower than the rent which may be reasonably expected, the Municipality is at liberty to assess the reasonable rent for the purposes of assessment at a rate higher than the rate at which it is being actually paid. That is the lower limit suggested by the word, "reasonably" and that when a valuation is challenged as ultra vires it is not the business of the Court to advise the assessing authority what, precisely, should be the legal valuation for the premises in question. The only thing the Court should do is to quash the illegal valuation and direct the rating authority to make fresh assessment according to law. On the basis of the rule as indicated above, the learned trial Judge has also observed that the decision of the Administrator could not be supported. The learned trial Judge has also observed that in case no comparable holding is available, then the provisions of Rule 8(b) of the said Rules read with Section 128(2) of the said Act, can be resorted to, after making the necessary recording by the Assessor or the Administrator to that effect, for the purpose of determining the valuation on the basis of cost of construction, but there is no basis to value a cinema house on the basis of profits or on a comparison with the rentals of residential premises. Such being the position, it was observed by the learned trial Judge that the determination as made by the Administrator was wrong and bad on the basis of his unreported judgment as referred to hereinbefore.

16. Before the learned trial Judge, reliance was placed by the Municipal authorities, on the case of *Municipal Corporation of Greater Bombay Vs. Royal Western India Turf Club*, , for the purpose of establishing that "profit basis" is one of the well known methods of valuation and may be resorted to for finding out the gross annual rental payable by a hypothetical tenant. That was a case u/s 154 of the Bombay Municipal Corporation Act, 1888, which provides only for determination of annual rent (not the actual rent paid by the tenant) and in the facts of that case, it has been held and observed amongst others that the profit basis method is no more than a calculation based on profit earning capacity of the premises and by this reckoning the amount of the gross receipts is ascertained, and from such amount are deducted the expenses of earning such receipts, the deductions provided for by statute, interest on tenant's capital and the estimated amount of tenant's profit. The figure so ascertained would give the rating authority a valuable indication as to the rent which the hypothetical tenant would be likely to give for the right to occupy the hereditament in question and therefore would enable them to form an opinion as to the correct amount of the net annual value for the purpose of rating. The learned trial Judge has observed that the said determination was distinguishable on the facts of this

case. On the basis of the decision as indicated above, the learned trial Judge has also observed that where the relevant statutory provisions do not indicate any particular method to be followed, the authorities would be at liberty to resort to any of the Common law method and not otherwise and particularly when, the said Act and the said Rules make provisions, they must be followed and complied with and that not having been done, the entire action in this case was void, ultra vires, illegal and irregular.

17. Mr. Das Gupta, appearing in support of the appeal after placing the pleadings, wanted to establish and indicate the extent of the said holding and then to the fact how annual value in this case was arrived at on the net profit basis as available from the Balance sheet and stated that such basis, which was in fact followed by the Assessor, in appropriate cases like the parent (present) one would be possible and permissible. To establish that profit basis is a relevant basis and not irrelevant. Mr. Das Gupta referred to the case of Municipal Corporation of Greater Bombay Vs. Royal Western India Turf Club, , the relevant particulars whereof have been quoted hereinbefore.

