(1989) 09 CAL CK 0049

In the Calcutta High Court

Case No : Matter No. 532 of 1986

Dr. Roma Sur APPELLANT

Vs

State of West Bengal RESPONDENT

Date of Decision : 18-09-1989

Acts Referred:

Calcutta Municipal Corporation Act, 1980 — Section 119, 120, 120(a), 131, 158
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, 9
Constitution of India, 1950 — Article 14, 19, 20, 226, 246(3)
West Bengal Premises Tenancy Act, 1956 — Section 4, 7, 8

Citation : 95 CWN 1

Hon'ble Judges : Shyamal Kumar Sen, J

Bench : Single Bench

Judgement

Shyamal Kumar Sen, J.—The petitioner is the owner of a built up covered area of 2 cottahs 8 chittaks more or less being premises No. 336, CIT Road, Scheme VI(M) in the town of Calcutta. In this writ application the petitioner has prayed for a declaration that sections 171, 174, 182, 189, 195, 219 and 442 of the Calcutta Corporation Municipal Act, 1980 (hereinafter referred to as the said Act) as unconstitutional and void and for striking down the provisions by appropriate writ. The petitioner has also prayed ''or a writ of mandamus commanding and directing the respondents not to give effect to the aforesaid sections of the said Act and also prayed for appropriate writs directing the municipal authorities not to take any step pursuant to aforesaid sections of the said Act''. The petitioner has also prayed for appropriate writ and direction prohibiting the respondents from realising and/or collecting the water fees mentioned in the consolidated rate bill issued and for appropriate directions upon the respondents to withdraw, recall and/or cancel the rate bills issued under the 1980 Act.

2. The learned Advocate for the writ petitioner submitted that u/s 234 of the Calcutta Municipal Act, 1980 it is the incumbent duty of the Corporation to supply water and also to take steps from time to time for ascertaining sufficiency of fees or tax for supply of water amounts to imposition of unreasonable restrictions to

enjoyment life and property. Prior to coming into force of the 1980 Act the Corporation used to issue the consolidated rate bills one for the owners'' share and the other for occupiers'' share of taxes. The said two bills were consolidated rate bills including charges for water at the rate of 25% and swerage at the rate of 5% as the amount charged. Since 1980 when the said Act came into force, only one rate bill has been issued by the Corporation. By issuing such rate bill the Calcutta Municipal Corporation effected substantial increase in the amount of taxes payable by the petitioner arbitrarily. The learned Advocate for the petitioner submitted that section 234(b) of the Calcutta Municipal Act, 1980 inter alia provides that the Corporation may at any time levy an annual fee subject to the regulations made in this behalf on the occupier of every house to which such supply is made. The said provision according to the learned Advocate for the petitioner is not enforceable in law inasmuch as the corporation by issuing one consolidated rate bill containing the water fee under the said Section 234(b) in the name of the owner only has cast an obligation on the owner although u/s 234(b) the said water fee is payable by the occupier. It has further been contended on behalf of the petitioner that rate bill for 4th quarter 1935-86 (January to March 1986) in respect of the said premises No. P-338 CIT Scheme No. VI (M) Calcutta which is annexure ''D'' to the writ petition shows that the respondents illegally included or imposed water fee of Rs. 195/- in the said consolidated rate bill for 4th quarter 1985-86 on the basis of the regulation purported to have been made by the Calcutta Municipal Corporation. According to the Learned Advocate for the petitioner there is no provision at all in the Calcutta Municipal Corporation Act, 1980 for imposition of water fees in the consolidated rate bill which u/s 171(1) is void, arbitrary and amounts to double taxation". It has further been contended that the said purported regulation was framed with the sole object of imposition of levy of annual fee for supply of water for domestic purposes. According to the learned Advocate for the petitioner such issuing and framing of regulation is bad in law and has not been made in accordance with the provisions of the said act. Rate of Annual fee for supply of water has been prescribed and/or mentioned in Clause 5 of the said regulations as hereunder :

(a)

(b)

Size of the Ferrule

Annual Fee

(i)

10 mm = 1/4"

Rs. 28/-

(ii)

15 mm = 1/2"

Rs. 120/-

(iii)

20 mm 3/4"

Rs. 480/-

(iv)

25mm = 1"

Rs. 780/-

Provided that no. annual fee shall be charged against any premises covered by items (i) and (ii) of Clause (a) hereinabove if such premises, the annual fee shall however, be charged for the second and subsequent water connection for domestic purposes in the same premises.

3. It is the case of the writ petitioner as appears from the consolidated rate bill which is annexure ''D'' to the writ petition that water fee has been charged at the rate of Rs. 195/- on the annual valuation of the premises in respect of premises No. 12A, Raja Rajkrishna Street, Calcutta also known as p-333 CIT Scheme VI (M) and in respect of premises no. 25, Baranasi Ghosh Street, Calcutta which belonged to one Smt. Snehalata Ghosh a sum of Rs. 61/- has been charged as water fee on the basis of annual valuation as appears from annexure ''E'' to the writ petition. It is the contention of the writ petitioner that the purported regulation does not contain and/or prescribe fees of Rs. 61/- as charged by the Calcutta Municipal Corporation which is evident from the said annexure to the writ petition. It is also the contention of the writ petitioner that the said regulation is contrary to law and is not in accordance with the schedule of water fees mentioned at the back of rate bill issued to the petitioner as also to the other house owners Calcutta. It has further been contended on behalf of the writ petitioners that fees on supply of water are being paid a throughout by every owner of every building including the petitioner which are always included in the consolidated rate bills by the Calcutta Municipal Corporation all throughout until 3rd quarter 1985-86 (October, November, December 1985) at the rate of 25% as water charges and 5% charges for sewerage etc. It is also the contention of the writ petitioner that by issuing only one consolidated rate bill the Calcutta Municipal Corporation has imposed unreasonable restrictions to all owners of lands and buildings to hold property within the Calcutta Municipal area and the same is ultra vires the Constitution of India particularly of Articles 14 and 19 thereof. It has also been contended that by reason of issuance of one consolidated rate bill and including within the same the water fee the entire liability for payment of water fee has been fixed upon the owner of the said premises although it may be that in a given case the premises in question has been let out entirely and it is the tenant who enjoys the water. The learned

Advocate for the petitioner in this connection referred to Section 234(1) of the Calcutta Municipal Corporation Act, 1980 and sub-section (b) of the said Act and also to Section 261 of the Act which provides for Corporation''s power to instal meter. The learned Advocate also refers to Section 265, Section 29 and Section 170 of the Calcutta Municipal Corporation Act. The learned Advocate submitted that the regulation framed by the Calcutta Municipal Corporation Act which provided for imposition of water fee on the basis of size of the ferrule is absolutely arbitrary in as much as ferrule size does not show the actual measure of the water being received by the person concerned. He also submitted that there is a distinction between fee and tax and the fee should correspond with the actual benefit or advantages being received by the person paying fee to the authorities concerned. In this connection he referred to following cases :

1. Union of India (UOI) and Others Vs. Bombay Tyre International Ltd. and Others, .

2. The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., .

3. Ratilal Panachand Gandhi Vs. The State of Bombay and Others, .

4. The provision for making regulation in the statute suffers from vice of excessive delegation of authority according to the learned Advocate for the petitioner. The learned Advocate further submitted that there is no quid proquo so far as the water fee is concerned. He referred to the judgment and decision in the case of Kewal Krishan Puri and Others Vs. State of Punjab and Another, . He also cited the decision in the case of The Government of Andhra Pradesh and Another Vs. Hindustan Machine Tools Ltd., as also judgment and decision in the case of Om Parkash Agarwal and Others Vs. Giri Raj Kishori and Others, . The learned Advocate further submitted that on the face of the statute there is no provision as to how the amount collected by way of fee will be utilised. There is no co-relationship between the imposition of fee with the services that one will get against such payment of fees. In this connection the learned Advocate referred to the following decisions : -

1. Nagar Mahapalika Varanasi Vs. Durga Das Bhattacharya and Others, .

2. Ram Narain Sons Ltd. Vs. Asst. Commissioner of Sales Tax and Others, .

3. Om Parkash Agarwal and Others Vs. Giri Raj Kishori and Others, .

It has also been submitted on behalf of the petitioner that Section 234 of the 1980 Act does not on the face of it attempt at any such co-relationship between imposition of fee with the services which one gets against such payment of fees and as such on current aprisal of levy of water fee the said section should be struck down. It has further been submitted that this levy of water fee cannot be characterised as a tax because there is no provision authorising its imposition. Section 170 of the Calcutta Municipal Corporation Act 1980 specifies taxes to be levied by the Corporation. The learned Advocate also submitted that the said section does not refer to any tax on supply of water. Under Article 265 of the Constitution of India a tax can be levied and collected only with the authority of law. Since there is no provision for imposition of such tax it cannot be treated as a tax. Alternatively in the event it is realised as a tax, the said realisation is without any authority of law. It has further been submitted that the water fee is realisable from occupiers but there is no guideline as to how such fee is to be collected. If there are more than one occupier in a house the provision cannot be properly worked out.

5. It has further been contended on behalf of the petitioner that proviso to Section 234(1)(b)of the Act contains the provision for realisation of fee for supply of water Sections 262 and 265 contains provision for installation of water meter. Both the sections cannot be resorted to by the corporation authorities simultaneously on the basis of the charge contemplated by the sections as the schemes are diamatrically opposed to each other. Hence the provisions should be harmoniously construed so as to give meaning and effect there to. Unless the rule of harmonious construction is adopted the inherent repugnancy between the provisions cannot be re-solved. Accordingly learned Advocate for the petitioner submitted that both the provisions should be read together and should not be taken in isolation and to be construed accordingly. It has been held by the Supreme Court in the case of V. Tulasamma and Others Vs. Sesha Reddy (Dead) by Lrs., that no provision of a statute should be construed in isolation but should be construed in the context and in the light of other provisions of the statute, so as to make it consistent with the enactment in the statute. It has also been submitted hat the charges payable by an occupier as per reading in a water meter partakes to the nature of a fee. Sections 262 and 265 occurring in later part of the statute may be said to qualify the earlier provisions of similar nature contained in the statute. While enacting sections 262 and 265 of the Act the legislature must be deemed to be aware of Section 234(1)(b) thereof. Hence the regulations framed administratively pursuant to Section 234 (1) (b) must be held to be subject to the statutory provision of Sections 262 and 265. There regulations can only be in aid of and auxiliary to the power of instalation of water meter. It is significant that Section 234(1) (b) itself does not speak of levy of fee or the basis of ferrule size. It speaks of water fee subject to regulations that nay be made in that behalf. This regulation being in the nature of executive instruction cannot be allowed to override the statutory provisions of Section 262 and 265. The learned Advocate submitted that Section 234 relates to corporation''s duty to supply water. The proviso was appended to Section 234(1 Mb) thereof to make it ex facie clear that such supply may not be made free of cost altogether. The regulations framed pursuant thereto cannot render in fructuous the substantive basis of charge as per water meter. The learned advocate relied upon the judgment and decision in the case of The Central Bank of India Vs. Their Workmen, at page 23 (para 20) wherein it was held that if a rule goes beyond what the statute contemplates the rule must yield to the statute. He also referred to Section 602 which provides that corporation may

make regulation not inconsistent with the provisions of the Act. The regulations providing for ferrule and charging of fee on the size of the ferrule are contrary to the provisions for water meter contained in the provisions of the Act. It has also been submitted on behalf of the petitioner that the provisions in the regulation for charging of water fee on the basis of ferrule size will create enormous coomplications in as much as it would be difficult to apportion the fees amongst the occupiers. He also submitted that it will be difficult to work out or implement the provisions of the Act, namely there is no provision to charge and owner u/s 234. He further submitted that excessive delegation of legislative power u/s 234 (proviso) to the Act is apparent as the regulation framed under the statute need not be placed before the legislature. In this connection he also referred to the following decisions :