18. Section 128 of the said Act, according to Mr. Das Gupta postulates two alternative modes of valuing a holding and one of them is Rental basis. He claimed that (onus) to establish that the said holding, on the basis of the relevant tests as indicated above, was entitled to have a lesser value or rent, was on the petitioners and such onus has not been duly discharged. In support of his submissions as above, reference was made by Mr. Das Gupta to the case of Corporation of Calcutta Vs. On the death of Sm. Rajlakshmi Debi her heirs Nani Gopal Mukhopadhyay and Another, . That was a case under the provisions of the Calcutta Municipal Act, 1923 and while dealing with an appeal against an increase in the order of assessment, the Court dealt with the question of onus and it has been observed that the assessment made by the Corporation is final subject of course, to the results of the objection taken by assessee u/s 139 and of the appeals under Sections 141(2) and 142(3). The right of filing an objection and that of filing appeals are evidently intended to provide opportunities to the assessee of proving the assessment to be wrong or excessive and, on the rules laid down in the Evidence Act, to regulate the question of onus, it is abundantly clear that if the assessee fails to show that the assessment is "prima facie" wrong, the Corporation is really under no obligation to prove that it is justified, for the assessee is bound to fail in his objection and his appeals, if he fails to make out his point. As indicated earlier, the Assessor made the valuation on the basis of the Balance Sheet of the said petitioners and Mr. Das Gupta pointed out that the said petitioners did not discharge their onus by establishing that such valuation as made on the basis thereof, was wrong. In fact, he also pointed out that no material has even been placed before this Court, to prove and establish that such valuation (or) the basis thereof was wrong. Mr. Das Gupta further submitted that on a mention to the case of Kalipada Dawn and Others Vs. Commissioners of the Vishnupur Municipality and Others, , the learned trial Judge has not really decided the issue, but has dealt with the same in a manner,

which was not appropriate. In fact, Mr. Das Gupta claimed that the learned trial Judge has not indicated duly, why "profit basis" of valuation, which is a proper test, and which was followed, would be immaterial in this case. Ultimately, it was submitted by Mr. Das Gupta, if in the facts and circumstances of the case, the learned trial Judge was not satisfied about the general review as made under the said Act, he should have remanded the case for reconsideration before the authorities and for necessary determination of annual value of the said holding on fresh and proper legal evidence.

19. Mr. Mitra, appearing for the said petitioners, on a reference to the case of *The Corporation of Calcutta Vs. Royal Calcutta Golf Club*, which amongst others has in fact laid down the purpose and requirements of Rule 8(a) of the said Rules, submitted that Rule 8(a) was not strictly followed or the provisions thereunder, were duly complied with in this case and for that reason alone, if not for other reasons, no interference should be made with the findings as arrived at by the learned trial Judge and that too on the basis of the legal evidence that was available before him. In that case, it has also been observed that under the said Act, the annual value has to be determined under Sections 128(1) and (2) and where an arbitrary method is followed, it will be struck down, Apart from holding that Section 150 of the Act creates a special jurisdiction, but it can only mean that if the authorities constituted by the said Act, proceeded in accordance with the provisions of the Act and the Rules framed thereunder, and were not guilty of any violations of the rules of natural justice, then any assessment or valuation made under the Act or certain orders as specified therein, cannot be questioned in any Court; but where such a special tribunal ignores the provisions laid down in the statute and the rules, or is guilty of violation of the rules of natural justice then in that case, the Civil Courts will have jurisdiction to go into the matter and, if necessary, set aside the findings or orders, and under the Act, there is any one review from the assessment, to the Review Committee, which does not necessarily consist of people cognizant with the law, and there is no provision for reference to the Courts upon any point of law. Under such circumstances, if the Court finds that the tribunal constituted under the Act had not acted in accordance with the terms of the statute or the Rules, or the principles of natural justice then the Civil Courts have ample jurisdiction to entertain a suit. Mr. Mitra further claimed the provisions of Rule 8(a) of the said Rules to be mandatory, on a reference to the observations in the case of *Prosad Kumar Mondal v. The Commr. of Krishnagore Municipality* (1978) 1 Cal LJ 276. In that case, forty one payers of Krishnanagore Municipality challenged the quinquennial municipal assessment which was to take effect from the 1st quarter of 1972-73 and the consequential demands made on the basis thereof, in a writ application. It was so challenged by them representing the other rate payers on a leave under Order 1 rule 8 of the CPC obtained from (his Court. The principal ground on which they challenged the assessment was that the assessment was not based on any bona fide valuation made by the Assessor of the Municipality in accordance with law. According to the petitioners, the valuations were revised by

the Assessor in an arbitrary manner; in the matter of formation of his opinion and in comparing the different holdings and different areas or localities the Assessor did not perform his statutory duties and proceeded entirely without any basis or material; the assessor failed to record any reason or justification for enhancing the valuation of different holdings in disproportionate and discriminatory manner not based on any common standard or basis. The report submitted by the Assessor is neither bona fide nor a lawful report and the entire assessment based on such a valuation is clearly illegal and without jurisdiction. As such, the assessment is liable to be set aside and the rates, as are being demanded on the basis thereof, being illegally levied are not sustainable in law and apart from a number of technical objections raised by the Respondent No. 1, the principal point of importance which requires consideration and which is common to both the appeals is as to whether the impugned assessment suffers any such illegality as would render it liable to be set aside and on such facts, it has been held that reading the provisions of the Bengal Municipal Act and the Rules framed thereunder, it appears that the Assessor is required to determine the annual value of each holding on the basis of gross annual rental at which the holding may reasonably be expected to let unless in his opinion such a rental cannot easily be ascertained in which case he is to proceed on the cost of construction basis again. When he proceeds to determine the annual value on, the gross annual rental basis that rental is to be individually determined as a positive act of determination by comparison with rents of similar holdings in the vicinity. But in ascertaining the gross annual rental, the Assessor (sic) is an average year irrespective of any actual rent being paid at a particular, time or in a particular year. That the Assessor is to ascertain the gross annual rental in each case in a positive manner is inherent in the scheme and is well indicated by what he is required to record in column 16 of Form B read with Rules 9 and 10 of the said Rules and it was also observed in that case that no material was placed before the Court to show what part the Assessor had played in preparing the field books or in proceeding on the basis thereof. Circumstances on the other hand go to show that the entries in those books were not made by the Assessor but by his agents. These agents of the Assessor took the existing rent in every case to be the rent which could reasonably be expected of the holding in spite the clear mandate of law that regard must be had to the rent which might reasonably be expected in an average year or taking a year with another and not in any particular year and that such rent should be the rent payable by a hypothetical tenant assumed to use the property in the same way as the actual occupier and to have the same facility for deriving profit from it. To that extent, the basis adopted is erroneous in law. That apart, in most cases, the gross annual rental had been fixed up with reference to a figure described as reasonable rent giving no idea as to how such a figure had been arrived at. Had the reasonable rent been fixed up with reference to rents of comparable holdings in the vicinity, one would have expected some entries in those books to indicate the comparative figures but nothing of the kind could not found. Now is there anything in those books from which it can be said that these figures shown as reasonable rents

were so determined on comparison with any rent prevailing in the locality. Such being the position, there can not be any hesitation in coming to the conclusion that the gross annual rentals in respect of individual holdings were not determined in accordance with Rule 8(a) of the Rules by those agents of the Assessor. So far as the Assessor is concerned, it appears that he has not prepared any valuation list and he has not filled up even column (16) of the returns called for u/s 134 of the Act. It has also been observed in that case that the statute distinguishes enquiries contemplated by Section 13-1 from inspections contemplated by Section 134. Though law permits the Assessor to cause inspection to be made through the agents for verification of the returns called for and to collect other particulars in respect of holding to be valued yet it requires the Assessor himself to make the necessary enquiries for ascertaining the gross annual rental on comparison with rents of comparable holdings because the law contemplates that the determination of the annual valuation based as it is on such gross annual rental must be the act of the Assessor. It is quite apparent that the Assessor never discharged the duty cast upon him by Section 133 of the Act read with the Rules made under the Act and as in the field books so also in the Assessors' report there is nothing to show any factual basis for determination of annual value in respect of individual holdings. This report is not compliance with Rule 10. The requirements under Rule 10 are mandatory and the fulfilment thereof only ensures the position that the Assessor has prepared the valuation list in a bona fide manner and that again in accordance with law apart from holding that the petitioners in that case had well established their claim that the Assessor in determining the annual values did not comply with the provisions of Rules 8(a), 9 and 10 of the Municipal Rules. Such non-compliance renders the valuation made by the Assessor ultra vires. The Assessor himself never discharged his statutory obligation for determining the annual values in his judgment and instead thereof delegated the said function to his agents whose determination he mechanically adopted. When the Assessor did delegate his functions to his agents, it is no longer his determination but only that of his agents which the law does not recognise and that being the position, the infirmities affecting assessment are very substantial in nature and touch the very assessment and render the same ultra vires as a whole. That being so, the petitioners can challenge the assessment as a whole and when there is no assessment in the true sense of the term or where the assessment as a whole is ultra vires, remedy contemplated by Section 148, would be no remedy at all. Apart from the above, reference was also made by Mr. Mitra to the decision in the case of Smt. Shyam Kishori Devi Vs. Patna Municipal Corporation and Another, which was a case under the provisions of Bihar and Orissa Municipal Act, 1922 and in which case, on 4th August 1944, the Patna Municipality was superseded by the Government initially for a period of three years but the said period was extended from time to time. On March 29, 1946, the Government issued a Notification directing that S. N. Sarkar, Assistant Special Officer of the Patna City Municipality, shall also exercise and perform the powers and duties which might be exercised and performed by the Commissioners u/s 107, among