1. Harakchand Ratanchand Banthia and Others Vs. Union of India (UOI) and Others, .

2. Kerala State Electricity Board Vs. The Indian Aluminium Co. Ltd., .

3. Al Hai Amir Hassan Properties v. Corporation of Calcutta & Ors., reported in 84 CWN. 172.

6. Learned Advocate further submitted that the working out or implementation of the said scheme of the provisions of the Act may create serious complications and/or difficulties and in some cases the provisions thereof may lead to absued result. For instance Section 193(C) if read along with section 232 may mean that in respect of the properties under a trust or under a receiver the trustee or the receiver is liable to make payment and if the rates and taxes are not paid the personal property of the trustee or the receiver will stand charged. This according to the learned Advocate will create serious complication.

7. The learned Advocate further submitted that Section 234 authorises the Calcutta Corporation to frame regulations for imposing water fee. These regulations are subordinate legislation and are administrative in character. The rules framed u/s 600 of the Act, are placed before the State Legislature but regulations framed under 602 have not been so placed before legislature. It is settled law that essential legislative functions cannot be delegated by the legislature to a subordinate authority. The learned Advocate submitted what is an essential legislative function has been laid down by the Supreme Court in the case of Devi Das Gopal Krishnan and Others Vs. State of Punjab and Others, . The Supreme Court in the said judgment held "essential legislative function is the determination of policy and its formulation as a rule of conduct." In the case of Gwalior Rayon Silk Mfg. (Wvg.) Co. Ltd. Vs. The Asstt. Commissioner of Sales Tax and Others, similar observation has been made by Supreme Court. No policy and no guideline is available in Section 234 as to the regulations to he framed therein. No guideline is available as to the basis of charge. The imposition of charges on the basis of ferrule size. On the basis of actual consumption has been provided for in the regulations. The learned Advocate also referred to the

judgment in the case of Municipal Corporation of Greater Bombay v. Nagpal Printing Mills and Anr., reported in AIR R 1988 SC 1009 wherein it was observed by the Supreme Court that the meaning of "supply if made" is actual supply and consumption.

8. The learned Advocate for the petitioner next argued that the valuation of property sought to be made u/s 174 by providing a non-obstante clause cannot override the principle of standard of fair rent provided under the rent control legislation. In this connection he relied upon the following decisions in support of his contention :

1. Dr. Balbir Singh and Others Vs. M.C.D. and Others,

2. Dewan Daulat Rai Kapoor and Others Vs. New Delhi Municipal Committee and Others, .

3. New Delhi Municipal Committee v. M. N. Soi & Anr. reported in AIR 1977 SC 302.

9. It has been submitted on the basis of the principles laid down in the aforesaid decisions by the Supreme Court that the application of standard rent cannot be excluded by non-obstante clause occuring at the beginning of the section. Since the clause is in conflict with the interpretation of the section, the conflict can be resolved if section is construed harmoniously. It has further been submitted that under such circumstances the said non obstante clause should be struck down. The learned Advocate further contended that in the event this Court is not inclined to strike down the said non-obstante clause then this Court may also hold that the non-obstante clause does not have the effect of nullifying the interpretation of annual value formulated by the Supreme Court and the said section has to be read in the light of the aforesaid judgments. The learned Advocate also in this connection submitted that if a provision in the statute is favourable then the portion which is unsustainable will be inoperative whereas the rest of the provision which stand the test of reasonableness will remain valid. In support his contention the learned Advocate relied upon the judgment and decision in the case of R.M.D. Chamarbaugwalla Vs. The Union of India (UOI), . The learned Advocate for the petitioner further submitted that the power conferred u/s 174(4A) is very wide and excessive and may lead to arbitrary action. Such provision in the statute has been contended to be bad and according to the learned Advocate violates Article 14 of the Constitution of India. The learned Advocate also refers to proviso to Section 174(4A). Under the said proviso plant and machinery is deemed to have been included within the lands and buildings The learned Advocate submitted that under 7th Schedule to the Constitution of India it is beyond the Legislative competence of the State Legislature to impose tax on lands and buildings. Under such circumstances provision made u/s 174(4A) for payment of tax is beyond the competency of the state legislature. The learned Advocate for the petitioner also challenged the power of the Calcutta Municipal Corporation to impose commercial surcharge.

The learned Advocate for the petitioner also referred to Section 189 of the Calcutta Municipal Corporation Act, 1980 and submitted that provision for deposit of the amount determined on the basis of valuation made u/s 188 as a condition precedent for entertaining an appeal as provided under sub-section (6) there of is bad in as much as it takes away the right of appeal. In this connection the learned Advocate referred to the following decisions :

1. The Anant Mills Co. Ltd. Vs. State of Gujarat and Others, .

2. Chatter Singh Baid and Others Vs. Corporation of Calcutta and Others, .

3. M/s. Jajodia Estates (P) Ltd. v. Corporation of Calcutta & Ors. reported in 87 CWN 291.

10. The learned Advocate also submitted that the provision for submission of returns for the purposes of revision in the annual valuation of lands and buildings as also imposition of penalty for non-submission of return are not justified according to law. The section according to the learned Advocate does not make it clear who is liable to submit this return. The learned Advocate in this connection also referred to Section 195 and Section 442 of the Calcutta Municipal Act whereas Section 182 provides that to enable the Municipal Corporation to revise the annual value of any land or building the owner or the person liable to pay the consolidated rate for such land or building shall furnish to the Municipal Corporation not later than 31st day of March of the year immediately following a return in such a form as may be prescribed. Section 442(1) provides the Municipal Corporation may by notice require the owner of any building to submit within 15 days from the date of service of the notice a signed statement with returns giving the particulars mentioned in the said section. Section 195(1) on the other hand provides that on the failure to recover any sum due on account of consolidated rate on any land or building from the person primarily liable there for. u/s 193, the Municipal Commissioner shall recover from every occupier of such land or building by attachment of the rent payable from such occupier a portion of the total sum as nearly as may be in the same proportion to that sum as the rent annually payable by such occupier bears to the total amount of rent annually payable in respect of the whole of such land or building. Sub-section (2) of Section 195 provides that an occupier from whom any sum is recovered under sub-section (1) shall be entitled to be reimbursed by the person primarily liable for payment of such sum. The learned Advocate submitted that taking the three sections together it would create serious difficulty as to who will file the return. The learned Advocate further submitted that whereas u/s 442 the obligation is clearly upon the owner to file the return. Section 182 provides that it may also be by person other than the owner. The learned Advocate further submitted that the Act suffers from excess of authority. Provision authorising the municipal authority to impose penalty is contrary to law and cannot be justified. In support of his contention he referred to Mannalal Khetan and Others Vs. Kedar Nath Khetan and Others, .

11. The learned Advocate further submitted that there is no guideline provided for determination of annual value u/s 174 of the Calcutta Municipal Act. The learned Advocate particularly referred to Section 174(2) of the Calcutta Municipal Act which provides that annual value of any land which is not built upon shall be fixed at 7% of the estimated market value of the land. The learned Advocate submitted that no machinery has been provided for determination of the estimated market value and as such it will give arbitrary power to the municipal authority. The authority concerned may fix any amount as estimated market value of the land and fix 7% thereof as the annual value of any land which is not built upon. There is no machinery or guideline as to how such market value of the land has to be estimated. The learned Advocate for the petitioner also referred to Section 174-A of the Act, and submitted that no machinery has been provided under the said Section as to how the determination will be made. In this connection the learned Advocate submitted that without any machinery or guideline the provisions in the Act cannot remain valid or binding. It has been submitted that the delegation of executive power upon executive without providing for the procedure for determination will lead to excessive or arbitrary power in the hands of the executive. The learned Advocate further submitted that Section 174(2) of the Calcutta Municipal Corporation Act, 1980 appears to be unreasonable In as much as there is no provision in the Act as to how the market value of the land should be estimated as such fixation of 7% of the estimated market value of the land is arbitrary. He further urged that the said section requires to be interpreted properly and in a reasonable manner. The learned Advocate further referred to Section 599 of the Act and submitted that the Corporation or any Municipal authority or officer or employee of the Corporation cannot Act in disregard of the law. It has also been submitted that if the provisions of the statute are unreasonable the court can strike down the said provision. The provision in the statute should be reaonable. In this connection he referred to the judgment and decision of the Supreme Court in Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, . The learned Advocate also relied upon the judgment and decision in the case of Motor General Traders and Another Vs. State of Andhra Pradesh and Others, . The learned Advocate submitted refering to the said decision that the Supreme Court observed in the said judgment "reason is the soul of the law and when the reason of any particular law ceases, so does the law itself."

12. Mr. P. K. Das learned Advocate for Motilal Dhar, one of the added parties supported the case of the petitioner. The learned Advocate mainly referred to Section 174 of the Act and submitted that no effect should be given to the non-obstante clause in the said section. In this connection he submitted the court should interpret the statute in conformity with the law and should give reasonable interpretation. In this connection he relied upon a judgment and decision in the case of The Dominion of India and Another Vs. Shrinbai A. Irani and Another, . He particularly referred to paragraph 10 at page 599 Of the said report wherein the Supreme Court observed as follows:

While recognising the force of this argument it is however, necessary to observe that although ordinarily there should be close approximation between the nonobstante clause need not necessarily and always be co-extensive with the operative part so as to have the effect of cutting down the clear terms of an enactment. If the words the enactment are clear and capable of only one interpretation on a plain and grammatical construction of the words there of a nonobstante clause cannot cut down the construction and restrict the scope of its operation. In such cases two nonobstante clauses have to be read as clarifying the whole position and must have been incorporated in the enactment by the legislature by way of abandunt caution and not by way of limit (sic) the ambit and scope of the operative part of the enactment.

The learned Advocate urged that the court may interpret the Section 174 of the Act in the light of the aforesaid observation of the Supreme Court in the case of the India (now the Union of India & Ors.) v. Sainbai A. Irani & Anr. (supra).