other Sections of the Act. On 2-11-1949, the Government of Bihar issued another Notification directing that each of the three officers mentioned therein shall exercise and perform the powers and duties conferred and imposed on a Committee constituted u/s 117 of the Act. One of the said officers was S. N. Sarkar. The appellant owned certain premises in the town of Patna. During the periodical revisional assessment of the year 1950 in regard to the said premises, the valuation thereof was fixed at Rs. 1,800 and its quarterly municipal taxes at Rs. 146-4-0; but, as some additions were made to the said premises, on 10-5-1951, the valuation of the said premises was raised to Rs. 2,400 and its quarterly municipal taxes were fixed at Rs. 195. On 17-11-1951, S. N. Sarkar, the Assistant Special Officer of the Municipality again enhanced the taxation u/s 107(e). The appellant filed a petition u/s 117(1) which was heard and rejected by the same Officer. In a suit by appellant for declaration that the alteration in the assessment made by the Special Officer was invalid and without jurisdiction and on such facts, the Supreme Court considered the scope and effect of Section 386(1)(b)(c) and Section 117(1) of the Act and it has been observed that under Clause (b) of Section 386(1), the powers and duties which may, under the provisions of the Act, be exercised and performed by the Commissioners could be exercised and performed by such person or persons as the State Government may direct. But it did not empower the Government to replace persons or authorities other than Commissioners by persons nominated by it. Therefore, if by the notification, dated 21-11-1949 the Government intended to replace the Committee by one or other of the three persons mentioned therein, it would be beyond its powers conferred under the provisions of Section 396(1)(b) of the Act. But the notification could be reasonably confined to the scope of the authority of the Government and if so confined, it may be interpreted as replacing only the two Commissioners by the person or persons mentioned therein. Under the construction accepted by the High Court, Section 117(1) would become unworkable and the same officer who revised the assessment would sit in judgment over it. Therefore, the order made by S. N. Sarkar, u/s 117(1) rejecting the objections filed by the appellant and enhancing the valuation of the suit holding and fixing the quarterly municipal taxes accordingly was without jurisdiction.

20. In view of the above determinations, it was contended that the Administrator had no power to hear, determine and consider the Review application, which was filed in respect of the said holding. The grounds of objection would be available from Annexure "C" to the writ petition and the same was admittedly heard and disposed of by the Administrator, which was categorically claimed to be in unauthorised use and exercise of power u/s 148 of the said Act. It was also contended that since Section 149 of the said Act has neither been suspended nor withdrawn or deleted, so it was not intended that even if the Commissioners of the said Municipality were not there, the Administrator should not have heard and dispose of the application for review. It was also contended that in view of the facts and circumstances of the case and more particularly for the

appointment of an Administrator of the said Municipality, on its supersession by the State Government, Section 149 of the said Act was never intended to be made unworkable and thus, on the basis of the determinations of the Supreme Court as mentioned above, the Administrator concerned, instead of hearing and dealing with the Review application, should have constituted a Committee in terms of Section 149(1) of the said Act, for necessary and due disposal of the matter. The findings on the point have also been indicated earlier.