13. The learned Advocate further submitted that imposition of surcharge u/s 171(4) of the Act is bad. In this connection he relied upon a judgment and decision in the case of Al Haj Amir Hassan Properties & Ors. v. Corporation of Calcutta & Ors., reported in 84 CWB 172. In that case Division Bench of this Court held that the Corporation cannot as a matter of right, recover the surcharge as a part of the consolidated rate payable by either the owner or the occupier It has to adopt other way in accordance with law for the purpose. It was also held that the Corporation is not entitled to include the surcharge contemplated by the second proviso of Clause (1) of Section 165 (as ins(sic)ted by the Calcutta Municipal 3rd Amendment Act, 197(sic)) of the Calcutta Municipal Act, 1951 in the bill for the Occupier''s share of the consolidated rate. The learned Advocate relying upon the Said Division Beach judgment and decision urged that the provision surcharge as made in the Act of 1980 cannot also stand and this (sic)should follow the principles decided by the Division Bench in that respect. The learned Advocate also pointed out that although Calcutta Municipal Corporation preferred an appeal against the said decision of the Division Bench of the Supreme Court, the said appeal was disposed of on the basis of the undertaking given by the learned Advocate for the Calcutta Municipal Corporation that surcharge will not be included within the rate bill and no principle has been decided by the Supreme Court. The learned Advocate further urged that provision for imposition of surcharge on the consolidated rate bill by including the same in the consolidated rate bill cannot stand in the eye of law. The learned Advocate further referred to Section 230 of the Calcutta Municipal Act and to sub-section (2) thereof and submitted that no adequate machinery has been provided or realisation of commercial surcharge under the said section nor is there any adequate guideline for the same. The learned Advocate also referred to Section 2(2) of the Calcutta Municipal Act, 1980 which provides "consolidated rate" includes; the surcharge levied on the consolidated rate under this Act. The learned Advocate submitted that the definition of consolidated rate, including within it the provision for surcharge is inconsistent with Section 171(4) which

provides that where any land or building is used for commercial or non-residential purposes, the corporation may levy surcharge on the consolidated rate of such land or building not exceeding (sic)% of the consolidated rate as the Corporation may determine. Proviso to sub-section on (4) relating to separate calculation of consolidated in respect of such land or building will also create complications according to the Learned Counsel. Moreover there is practically no guideline or machinery provided for such calculation as envisaged in the Act. The learned Advocate submitted that since the surcharge is included within consolidated rate itself under the definition it would be anomalous to calculate separately the consolidated rate itself from the surcharge. The Division Bench in the case of A. H. Alhaj Amir Hassan Properties v. Corporation of Calcutta & Ors., (supra) already held that consolidated rate has always been Linked up with the concept of owner or occupier. These concepts are not relevant to the levy of surcharge which proceeds on the basis of the user of the property irrespective of whether the user is the owner or the occupier. If the surcharge is not treated as a separate or independent levy many complications would arise for realisation of occupier''s share of consolidate rate. Distress and sale of moveable property found on the premises are permissible, I the section with necessary modifications are to be applied to surcharge it necessarily follows that distress and sale of the moveable property of the person who uses any land or building or portions there of for commercial or non-residential purposes would be justified. The Division Bench also observed that it is not at all fair that moveable property of any person who is not using the land or building for commercial or non-residential purposes should be subjected to distraint. The learned Advocate accordingly (sic)urged that the imposition of surcharge as made in Act is improper and arbitrary and such provision should be set aside. The learned Advocate also argued that the right conferred on the Calcutta Municipal Corporation u/s 230 of the Act of 1930 to recover from the occupier by the owner is ill(sic)sory. The lewarned Advocate submitted that although the said Section provides that the person primarily liable to pay the consolidated rate may recover the same from the occupier but the provision for recovery as contemplated in the said section will create endless complications. It would also be unfair to make the owner primarily liable to pay although the land or building may be used by the occupier for commercial or non-residential purposes. The learned Advocate next submitted that the right to sub-soil water and sinking of tubewell fee charged by Calcutta Municipal Corporation under Sections 242 and 248 is arbitrary and beyond the scope of legislative competence of the State legislature. The learned Advocate refers to Section 242 of the Act of 1930 which provides as follows "All rights over the sub-soil water resources in Calcutta shall vest in the Corporation". The learned Advocate submitted that the sub-soil writer resources really belongs to nature and cannot vest in the Corporation or any authority. The learned Advocate also referred to Section 248 which deals with prohibition regarding sinking of tubewells. The said Section is set out herein :

(1) No person shall, except with the prior permission in writing of the Municipal

Commissioner, sink a tube-well in any premises.

(2) The Municipal Commissioner may with the prior approval of the Mayor-in-Council, grant such permission and issue a tubewell licence on such conditions and on payment of such annual fee as the Mayor-in-Council may from time to time specify:

Provided that any person owning a tubewell sunk before the commencement of this act shall take out a tube well licence on such conditions and on payament of such annual fee as the Mayor-in-Council may from time to time determine.

14. The learned Advocate submitted that the prohibition regarding sinking of tubewells as contained in section 248 is also arbitrary. It is an inherent right of a person to enjoy water from the sub-soil which is a part of nature. The Corporation cannot impose condition for obtaining permission to sink tubewell and to get water from sub-soil. The said water resources in the sub-soil cannot belong to Calcutta Municipal Corporation as provided u/s 242 as the same really forms part of nature. The learned Advocate submitted that such a provision in the statute as contained in Section 242 and 248 of the Calcutta Municipal Act restricting right of user of water which is part of natural resources is highly arbitrary and improper. The learned Advocate next submitted that the water fee as is being charged by the Calcutta Municipal Corporation under the Act of 1980 is not related to actual consumption and the procedure adopted by the Calcutta Municipal Corporation under the regulations framed by it under the said Act and as such is improper and arbitrary. The learned Advocate submitted that the fee on water should be on the basis of actual consumption, in support of his contention the learned Advocate relied upon a judgment and decision in the case of Municipal Corporation of Greater Bombay Vs. Nagpal Printing Mills and Anr, . I(sic) was held by the Supreme Court that Rule 3(d)(i) of the Rules framed under the Bombay Municipal Act, 1988 empowers the Corporation to levy charge only in respect of water that has in fact been supplied to and consumed by the consumer and it is to be levied on the basis of measurement or estimated measurement. Section 277 of the Bombay Municipal Act, 1988 really confers such power on the Corporation. It has been held that where the measuring device has failed to record the correct consumption, it may be estimated. But that must be on sound guidelines otherwise it would be arbitrary and mere ipse dixit of the authorities concerned. It was held that the bye-laws made in 1968 by the Corporation empower the Commissioner to fix a quota. But no guideline has been indicated. It has also been held that u/s 169 of the Act the supply referred to is the supply which is in fact supplied which can be measured where the measuring device has failed to record the correct consumption, it may be estimated. The circumstances in which the measuring device could be said to have failed, the modes of estimation in such circumstances are provided for by rule 3(a), (b) and (c)of the Water Charges Rules. The Corporation cannot estimate and charge on the basis of water it makes available for use by a consumer. There is no warrant for such a construction. Therefore, there being no

methodology in Rule III (d)(i) of the Water Charges Rules for measuring the actual water supply, that rule is beyond the powers of he Corporation and would be liable to be struck down.

15. The learned Advocate on behalf of the added applicants Naderchand De and others adopted the argument made on behalf of the petitioner and submitted that the provision contained in Section 174 of the Calcutta Municipal Corporation Act, 1980 is ultravires of Article 14 of the Constitution of India in as much as it confers arbitrary, unguided and unbridled power to the authority for determination of annual value of a land and building. The provision made therein that "annual value of a land and building, shall be deemed to be gross annual rent including service charges if any, at which such land and building might at the time of assessment be reasonably expected to let" amounts to confirment of power of in controlled and arbitrary power upon the Municipal Corporation of determining the annual value without any guideline and/or parameter to arive at such annual value. It has been submitted on behalf of the said added party that such confirment of arbitrary power squarely comes within the prohibitory provision of Article 14 of the Constitution of India. In support of his contention the following decisions have been relied upon

1. Shree Meenakshi Mills Ltd., Madurai Vs. Sri A.V. Visvanatha Sastri and Another, ;

2. The State of West Bengal Vs. Anwar Ali Sarkar, ;

3. Messrs. Dwarka Prasad Laxmi Narain v. State of Uttar Pradesh & Ors., reported in AIR 1954 S. 224 at: 227;

4. Yogiraj Charity Trust v. Commissioner of income Tax, New Delhi, reported in AIR 1975 SC 1836 at 1845.

The Supreme Court in the aforesaid decision has laid down that conferment of such arbitrary power itself (sic)rings the basic concept of the provision of Article 14 of the Constitution of India for exercising such arbitrary power in an arbitrary manner by virtue of the conferment of aforesaid arbitrary power. The basic concept of justice not only be done but must be seen to have been done would be disregarded.

16. Moreover, the concept of determining the annual value of a land on the basis of the expected rent is also ultavires article 14 of the Constitution of India in as much as there is no (sic)nexus between the determination of annual value of a land or building on the basis of rent as made in the Calcutta Municipal Act, 1980 which contemplates determination of tax on land and buildings and not on the annual rent. As such, the provision for determination of annual value should be held as having no nexus between the object of the Act for which the said enactment was made. Such a procedure of determining annual value really amounts to determination of tax on income, which the land and building is capable of fetching but not on land and buildings in relation to its size and length

and or the structure. Such being the position, such a procedure is an indirect method of taxing of income on land and buildings, but not on land and buildings, taxing on income of land and buildings, but not on land and buildings, taxing on income of land and buildings amounts to tax on income which is wholly outside the legislative competence of the State for enactment of the Calcutta Municipal Corporation Act, 1980.

17. That apart, the provision of Calcutta Municipal Corporation Act, 1980 does not contemplate passing of tax on such land and buildings by the actual occupier of such lands and buildings that is to say, no incidence has been created under the provision of the said Calcutta Municipal Corporation Act, 1980 for payment of tax by the occupier of land and buildings. That incident of payment of consolidated rate has been created by Section 193 where the occupier of lands and buildings has been left out.

18. Section 194, however, speaks of appointment of liability of consolidated rate on land or buildings, when the premises are assessed, are let to a tenant. Such a provision of apportionment of liability is wholly ultravires the provision in Calcutta Municipal Corporation Act, 1980, in as much as, if there is no incidence of payment of tax that is to say if there is no charging Section under the said Act for payment of tax by the occupier, the provision of apportionment of consolidated rate between the owner and the occupier becomes a provision of putting cart before the horse, that is to say, if no liability is created for the occupier to pay tax, the provision for apportionment of payment of such tax becomes nugatory and inoperative and in that event any tax liability is to be bo(sic)ne by the owner of a land or buildings. Mere creation of right without a reciprocal duty to pay such tax does not take the owner anywhere. More so, on the fact that the provision made in Section 194 for aportionment of liability for payment of tax is wholly unworkable in as much as no machinery has been provided in the said Act for determining the annual value "on the basis of rent of such lands and buildings" as expressed in Section 194 of the said Act. If the provision of Section 194 cannot be worked out, the passing of tax liability to the occupier also evaporates and in that event the owner is to shoulder the entire responsibility for tax on land and buildings. The two basis structure of taxing statute, namely - i) the Charging section and (sic)i) the Computation section is a well recognised principle of a taxing statute. In support of his contention the learned Advocate relied upon a case Sudhir Ch. Mukherjee Vs. Additional Commissioner, Commercial Taxes and Others, . It has been submitted that wording of Section 194 makes it amply clear that the said provision is for computation of the quantum without any corresponding liability and/or charge created for payment of such tax in the said Act without a charging Section for passing of the taxing liability to the occupier. The purported provision in Section 194 for apportionment thereof becomes illusory provision for the occupiers and as such ultravires the provision of the Calcutta Municipal Corporation Act, 1930. The said provision of Section 194 read with Section 174 is as such ultravires the Article 4 of the Constitution of India in that: count as well. If the provision of

Section 174 and Section 194 is to be declared ultravires, the provision for payment and/or computation of the consolidated tax as contemplated in Calcutta Municipal Corporation Act, 1980 cannot be worked out till a suitable provision for charging consolidated rate and passing of portion thereof to the occupier is made by making them liable to pay the same does not arise.

19. Mr. A. Ganguly, learned Advocate on behalf of shri Baidyanath Ad(sic)tya submitted that the Calcutta Municipal Corporation is under statutory obligation to supply water. In this connection he referred to Section 29 of the Calcutta Municipal Corporation Act, 1980 which mentions the obligatory functions of the corporation. It has been specifically mentioned that the "Corporation shall, having regard to the available resources, provide specific civic service including water supply, swerage and drainage" etc. Under the said Section the Corporation should also take measures which it may lawfully use or take for the construction and maintenance of water works and providing by itself or by any agency means for supply of water for public and private purposes. He also referred to Section 119 of the Municipal Act which provides for municipal fund. Under Sub-section (2a) of Section 119 one of the purposes for which the municipal fund shall be maintained is the water supply, sewerage and drainage account. u/s 120(a) an amount equal to 30% of the amount realised or account of the consolidated rate imposed u/s 171 other than the amount realised from the bustees shall be placed to the credit of the municipal fund in the water supply, swerage and drainage account. Mr. Ganguly submitted referring to the aforesaid provisions that there is already a provision for crediting 30% of the amount realised on account of the consolidated rate of water supply, sewerage and drainage which is consistent with the provision contained in Section 29 imposing obligation upon the Calcutta Municipal Corporation to supply water. Under such circumstances imposition of water fee separately is not inconsistent with the aforesaid provisions of the Act. Mr. Ganguly has also submitted that the Calcutta Municipal Corporation is not authorised u/s 170 of the Act to impose surcharge on the consolidated rate on land or building used for commercial or non-residential purposes contained in Section 171(4) of the Act is beyond the scope of Calcutta Municipal Corporation''s power to levy the taxes mentioned in Section 170 of the Act.

20. Mr. Ganguly also preferred to Section 193(c) and also Section 232 of the Calcutta Municipal. Corporation Act, 1930 and submitted if both the aforesaid provisions are rend together it would mean fixing a liability on person who cannot be made liable and his personal property may be charged, for example, in the case of receiver or trustes of properties. The personal property of the receiver or that of the trustees may be charged for non-payment of arrears of rates in respect of properties over which there is Receiver or Trustee in as much as the Receiver or Trustee is under an obligation to pay rates and taxes in respect of such properties over which they have been appointed Receivers or Trustees. Mr. Ganguly also referred to Section 230 of there act and submitted that u/s 230(a) provision for apportionment of consolidated rate is without any reasonable basis in as much as if there be only one occupier other than owner

but the said occupier is occupying only one room in a big building he will have to bear the liability of half of the share of the consolidated rate although ne is occupying only a room of a big building. Mr. Ganguly also referred to Section 235 of the Calcutta Municipal Corporation Act, 1930 which provides as follows :

The Corporation shall provide supply of unfiltered water

(a) In those parts of Calcutta in which such water is provided at the com(sic)encement of this act, and

(b) in such other parts of Calcutta as it may (sic)

fit;

Provided Corporation may discontinue the supply of unfiltered water in any part of Calcutta where a supply in sufficient quantity of wholesome water becomes available.

It appears from the said section 235 that the Corporation shall supply unfiltered water in those parts of Calcutta in which such water is provided at the time of com(sic)cement of the Act and in any other part of Calcutta as it may think fit. The proviso to the said Section makes it clear that the Corporation may discontinue the supply of unfiltered water in any part of Calcutta where a supply in Sufficient quantity of wholesome water becomes available. Mr. Ganguly urged on the basis of the said Section 235 that it is obligatory on the Calcutta Municipal Corporation to supply either wholesome water or in case wholesome water is not available must provide supply for unfiltered water. I(sic) has been contended that in an area not being supplied with wholesome water there is obligation to supply unfiltered water. It is, therefore, obligatory according to Mr. Ganguly to provide for supply of water either wholesome of unfiltered in all areas of Calcutta. Imposition of water fee separately goes against the said provision. Mr. Ganguly also referred to Section 238 of the Act. and submitted that the categories mentioned under Sub-section (2) of the said Section which are deemed not to be included far the purpose of supply of water for domestic purposes are vague and will create confusion.

21. The learned Advocate on behalf of added respondent Smt. Ramala Biswas argued that in the affidavit filed on behalf of the respondent Smt. Ramala Biswas affirmed by one Dulal Chandra Sarkar on 10th July, 1986 the constitutional validity of Section 193(1), 213, 219, 220, 232 and 120(a) have been challenged. It has been submitted on behalf of the said added respondent Smt. Ramala Biswas that the Calcutta Municipal Corporation Act, 1980 provides inter alia for imposition of rates on lands and buildings in Calcutta, the method of recovery of such rate and also for appeal by the rate payer against the assessment of rates assessed by the municipal authorities. It has further been submitted that in pith and substance the said Act has been passed by the Legislative Assembly by virtue of power conferred under Entry 5, List II of Schedule VII of the Constitution of India which reads as follows :-

5 Local Government, that is to say the constitution and powers of Municipal Corporations, Improvement Trusts, District Boards, Mining Settlement Authorities and other local authorities for the purpose of local self Government or village administration.

It is thus clear that the said Act is not a piece of legislation under Entry 49 of List II of Schedule VII of the Constitution of India which speaks of "Taxes on Lands and Buildings", and, therefore, the Stat Legislature has powers to imposfees under Entry 66 and not takes under Entry 49 for the purpose of fulfilling the duties imposed by the said Act under the said Entry 5. The learned Advocate also relied upon the judgment: in the case of Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another, whereby the Supreme Court struck down the Travancore Cochin Land Tax Act, 1955 as unconstitutional and void. It has been argued that the Calcutta Municipal Corporation Act, 1980 deals with "imposition of rates" and recovery of rates and to understand the meaning of the word rate and its nature as used by the various State Legislatures in enacting the laws relating to the constitution and powers of municipal corporations under the said Entry 5 it is necessary to refer to the social meaning the word ''rate'' and acquired in the history of legislation both in England and India. The learned Advocate in this connection relied upon a judgment and decision of the Supreme Court in the ease of Patel Gordhandas Hargovindas Vs. Municipal Commissioner, Ahmedabad, . In para 5 of the said judgment at page 1745 of the said report the Supreme Court observed that "the word ''rate'' has come to our country for the purpose of local taxation from England.

.......This history will show that the case was assessed generally on the occupier of lands and buildings on a account of his beneficial occupation of such lands and buildings. The very fact that the rate was assessed on the occupic(sic) of lands and buildings leads clearly to the inference that the rate was to be levied on the annual valuation of the land or buildings to the occupier and had nothing to do with the capital value of the lands and buildings to the owner. In other words, the rate was to be levied on the annual value of the land or building depending upon its lett(sic)ng value and not on the capital value. This principle that the rate was to bo levied on the letting value is incorporated in all the previous legislations upto the Calcutta Municipal Act, 1951 as well as in Section 174 of the said Act.

22. The present position is sum(sic)ed up in Halsbury''s laws of England; Third Edition (Vol. 32) para 10 at pages 11-12, under the ehading "Meaning and nature of Rate". At page 12 the law is stated as follows :-

The rate is not a tax on the land, but a personal charge (s) on the occupation in respect of the land(s).

The learned Advocate thereafter referred to Section 171(1) of the Calcutta Municipal Corporation Act, 1980 which provides as follows : -

For the purposes of this act, a consolidated rate on the annual value, determined under this chapter, of lands and buildings in Calcutta shall be imposed by the

Corporation.

This section authorises the Municipal Corporation to impose consolidated rate for the purposes of the Act, that is to say, "to make adqquate and suitable provisions for such services as may be required for the fulfilment of the several duties imposed by this Act." The Act contains various duties some of which are obligatory, namely, the duties imposed by Section 29 of Chapter IV of the said Act.

23. The learned Advocate submitted that Section 171 of the said act is unconstitutional in as much as the legislature had completely abdicated its functions and had delegated essential legislative power to the municipality to determine which property should be burdened with the consolidated rate. The learned Advocate further argued that the section is also unconstitutional and invalid in as much as it authorises the municipal corporation to impose consolidated rate on dissimilar properties, that is to say, the properties which are enjoying the benefits of such obligatory services such as supply of water, conservancy services etc. with those bu(sic)lsings which do not enjoy such amenities as provided by the said Act. It is thus arbitrary and violative of Article 14 of the Constitution of India, in as much as the Municipal Commissioner has been provided with unguided and unfettered powers in the matter of imposition of consolidated rate on lands and buildings which are dissimilar in nature and character. The learned Advocate relied upon the following decisions of the Supreme Court in support of his contention.

1. The Western India Theatres Ltd. Vs. Municipal Corporation of The City of Poona, ;

2. Kunnathat Thathunni Moopli Nair v. State of Kerala reported in 1961 SC 552,

3. Patel Gordhandas Hargovindas & Ors. v. The Municipal Commissioner, Ahmedabad & Anr., reported in AIR 1961 1742;

4. The Corporation of Calcutta & Anr. v. liberty, Cinema, reported in AIR 196(sic) s(sic) 1107.

24. The learned Advocate referred to Section 147 of the Act of 1899 which is set out herein below :-

147. The following rates may be imposed upon all buildings and lands namely,

a) a general rate not exceeding thirteen percent on the annual valuation determined under this Chapter;

b) a water rate not exceeding six per cent on the annual valuation determined as aforesaid;

c) a lighting-rate not exceeding two per cent on the annual valuation determined as aforesaid; and

d) a sewage rate not exceeding two per cent on the annual valuation determined as aforesaid.