21. On a close scrutiny the Supreme Court judgment as indicated above is distinguishable and in fact, has no application in this case. Section 116(1) of the Bihar and Orissa Act, 1922 lays down that any person, who is dissatisfied with the amount assessed upon him or with the valuation or assessment of any holding, or who disputes his occupation of any holding or his liability to be assessed, may apply to the Commissioners to review the amount of assessment or tax and such provisions, as submitted, were in the same line with Section 148(1) of the said Act. Section 117(1) of the Bihar and Orissa Act, 1922 requires that every application presented under the last preceding section relating to assessment made u/s 107, shall be heard and determined by a Committee consisting of two Commissioners and two tax payers of the Municipality, nominated or elected in the prescribed manner by the Commissioners at a meeting and one nominee of the Government, not below the rank of a Deputy Magistrate, nominated by the District Magistrate in this behalf, provided that no Commissioner or tax payers shall be a member of the Committee, to hear applications from the ward for which he was elected and that three members shall form quorum. Those provisions in the Bihar and Orissa Act, are not identical with the provisions of Section 149(1) of the said Act and as the manner of composition of the Committee under the two Acts has a different character, so also, the said determination of the Supreme Court in our view, is distinguishable on the facts of the present case. Apart from the above, in the said Supreme Court case, the Committee was required to be formed by two outsiders and a nominee of the Government, apart from the Chairman, which would not be a case under the said Act, as under the same, the officer as appointed, would be empowered to exercise such powers of the Chairman or of the Commissioners, whether at a meeting or otherwise, as may be conferred on him and such powers, shall cease to be exercised by the Chairman or by the Commissioners, as the case may be. The effect of such appointment as in this case would be that the Administrator stepped into the shoes of the Chairman and the Commissioners and consequently, on such appointment, there was neither a Chairman nor the Commissioners of the said Municipality and furthermore, on such appointment, they were denuded of their powers and such powers had vested in the Administrator or an executive officer. The effect of supersession of the said Municipality or of a Municipality, on appointment of an Administrator, in our view, would mean the virtual suspension of the provisions of Section 149(1) of the said Act. The views as expressed above, were in fact taken by me in the unreported judgment dated 5th July 1979 in the case of Life Insurance

Corporation of India v. Asansol Municipality (Civil Rule No. 3129(W) of 1974) and that was referred to by Mr. Das Gupta. It was also contended by him that since the valuation/assessment was not done by the Administrator but the same was done by the Assessor, appointed by him, so there was no bar for the Administrator, to hear and decide the Review application and more particularly when, by such act, he was not judging his own action or reviewing his own order. Thus, the Administrator in this case, on the basis of the tests and requirements was authorised to hear the Review application and the hearing given or the determinations as made by him, cannot be said to be unauthorised or it cannot be said that in making the determinations on Review or acting as Review Committee, the Administrator had acted illegally and unauthorisedly or that the determinations as made by him, were ultra vires. We hold that in holding contrary to the above, the learned Judge had not made the determination properly and his findings on that account and also his determinations as made on the basis of the unreported decision as indicated hereinbefore and that too without giving due opportunities to the appellants before us, who were respondents before him, were not proper. We further feel that the above view as taken by us, also gets support from the determinations in the case of Sri Sri Iswar Ganesh Jiu and Others Vs. The Municipal Commissioners of Hooghly-Chinsura and Another, and the observations of the Full Bench in the case of Kamal Krishna Bhattacharya and Others Vs. The State of West Bengal and Others, .