Provided that buildings and lands, no part of which is within one hundred and fifty yards of the nearest stand post or other supply of filtered water available to the public, shall be assessed to water-rate at three percent less than buildings and land otherwise situated.

The learned Advocates submitted that the word rate means fee and as such there must be some rational relationship between the amount collected as rate and the services rendered by the Corporation to the rate-payers. Section 120 of the said Act provides that an amount equal to 30% of the amount realised on account of consolidated rate imposed u/s 171 shall be placed to the credit of the municipal fund in the water supply, sewerage and drainage account. Hence the amount of consolidated rate ought to be reduced. The learned Advocate also relied upon the judgment and decision of the Supreme Court in the case of Kewal Krishan Puri and Others Vs. State of Punjab and Another, . The learned Advocate referred to Section 174 of the Calcutta Municipal Corporation Act, 1980 which is set out herein below :

Section - 174

Determination of Annual Valuation - the relevant portion whereof is set out hereunder : -

(i) Notwithstanding anything contained in the west Bengal Premises Tenancy Act, 1956 or in any other law for the time being in force, for the purpose of assessment to the consolidated rate, annual value of any land or building shall be deemed to be gross annual rent 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, less an allowance of ten percent for the cost of repairs and other expenses necessary to maintenance such land or building in a state to command such gross rent. The provisions of the said section confers wide and uncontrolled power to the authorities under the said act, without any guidelines as to the interpretation of the words "be reasonably expected to let" and is capable of being used with arbitrary discrimination by the assessing authorities in the matter of determining the annual valuation of any land or building.

It has been submitted that the provisions of the said section confers wide and uncontrolled power to the authorities under the said Act without any guideline as to the interpretation of the words "be reasonably expected to let" and is capable of being used with arbitrary discrimination by the assessing authorities in the matter of determining the annual valuation of any land or building. The learned Advocate referred to the judgments and decisions in the case of The Corporation of Calcutta Vs. Sm. Padma Debi and Others, , Corporation of Calcutta Vs. Life Insurance Corporation of India, , The Guntur Municipal Council Vs. The Guntur Town Rate Payers'' Association etc., , Dewan Daulat Rai Kapoor and Others Vs. New Delhi Municipal Committee and Others, in support of his contention that the words "be reasonably expected to let" cannot but mean reasonably be expected to receive anything more than the standard rent from the hypothetical tenant and the annual value of the building cannot, there for exceed the standard rent. It (sic) further been submitted that in the case of Dewan Dulat Rai Kapoor v. New Delhi Municipal Corporation & Anr., (Supra) it was held by the where Supreme Court as appears at page 542 of the said report that where standard rent has not been fixed "the landlord is lawfully entitled to receive the contractual rent, the annual value must be limited to the measure of standard rent determinable under the Rent Act and cannot be determined on the basis of the higher rent actually received by the landlord from the tenant." The Supreme Court held that "the assessing authority would, in either case, have to arrive at its own figure of the standard rent by applying principles laid down in the Delhi Rent Control act, 1958 for determination of standard rent and determine annual value of the building on the basis of such figure of standard rent." Accordingly it has been submitted that the words be reasonably expected to let as appearing in Section 174 of the Calcutta Municipal Corporation Act of 1980 would mean that the landlord cannot reasonably be expected to receive anything more than the standard rent which is to be determined on the annual value of the building on the basis of such figure of standard rent. The learned Advocate argued that to nullify the effect of the various decisions already cited by him the State legislature has for the first time in the said 1980 Act introduced a non-obstante clause so that the determination of annual value on the basis of standard rent or fair rent as used in the West Bengal Premises Tenancy Act, 1956 can be given a go by the assessing authorities and the annual value determined on arbitrary basis. The legislature has not laid down any criteria or guideline for the assessing authorities to determine what would be "reasonable" expectation if the building is let to a hypothetical tenant from year to year. It has been contended that the discrimination is thus writ large on the face of the Section which confers unguided an uncanalised powers to the assessing authorities, and should be struck down as arbitrary, violative of the principles of Article 14 of the Constitution and thus void.

25. The learned Advocate for the said added respondent Smt. Ramala Biswas further Submitted that u/s 189 of the Calcutta Municipal Corporation Act, 198C provision has been made for the first time to set up a Municipal Assessment Tribunal for hearing and disposal of appeals against the orders passed by Hearing Officers u/s 188 of the said Act. The said section 189 has further laid down pre-condition for preferring an appeal, namely, that no appeal under this Action shall be entertained unless the consolidated rate in respect of any land or building for the period ending on the date of presentation of the appeal on the valuation determined u/s 188 has been deposited and the appeal shall abate unless such consolidated rate is continued to be deposited till the appeal is finally disposed of. According to the learned Advocate imposition of such a condition is arbitrary in that the rate-payer may not have the capacity to pay the amount of consolidated rates so enhanced and thus is deprived of his fundamental right of equal protection of law under Article 14 of the Constitution of India. The learned

Advocate tried to justify his submission on the basis of an illustration and gave example of her own case, namely the annual value of her premises No. 356 Lake Gardens, Calcutta 45 has been sought to be increased from Rs. 10,07.8/- to Rs. 54,000/- on the basis of estimated rent although the premises is self-ocupied with effect from 1st quarter 1982-83 until now. The hearing of objection of such assessment has not been heard although six years have passed. The increased assessment would be retrospectively charged and as a result thereof huge amount would be due and payable and no appeal can be preferred to the tribunal without putting in the entire amount so accumulated which is beyond the paying capacity of this added respondent. It has been alleged that the municipal authorities should have taken proper steps to complete the hearing of objection within a reasonable time which the authorities failed and neglected to do. With the result the added respondent would have to pay huge arrears causing servere financial strain to the added respondent. According to the learned Advocate there may be other instances where due to unreasonable delay on the part of the municipal authorities to complete hearing of objections huge sums have accumulated. It has been further contended that the said section also provides that "the decision of the tribunal with regard to violation of assessment shall be final and no suit or proceeding shall lie in any civil court in respect of any matter which has been or may be referred to or has been decided by the tribunal. "The learned Advocate submitted that the said section thus deprives the aggrieved ratepayer from agitating his grievance from Court of Law against the arbitrary decision of the tribunal. It is a taxing statute and, therefore, the aggrieved rate payer has a right under the Constitution to approach the Civil Court for redress of his grievance on point of law. In this connection the learned Advocate relied upon the decision of the Supreme Court in the case of Kunnathat Thathunni Moopil Nair etc. v. State of Kerala & Anr., reported in AIR 1961 SC 554.

26. The learned Advocate further submitted that provision in the Act for imposition of interest and also for charging penalty for non-payment of consolidated rates on the due date is arbitrary and is violative of Article 20 of the Constitution of India for principle analogous thereto which prohibits double punishment for the same offence. The learned Advocate submitted the provision for penalty in the Act for non-payment of consolidated rate on the due date should be struck down as the provision for interest is already there which will be in the nature of a compensation for loss suffered by the Municipal Corporation for non-payment on the due date. The learned Advocate also submitted that the power conferred upon the municipal commissioner to issue and sign distress warrant for the recovery of dues cannot also be supported in view of the fact that consolidated rate bills issued by the Municipal Corporation is also signed by the Municipal Commissioner of such a provision, therefore is in violation of the principles of natural justice inasmuch as a man cannot be a Judge of his own cause it has further been submitted that there is no provision in the Act for hearing the objection to the payment of the consolidated rate as demanded under the Act which is a relic of the procedure adopted by the alien rulers

whereas in their own country payment of rate is enforceable by distress and not by action and the English law guarantees that no distress proceedings may be taken by the rating authority and that an application for a distress warrant has to be made by the rating authority making a complaint to the Justice of Peace who would issue a summons requiring a person named in the complaint to appear before a Magistrate''s court to show why he has not paid the rates specified in the complaint and the grounds of objection to payment which may be raised before such court and that if dissatisfied with the order of the Court an aggrieved rate payer can appeal there from even upto the House of lords, but such a provision has not been made in the Act of 1930. The'' learned Advocate also referred to Section 232 of the Calcutta Municipal Corporation Act which provides that the consolidated rate on lands and buildings put the first charge on the premises. It has been submitted that rate is not a tax on the land, but a personal charge on the occupier in respect of the land. The provisions are confiscatory in nature and violative of Article 300A. The legislature has not used the words "tax on lands and buildings" and as such the lands or building cannot be charged with the payment or rate.

27. Further the said Act of 1980 is in pith and substance a legislation relating to Local Government under Entry 5 of the List 2 (State List) of the Seventh Schedule and is not a legislation under Entry 49 - taxes on lands and buildings. There is not thus legislative competence to enact such a provision as contended in the said Section 232 of the 1980 Act, declaring the consolidated rate as first charge upon the land and building. The said provision being beyond the legislative competence of the West Bengal State Legislature is ultra vires the Constitution of India and void and should be struck down as such.

28. It has been further submitted that the main operative sections of the 1980 act are discriminatory in nature and confiscatory in character, and inequality is writ large on the said Act, and following the decisions of the Supreme Court reported in AIR 1961 SC 554 referred to earlier, this Court should be pleased to strike down the 1989 Act as ultra vires the Constitution of India and void.

29. Mr. Somen Ghosh, learned Advocate for Smt. Madhuri Mitra one of the added respondents submitted that Sec. 178(1) of the Calcutta Municipal Act, 1980 provides "the State may make rules and provide for the detailed procedure for determination of the Annual Value of Lands and Buildings in Calcutta and for other matters connected therewith, and such rules together with any regulations made under this Act shall constitute the Municipal Assessment Code." The learned Advocate submitted that the procedure prescribed by the statute must be followed. Under the statute it is obligatory to frame rules providing for the detailed procedure but no such rules have been framed under the said section and as such no tax on lands and buildings in Calcutta can be imposed by executive order. In this connection the learned Advocate relied upon the following decisions :

1. Gopal Narain Vs. State of Uttar Pradesh and Another, .

2. Municipal Council, Khurai and Another Vs. Kamal Kumar and Another, .

3. Jothi Timber Co. v. Calicut Municipality, reported In AIR 1970 SC 65 (166).

30. The learned Advocate referred to Article 246(3) of the Constitution which provides as follows

The Legislature of any State has the exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in list II in the Seventh Schedule (" state List"). Entry 17 in the State List provides for making laws in respect of Water that is to say Water Supplies and Entry 66 empowers the State to levy fees in respect of water supplies. This WATER SUPPLY surely does not include domestic TUBE WELLS.

31. The learned Advocate submitted that taxing power the State Legislature being so limited by the Constitution of India, Municipal or other local bodies created by the State Legislature cannot transgress the limitations so imposed by the Constitution. In this connection the learned Advocate relied upon a decision and judgment in the case of Jothi Timber Co vs. Calicut Municipality (Supra).

32 Section 248(2) of the Calcutta Municipal Corporation Act, 1980 provides "the Municipal Commissioner may, with the prior approval of the Mayor-in-Council, grant such permission and issue a tubewell licence or such conditions and on payment of such annual fee as the Mayor-in-Council may from time to time specify." It has been submitted that the section empowers Mayor-in-Council with unfettered power to increase fee annually. Such-unfettered and unrestricted power of Mayor-in-Council resulted increase in annual licence fee from Rs. 100/- to Rs. 300/-. The learned Advocate further submitted that it is not permissible for the Legislature to leave the executive with an unguided discretion. In this connection the learned Advocate relied upon the following decisions :

1. Kedarnath v. State of West Bengal (1953) SCA 835 (846)

2. The State of West Bengal Vs. Anwar Ali Sarkar,

It has been submitted that the delegation of power to fix the rate of tax will be valid if the statute gives guidance to the delegates as to how the power is to be exercised or the legislative policy is laid down or checks are provided "to ensure that reasonable rates are fixed by the local body. In this connection the learned Advocate relied upon the following decisions :

1. Devidas v. State of Punjab, reported in AIR 967 SC 1895.

2. Municipal Board v. Raghuvendra, reported in AIR SC 69.3

3. Delhi Municipality v. B- G- S. & W. Mills, reported in AIR 1969 SC 1232 (1244, 1243, 1354).

4''. Gulabchand Bapalal Modi Vs. Municipal Corporation of Ahmedabad City, .

33. Mr. Ghosh further submitted that the guideline for assessment of lands and

buildings under the Calcutta Municipal act'', 1980 issued by mayor of Calcutta on 8th February, 1986 suffers from unreasonable classification. The said guideline has been issued without any valid and reasonable basis. Referring to the said guideline it has been contended that the premises exclusively occupied by the owners for their own residence has been classified under the category.

1. In terms of the said guideline clause 1 (c) it has been provided as follows :

(c) In the case of an old building additions, alterations building will be taken by computing the rentals for the old and new portions as under : -

(i) the rent for the old portion should be increased normally by 10 percent.

(ii) that all the new portion shall be taken at not less than 150 percent of rate of rent for the old portion.

The learned Advocate submitted that there is no basis for fixing 150 percent of the rate of rent of the old portion for the purpose of assessment of the gross rental rate in respect of the new portion as mentioned in sub-clause (2) of clause 1(c). The guideline does not indicate how the said figure 150 has been arrived at. The clause 2 of the said guideline refers to premises partly let out and partly occupied by owner. It has been mentioned therein that in the case of building partly let out on rent and partly occupied by owner for his/own residence the gross annual rent for the entire building shall be taken by adding the rentals of the tenanted and owners occupied portion as under. The reasonable rent for the owner occupier portion shall be taken by increasing the same at the 10 percent of the rent taken during the last assessment of such portion. The learned Advocate submits that the said provision in the guideline for taking the reasonable rent for occupied portion By increasing the same by 10 percent of the rent taken during (sic) last assessment for such portion as arbitrary and without any basis ?whatsoever. The learned Advocate submits that the similar provisions are there in the other portion of the said guideline in respect of the tenented portion of the said premises partly let out and partly occupied by owner and also in respect of multi-storied buildings. "No adequate machinery has been provided also for determination and for assessment in terms of the said guideline.

34. Mr. Bhaskar Gupta, learned Advocate for New Alipore House Owners association referred to section 174 of the Act and submitted that said section provides no guideline for determination of what will be reasonable letting out value'' Mr. Gupta further submitted that the provision contained in the said section that the annual value of any land or building shall be'' deemed to be the gross annual rent 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 less an allowance of 10 percent for the cost of other expenses necessary to maintain such land or building is contrary to the well settled principles laid down by the judicial decisions beginning from Padma Devi''s case. Mr. Gupta also submitted that the said section offends article 14 of the Constitution and is arbitrary in nature. He has also submitted that the words "be reasonably expected to let"

must be reasonably interpreted to mean standard rent as the basis of assessment. He further submitted that the said section offends Article 14 of the Constitution firstly because regardless of the nature, character and situation of the building and regardless of the actual rent which the property may fetch the annual value is to be determined on the basis of notional value at the time of assessment thereby treating unequals as equal. Secondly, according to Mr. Gupta entire liability has been a fixed on the owner but there is no provision for passing on this lability on the occupier. The learned Advocate further submitted that the said Section 174 of the act cannot be given effect to unless Section 178 which provides for Municipal Assessment Code is made applicable because under the Section 178 the State Government may makes rules provided for the lands or buildings in Calcutta. Therefore the section itself contemplates that the detailed procedure will be provided in future and unless the said procedure is there it would not be proper to proceed with the assessment on the basis of Section 174.

35. Mr. S. Pal and Mr. L. K. Pal Advocates on behalf of some of added respondents also supported the contention of Mr. Gupta. Mr. S. Pal further submitted that the statutory powers conferred on the municipal authority are to be exercised in the mode prescribed by the statute itself and since section 178 of the Calcutta Municipal act provides that the State Government may make rules provide for the detailed procedure for-determination of the annual value of the lands or buildings in Calcutta and for other matters connected therewith and such rules together with any regulations made. In this act shall constitute the Municipal Assessment Code untill such rules are framed there is no Municipal Assessment Code and the Municipal authorities cannot proc(sic) determine the valuation in an arbitrary manner. The learned Advocate also referred to a decision in the case of Sudhir Ch. Mukherjee Vs. Additional Commissioner, Commercial Taxes and Others, . The learned Advocate referred to the page 559 of the said report wherein it has been observed by the Division Bench of this Court as follows:

It is now settled that statutory powers are to be exercised in the Mode prescribed by the statute and not in any other manner. Mr. Pal supported the case of the petitioner and adopted the arguments made by Mr. Lahiri, Mr. Das and Mr. Gupta in all other respects. The other added respondents also supported the case of the petitioner and adopted the arguments made by the said Advocates.

36. Mr. Pradip Ghosh, learned Advocate for the Calcutta Municipal Corporation submitted that it is not necessary to decide other questions which are not involved in the writ petition. Challenge in the writ petition is restricted to Sections 171, 174, 182, 189, 195, 219 and 442 of the Act of 1980. It has further been submitted that the petitioner is the owner of a building in Calcutta. The provisions partaining to and/or which relates to an occupier cannot be challenged by the petitioner being the owner of a building. The learned Advocate relied upon the following decisions in support of his contention:

1. The Central Bank of India Vs. Their Workmen, .

2. The State of Bihar Vs. Rai Bahadur Hurdut Roy Moti Lall Jute Mills and Another, .

3. All India Station Masters'' and Assistant Station Masters'' Association, Delhi and Ors. v. General Manager, Central Railway & Ors., reported in AIR 1964 SC 384.

37. With regard to the submission of the petitioner that court should not confine itself within the narrow limit of a particular case. The learned Advocate for the respondent relied upon the following decisions :

1. Atiabari Tea Co., Ltd. Vs. The State of Assam and Others, .

2. S. P. Gupta, V. M. Tarkunde, J. L. Kalra and Qrs., Iqbal M. Chagla & Ors., Ra(sic)ppa P. Subramanium, D. N. Pande & Ors. v. President of India & Ors.

AND

Mills Lily Thomas v. President of India & Ors.

AND

S.P. Gupta Vs. President of India and Others, .