22. It was also stated by Mr. Das Gupta that the valuation in this case was done by the Assessor and not by the Administrators and for that also, the Administrator had the right and authority to hear and consider the question of valuation in the Review proceedings and when the learned trial Judge was not satisfied about the procedure followed by the Administrator in determining the valuation on such Review, he should have remanded the proceedings back to the Administrator for due completion of the valuation proceedings in accordance with law and after taking necessary evidence. Mr. Das Gupta's contentions as recorded hereinbefore, in view of our earlier findings on the powers of the Administrator in dealing with or disposing of the Review proceedings, appear to us to be of substance.

23. The determinations as made by the learned trial Judge on the question and interpretation of Sections 135 and 154, and that too on the basis of available legal evidence, in our view, as also indicated earlier, requires no interference and as such, those findings are upheld. On consideration of the provisions of Sections 128(1) and 128(2), we find that they are alternative provisions and such fact would be apparent from a reference to the opening words of Section 128(2) and in fact, if the tests in Section 128(1) fail, then those in Section 128(2) can be or are required to be resorted to and these provisions in Section 128(2) are alternative provisions and they come into play and operation on the failure of the tests in Section 128(1). Such being the position, we are also of the view that Sub-sections (1) and (2) of Section 128 are not required to be resorted to or

brought into operation simultaneously. The learned trial Judge's findings also substantially correspond with the above findings of ours and as such, they are upheld.

24. Admittedly, Rule 8 of the said Rules prescribes the procedure to be followed by the Assessor of Municipal Taxes under the said Act and as observed by the learned trial Judge, Sub-rule (a) of the said Rule 8, explains and elaborates the procedure for finding out the gross annual rental u/s 128(1) and further requires that steps in the matter, should be taken by finding out the rent of comparable holdings, in the vicinity and it has also been observed by the learned trial Judge, that where no such attempt is done but an alternative mode is adopted, the proceedings should be deemed to be ultra vires. While on this point, we must consider Rule 14 of the said Rules, which requires that for the purpose of determining the gross annual rental of a holding, the Committee shall generously (generally?) follow the procedure laid down in Rule 8. The terms of the said Rule 8 have been quoted hereinbefore- That being the position and on construction of the Rule, we think, we are justified in observing that the Assessor or thereafter, the Administrator in this case, had due authority and jurisdiction to take into cognizance, the relevant comparable units, in the matter of fixing the annual rent. We also agree with the learned trial Judge that it cannot be observed in this case that either the Assessor or the Administrator had really come to their finding on the annual value, on appropriate comparison of comparable units and as such, the findings arrived at by the learned trial Judge must be upheld, even though we feel, following the determinations in the case of Municipal Corporation of Greater Bombay Vs. Royal Western India Turf Club, that net profit would also be a proper and relevant test in appropriate cases. In this case, we are satisfied that there is scope for receiving appropriate legal evidence even at the stage of Review by the Reviewing authority and on that being the position and also in view of his own determinations in the case of Kalipada Dawn and Others Vs. Commissioners of the Vishnupur Municipality and Others, , to the effect that when a valuation is challenged as ultra vires, it is not the business of the Court to advise the assessing authority what, precisely should be the legal valuation for the premises in question. The only thing the Court should do is to quash the illegal valuation and direct the rating authority to make fresh assessment according to law. The learned trial Judge, in our view was not justified in not making an order of remand to the rating authority for reassessing or redetermining the annual rent in accordance with law, the more so when, he himself has directed the quashing of the concerned assessment, holding the same to be ultra vires. In fact, we also feel that the findings and the determinations of the learned trial Judge on the above aspect were not consistent with his earlier determinations, which we approve.

25. Such and above being the position and our findings, we allow this appeal in part and after setting aside the findings of the learned trial Judge on those points as indicated, remit the case back to the Reviewing Authority of the said Municipality for making appropriate determinations in accordance with law after

duly fixing the annual rent on the basis of or in terms of the tests as indicated hereinbefore and more particularly in terms of Rule 8 of the said Rules.

26. The appeal is thus allowed in part. There will be no order as to costs.

Amarendra Chandra Sengupt A, J.

27. I agree.