Relying upon the aforesaid decisions he submitted that the principles advocated by the learned Advocate for the petitioner that the court should not confine itself within the narrow limits of a particular case should not apply. The learned Advocate also referred to a judgment in the case of M/s. Gammon India Ltd. v. Union of India & Ors. reported in AIR 1974 SC 260 (para 39) to show what should be the role of an intervener. On the question if the scope of the petition is enlarged by Order 1 Rule 8 the learned Advocate for the respondent submitted that there is no such scope for enlargement in the present case in view of the decisions cited above. On the question of double taxation the learned Advocate referred to the judgment in the case of Corporation of Calcutta and Another Vs. Liberty Cinema, and submitted there is no excessive delegation in the present case. He also relied upon a judgment and decision in the case of The State of Andhra Pradesh and Another Vs. K. Jayaraman and Others, and submitted that interpretation of the proviso must curve out from original section is not always the rule. The learned Advocate further sought to distinguish the case of Municipal Corporation of Greater Bombay Vs. Nagpal Printing Mills and Anr, and submitted that the principles of quid pro-quo does not apply in the instant case. The learned Advocate also submitted that the court must presume the Act to be vires. In this connection he referred to Seerbhai 3rd edn. Volume - 1 pages 190 to 192 and Basu''s Commentary''s on the Constitution of India, Volume-I, 6th Edn. at page 395. The learned Advocate submitted that the court should not presume section 174 as ultra vires. He also referred to a decision in the case of Corporation of Calcutta Vs. East India Commercial Company Pvt. Ltd., . Mr. Ghosh also submitted that in case where the premises is actually let out ordinarily contractual rent will be basis for determination otherwise municipal authorities will decide what will be the fair rent on the principles of section 8 of the West Bengal Premises Tenancy act. In this connection he relied upon a judgment in the case of Patel Gordhandas Hargovindas Vs. Municipal Commissioner, Ahmedabad, . He further submitted that there are enough cheeks and balance in the present Act of 1980. Objections to valuation will be heard by Special Officers. There is also provision for appeal to Tribunal. In fact there is not much of difference between Section 174 of the New Act and Section 158. Section 230 of the said Act corresponds to Section 201 of the old act, which provides for payment by owner on behalf of the occupier. The learned Advocate for the respondent in this connection referred to a judgment and decision in the case of Rai Ramkrishna and Others Vs. The State of Bihar, . In that case the Supreme Court interpreted entry 56 of the second list in Schedule 7 which refers to taxes on goods and passengers carried by road or on inland water ways. By this entry the State Legislatures? are authorised to levy taxes on goods and passengers. It is not on all goods and passengers that taxes can be imposed under entry. It is on goods and passengers carried by road or on inland water ways that taxes can be imposed. The expression "carried by road or on inland water ways" is an adjectival clause qualifying the goods and passengers that is to say it is goods and passengers of the said description that have to be taxed under this entry. Nevertheless, it is obvious that goods as such cannot pay taxes and so tax levied on goods have to be recovered from some persons and those persons must have an intimate or direct connection or nexus with the goods before they can be called upon to pay tax in respect of carried goods. Similarly passengers who are carried are taxed under this entry but usually it would be inexpedient if not impossible to recover the tax directly from the passengers. So it would be expedient and convenient to provide for recovery of the said tax from the owners of the vehicle themselves. Hence, the Supreme Court held that it is competent for the Legislature to device a machinery for the recovery of said tax by requiring the bus operator or bus owners to pay the said tax. It was held that the entries of the 7th schedule of the Constitution of India confering the legislative power on the legislature must receive the widest denotation. On this principle the learned Advocate for the respondent Municipal Corporation argued that the tax may be recovered from the owner in respect of the building although the occupier of the same acknowledges the benefit of the property. Section 2(20) of the Calcutta Municipal -Corporation Act, 1980 defines consolidated rate "which includes the surcharge levied on the consolidated rate under the act. Therefore, the provision in Section 2(3)(b) which provides that the entire amount of the surcharge on the consolidated rate on any lands or building nay be recovered by the person primarily liable to pay the consolidated rate from the occupiers of such land or building who use it for commercial or non-residential purposes. Section 193 provides that the consolidated rate on lands and buildings shall be primarily leviable if the land or building is let upon the lessor, if the land or building is sub-let upon the superior lessor, if the land or building is unlet upon the person to whom the right to let such land or building vests. The learned Advocate for the respondent, therefore, submits that there is no wrong if the surcharge is imposed upon the owner of a building as the surcharge is included within the definition of consolidated rate. Section 195 also provides for recovery of consolidated rate on lands and buildings from occupiers on the failure to recover the sum due on account of consolidated rate from any person primarily liable to pay since the section 230 provides that the person primarily liable to pay consolidated rate including surcharge may recover it from the occupier. Section 231 also provides for further remedy for the person primarily liable to pay since it has been provided that the sum due by way of consolidated rate will be recoverable as a rent due. The learned Advocate further submitted that in view of the decision in the case of Gillanders Arbuth not & Co. Ltd. v. Corporation of Calcutta, reported in 1986(1) CHN 262 and in the case of Chatter Singh Baid & Ors. v. Corporation of Calcutta. & Ors., reported in 1983 (2) C(sic) 330 vires of section 189((sic)) of the Act of 1980 which corresponds to Section 183(3A) of the Act of 1951 although challenged by the petitioner was not pressed. The learned Advocate for the respondent also referred to Section 178 being the assessment code. It has been submitted that said section 174 is not dependent upon section 178. In this connection he relied upon a judgment and decision in the case of Corporation of Calcutta v. Sambhu Das Pyne reported in 1985(1) CHN 195. It has been submitted that the ratio of the said decision will apply with greater force so Ear as the said sections 178 and 174 are concerned. So far as water tax or fee is concerned the learned Advocate submitted that proviso, to Section 165 of 1951 Act is the same as that of Section 171 of the 1980 Act. Under the 1930 Act there is no such levy by the name of water tax but the provision has been made for water fee under proviso to section 234 In this connection the learned Advocate argued that proviso to Section 234 refers to water fee meant for domestic purpose and Section 239 for non-domestic purpose. Section 239 refers to power to supply water for any purpose other than domestic purpose referred to in section 238. The learned Advocate also referred to Section 261 of the Act of 1980 which provides for power of "corporation of establish block meters. The learned Advocate also referred to Section 262 which provides that the municipal commissioner provided a water meter and attached the same to the supply pipe in the premises connected with the service main of the corporation. He has also referred to Section 265 of the act which provides for payment of supply of water as recorded by meters. The learned Advocate in this connection submitted that such meter referred to in the aforesaid sections are really meant for consumption of water for non-domestic purpose. The Learned Advocate in this connection referred to a judgment and decision in the case of Kewal Krishna Puri and Anr. v. State of Punjab and Anr and other Civil Cases reported in 1980(1) SCC 415 and submitted :hat the principles of quid pro. quo will not apply. It has also been contended by the learned Advocate for respondent that Section 234 deals with supply of water to houses for domestic purposes of the occupants thereof and :he same is clear from Section 234(1)(b) of the Act. The proviso which imposes annual fee is in respect of such supply meaning thereby supply of water for domestic purposes. This has to be distinguished from the provisions of Section 265 which relates to payment for supply of water recorded by meters. It has been contended that at present the water meters are being fitted only in the commercial premises where water is supplied for non-domestic purpose and those non-domestic consumers are presently paying for water as consumed by themselves The domestic consumers are only subject to a nominal water fee which is imposed as an annual levy and as and when the domestic premises will be fitted with meters, it is only then the Corporation will be able to charge water fee by ad(sic)ering to meter reading. It has also been contended that there is nothing wrong in providing levy of Tee on the basis of ferrule size. If a particular consumer does not require large volume of water he can easily opt for lower size ferrule. If, however, inspite of having a large size ferrule sufficient water is not available or water available falls below the expected volume of supply, it will be open to the consumer to complain to the Corporation and the Corporation may be compelled to supply adequate water. For that reason alone the regulation will not stand invalid. According to the respondent the fee for domestic users and non-domestic users are treated in the same way on the basis of ferrule size and non-domestic users on the basis of water meters the same will not amount to discrimination because non-domestic users constitute a separate class altogether. There is no discrimination so far as the domestic user is concerned if they are treated as a separate class altogether. It has also been contended that there is nothing wrong with the imposition of a general levy on the basis of ferrule size as classification is based on a reasonable basis viz. (i) difference in rate able value and (ii) difference in size of the ferrule which means entitlement to get water. It is not necessary to make the levy commensurate with the actual supply or actual consumption as this is not a fee co-related to actual consumption. But the fee can be levied for the purpose of defraying the expenses of maintaining water supply for the domestic purpose. It is not necessary that the revenue collected from such fee should be specially earmarked and spent. As a matter of fact, fee if so collected is only a fraction for the purpose of maintaining the water supply. Until the mater is fixed as provided in the Act or the recording of consumption, there is no wrong in applying the regulation.

38. The learned Advocate further submitted that it may be that the regulation framed by the Calcutta Municipal Corporation with regard to the water fee is deficient in so far as money collection and appropriation from occupiers in the premises are concerned. The court may only strike out the necessary part and need not travel beyond the same He further submitted that the court need not decide beyond the scope of the petition. The learned Advocate referred to Section 573 which provides that in case there is no provision for collection of any fee rate or rent or charge due to the corporation the same may be recoverable from the person from whom such sum is due as if the same is a consolidated rate. He submits accordingly that the corporation is entitled to recover the water fee as a consolidated rate even if the regulation is declared as bad.

39. I have considered the facts on record and respective submissions of the parties and the cases cited from the bar. The first point raised by the petitioner and the other added parties who supported the case of the petitioner is that the

water fee imposed under the Act is not in accordance with law for the reasons already noted. Submissions made on behalf of the petitioners and others on that account cannot be totally accepted in the case of omprakash Agarwal & Ors. v. Giriraj Krishori & Ors., reported in 1936(1) SCC 722 upon which reliance was placed on behalf of the respondent no. 1 the facts inter alia are that the appellants who are dealers in agricultural produce carrying on business in certain notified market areas set'' up under the Punjab Agricultural Produce Market Act, 1961 in the State of Haryana have questioned the validity of the Haryana Rural Development Fund Act 1933 (hereinafter referred to as "the Act"). Section 3 Of the Act provides that with effect from such date as the State Government" may by notification on that behalf prescribe, there shall be levied on the dealer for the purpose of the Act, a cess, on ad valorem basis at the rate of one percentum on the sale proceeds of agricultural produce bought or sold or brought for processing in the notified market area. It, however, provides that except in case of agricultural produce brought for processing, no cess shall be leviable in respect of any transaction in which delivery "of the agricultural produce brought or sold is not actually made. The cess is payable by the dealer in such manner as may be prescribed to such officer or person as may be appointed or designated by the State Government" in that behalf. The dealer is, in his turn entitled to pass on the burden of the cess paid by him to the next purchaser of the agricultural produce from him. He may, therefore, add the same to the cost of agricultural produce or the goods processed or arrears of land revenue. Sub-section (3) of Section 4 provides that the amount of cess paid to the concerned officer by virtue of Section 3 of the Act shall be credited to the Fund within such period as may be prescribed. Sub-section (4) of section 4 provides that any grant made by the State Government and local authorities shall also be credited to the Fund. Sub-section (5) of Section 4 of the Act states that the Fund shall be applied by the State Government to meet the expenditure incurred in the rural areas, in connection with the development of roads, hospitals, means of communication-, water supply, sanitation facilities and for the welfare of agricultural labour or for any other scheme approved by the State Government for the development of the rural areas. The Fund can also be utilised to meet the cost of administering the Fund. The said Act also provided for punishment in case of violation of the provisions of the Act. The appellants who became liable to pay the cess on the coming into force of the Act questioned its validity before the High Court of Punjab and Harayana. The petitions field by them were first heard in the High Court by a Single Judge. The learned Single Judge found that the act was unconstitutional and stock it down aggrieved by the decision of the learned Single Judge the State of Harayana filed a letters patent appeal before the Division bench of the High Court. The Division Bench allowed the appeal, set aside the judgment of the learned Single Judge and upheld the constitutional validity of the Act. The writ petitions which had been filed by the appellants were dismissed. Thereafter appeals by special leave were filed against the judgment of the Division Bench of the High Court. The principal contention urged by the appellant before the Supreme Court is that the cess levied under the Act is in the nature of a tax and it does not fall under any of the increase in list II of the 7th Schedule to the Constitution under which the State Legislature can levy a tax. The ground on which the Division Bench of the High Court upheld the constitutional validity of the Cess was that it was in the nature of a fee and, therefore, it could be levied as a fee imposed on dealers carrying on business within the market area for the service rendered to them by the State Government. The very same contention was also urged before the Supreme Court on behalf of the State'' Government. In support of his contention the State Government relied upon the decisions of the Supreme Court in the case of Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others, , Municipal Corporation of Delhi and Others Vs. Mohd. Yasin, and Southern Pharmaceuticals and Chemicals, Trichur and Others Vs. State of Kerala and Others, and argued that it is not necessary that there should be a direct co-relation between the levy and service to be rendered and that such co-relation could be of "general character and not of mathematical exactitude." It was also argued that in the'' instant case there is a reciprocal relationship between levy of fee and service that has been rendered. It was submitted on behalf of the State Government that the impugned legislation has been enacted to fulfill the objectives contained in Articles 46, 47, 48 and 28-A of the Constitution that the dealer for whom the cess is collected is only a collecting agent and the burden of the cess is passed on to the next ''purchaser and that since out of 95 notified areas in the State of Harayana 61 are located in the rural area, the majority of dealers were directly benefited by the objects on which the amount collected as cess is spent. The Supreme Court also in the aforesaid decisions considered the distinction between tax and fee which is also recognised by the Constitution. It was held that in determining a levy as a fee true test must be whether its primary and essential purpose is to render specific service to Specified area or class it being of no consequence that the State may ultimately and indirectly be benefited by it. Entries 45 to 63 in the List-II of 7th Schedule to the Constitution mentioned the group of items whereupon taxes may be leived by States. Entry 66 empowers the State to levy fees in respect of any of the matters in List-II. Unless the cess in question can be brought under any of the entries from 45 to 63 it cannot be levied as a tax at all. It is no doubt true that under entry 63 List-II it is permissible for the State to levy any amount by way of fee in respect of any of the matters in that list. The relevant entry in the present case is entry 28 dealing with the markets and fares but the amount so levied should be truly a fee and not a tax with the mask of a fee. It was also observed by the Supreme Court that "a tax is a compulsory exaction of money by public authority for public purpose enforceable by law and is not a payment for service rendered" is a famous statement of Latham, C.J. in Mathews v. Chicory Marketing Board. Supreme Court also took into consideration its earlier judgment in the case of The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., . It was held in the aforesaid decision that the essence of tax is compulsion that is to say it is enforced under the statutory power without the tax payers'' consent and the payment is enforced by law. The second characteristic is that it is an imposition made on public fund without reference to any special benefit to be conferred on the payers of the tax. This is expressed by same view that the levy of tax is for the purpose of general revenue which is collected and forms part of public revenue of the State. As the object of the tax is not to confer any special benefit upon any particular individual, there is, as it is said no element of quid pro quo between the tax payer and the public authority. Another feature of tax is that a(sic) it is a part of common burden that quantum of imposition of the tax payer depends'' upon general capacity to pay. As regards fees Mukherjee J. in the aforesaid decision in the case of Commissioner, Hindu Religious Endowment Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (sic)supra) observed as follows :

Coming now to fees a ''fee'' is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the government in rendering the service though in many cases the costs are arbitrarily assessed. Ordinarily the fees are uniform and no account is taken of the varying parties of different recipients to pay. These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases." The Supreme Court in the case of Omprakash Agarwal and Ors. v. Giriraj Kishori (supra) distinguished its earlier decision in the case of Sreenivas General Traders v. State of Andhra Pradesh (supra) on the ground that the fee which was collected was payable to the marketing committee and was to be spent by the marketing committee for purposes for which it was established. In Municipal Corporation of Delhi v. Md. Yasin (supra) the amount collected by the municipal corporation is for the limited purpose for which it was established and in Southers Pharmaceuticals. Trichur v. State of Kerala (supra) it was held that there was co-relation between fee collected and the cost of establishment needed for the enforcement of the Abkari act which came up for consideration in that case in so far as the licences were concerned. In none of these three cases it has been stated that a fee may be validly imposed When no service either directly or indirectly are rendered to the person for whom it is collected. Accordingly the aforesaid decisions were distinguished. The Supreme Court accordingly held that cess collected u/s 3 of the Act is required to be credited to the Fund u/s 4 of the Act. It was held that the said cess partakes character of a part of the common burden which has to be levied and collected only as a tax. The dealer who pays the cess may as one of the members of the general public derived some benefit from the expenditure of the fund incurred by the State Government. The benefit so derived by him is merely incidental to the fact that he happens to be a person residing in the State of Haryana. Considering the facts and circumstances of the said case it was held that there did not exist any co-relation between the amount by way of cess under the Act and the service rendered to the person from whom it is collected. In fact it was held that there was no co-relation at all. In this case it was held by the Supreme Court that the levy of cess was not a fee as claimed by the State but it was a tax not leviable by it. The levy of the case u/s 3 was, therefore, quashed. In the case of Municipal Corporation of Delhi and Others Vs. Mohd. Yasin, a notification was challenged whereby Delhi Municipal Corporation purported to enhance the fee for (sic)tering animals in its a laughtering house from Rs. 00.25p. to Rs. 1/- to Rs. 8/- for each animal in the case of buffaloes was challenged before the Delhi High Court on the ground that the corporation was really proposing to levy a tax under the guise of enhancing the fee. The High Court accepted the contention of the petitioners and ultimately the matter came up before the Supreme Court in which the Supreme Court observed that there is no generic difference between a tax and a fee though broadly a tax is a compulsory exaction without promise of any special advantages to classes of tax payers whereas a fee is a payment for services rendered, benefit provided for privileges conferred. Compulsion is the hall-mark of the distinction between a tax and a fee. Apparently the High Court was under the impression that the fees collected should be shown to be related to expenditure incurred directly and inclusively in connection with the slaughtering of animals in its a laughter houses and also shown as such in the municipal budget. This was a wholly erroneous approach in the light of what we have said earlier. We have explained earlier that the expenditure need not be incurred directly nor even primarily in connection with the special benefit or advantages covered. We have also explained that there need not be any fastidious balancing of the cost of: the services rendered with the fees collected.

40. In the case of Sreenivas General Traders & Ors. v. State of Andhra Pradesh (supra) the Supreme Court held that the increase in the rate of market fee levied by the market committee in the state under sub-section (1) of Section 12 from 15 paise charged in 1972 to rupee 1/- was not illegal and invalid on the ground that there was no quid pro quo or on the ground that the market committee had accumulated surplus fund in a particular year when it was now shown that the fee was spent for unauthorised purposes. The purpose for which the proceeds of the market committee fund can be expended. Section 15 of A. P. (Agricultural Produce and Live Stock) Market Act 16 of 1966 there could be no doubt that the purposes mentioned viz., acquisition of site for the market establishment, maintenance and improvement of the market, construction of buildings, maintenance of standard weights and measures, promotion of grading service measures for the preservation of food-grains etc. are all purposes which are extremely beneficial to the growers and traders. Co-relationship between the levy and the services rendered/expected is one of general character and not of mathematical exactitude. All that is necessary is that there should be reasonable relationship between the levy of the fee and the services rendered. Moreover, there is no generic difference between a tax and a fee. Both ate compulsory exaction of money by public authorities. Compulsion lies in the fact that payment is enforceable by law against a person in spite of his unwillingness or want of consent a Levy in the nature of a fee does not cease to be of that character. Merely because there is an element of compulsion or coerciveness presenting it

nor is it a postulate of a fee that it must have direct relation to the actual service rendered by the authority to each individual obtained the benefit of service. It is now increasingly realised that merely because the collection for the service rendered or grant of a privilege of licence are taken to the consolidated fund of the State and not separately appropriated towards the expenditure for rendering the service is not by itself decisive. It is also increasingly realised that the element of quid pro quo in the strict sense is not a sine qua non for a fee.

41. Considering the aforesaid decisions of the Supreme Court it appears to me that the provision for imposition of water fee cannot be said to be really in the nature of imposition of tax. Section 131 of the Act provides for annual budget of the corporation. It has been provided therein that the corporation shall on or before 22nd day of March in each year adopt for the ensuing year the budget estimate shall of receipts and expenditure of the corporation to be recovered and incurred on account of Municipal Corporation of Calcutta. De-tails, of the provisions of fund made in the Act with regard to finance and the municipal fund in Part-Ill Chapter 8 of the Act Section 119 of the said Act under the heading Municipal Fund provides as follows :

Sec. 119 Municipal Fund- (1) There shall be a fund to be called the Municipal Fund to be held by the Corporation in trust for the purposes of this Act and all moneys realised or realisable under this Act and all moneys otherwise received by the Corporation shall be credited thereto.

(2) The Municipal Fund shall be maintained in the following five accounts, namely; -

(a) The Water-Supply Sewerage and Drainage Account,

(b) the Road Development and Maintenance Account.

(c) the Bastee Services Account,

(d) the Commercial Projects account, and

(e) the General Account which shall relate to all moneys received by or on behalf of the Corporation other than those specified in clause (a), clause (b), clause (c), clause (d).

Explanation. - For the purpose of this section, "commercial projects" shall include municipal market development projects property development projects, and such projects of a commercial nature as may be specified by the Corporation from time to time.

(3) All moneys realised on different accounts referred to in sub-section (2) shall forthwith be deposited with the State Bank o'' India or with such other scheduled bank as may be approved by the State Government in this behalf for credit to the respective heads of accounts styled as :-

(a) the Water-supply. Sewerage and D(sic)ainage Account of the Municipal Fund of the Calcutta Municipal Corporation;

(b) the Road Development and Maintenance account of the Municipal Fund of the Calcutta Municipal Corporation;

(c) the Bustee Services account of the Municipal Fund of the Calcutta Municipals Corporation;

(d) the General Account of the Municipal Fund of the Calcutta Municipal Corporation.

It appears from the provisions contained in the said Section 119 and different sub-sections that the municipal fund is to be maintained or water supply, swearage and drainage account. Sub-section (3) also provides that money to be realised on different accounts shall be deposited in the State Bank of India or any other scheduled bank approved by the State Government under different headings mentioned therein out of which the first one is water supply, sewerage and drainage of the municipal fund of the Calcutta Corporations Therefore, it appears that adequate provision has been made for municipal fund for the purpose of water supply and also money realised to be set apart and (sic)ept for that purpose has also been provided for in the said Act. Section 131(2) provides that the budget estimate shall separately state the income and the expenditure of the corporation to be recovered and incurred in terms of the following accounts, the water supply, sewerage and drainage account. Therefore, it cannot be said that there is no provision in the Act to co-relating imposition of water fee with the services that may be rendered by the corporation. Accordingly, the contention of the petitioners and the added respondents that such imposition of mater fee is really in the nature of imposition of water tax and Municipal Corporation has no authority to impose water tax inasmuch as there is no provision for imposition of such water tax u/s 170 cannot be accepted, in the writ petition there is no specific allegation as to absence of quid pro quo on the realisation of water fee. The particulars as to have the annual budget provides for the same and the expenditure incurred on that account could not have been furnished accordingly on behalf of the corporation since no such allegation has been made. Under such circumstances in my opinion the contention that the water fee realisable by the corporation is really in the nature of a tax should fail. The contention of the petitioner that there is excessive delegation of authority also cannot be accepted. The contention of the learned Advocate for the petitioner and added respondents that the Act suffers from excessive delegation of legislative power upon an executive authority cannot be accepted. It cannot be said as contended by the petitioner and the added respondents that Section 234 and 235 of the said Act are contrary to rule making power u/s 602 or that it is difficult to implement the Act inasmuch as there is no proviso to charge a owner u/s 234. In my opinion it cannot be said that there is excessive delegation of power under proviso to Section 234 in the case of M/s. Devi Das Gopal Krishnan v. State of Punjab & Ors., reported n AIR 1967 SC 1985 the Supreme Court, reiterated its earlier view laid down in the case of Vasantlal Maganbhai

Sanjanwala Vs. The State of Bombay and Others, . In para 15 at page 1901 of the said report in the case of M/s. Devi Das Gopal Krishnan v. State of Punjab & Ors., the supreme Court observed as follows:

The Constitution confers a power and imposes a duty on the legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously it cannot abdicate its function in favour of another. But in view of the multifarious activities of a welfare State it cannot presumably work out all the details to stilt the varying aspects of a complex situation. It must necessarily delegate the working out of details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all and it may declare its policy in vague and general terms it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a Court to hold on a fair, generous and liberal construction of an impugned statute where the legislature exceeded such limits. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature. "(Vasantlal Maganbhai Sanjanwala Vs. The State of Bombay and Others,)

It cannot be said in the instant case that the essential legislative function, namely, the determination of the legislative policy and its formulation as a rule of conduct has been abdicated in favour of the municipal authority. In my opinion what has been delegated on the municipal authorities is to work out the details to suit varying aspects of a complex situation. It cannot be said on a proper construction of the provisions of the Act and the regulations that essential legislative function has been delegated to the municipal authorities for the purpose of making regulations and that the legislature has exceeded its limit thereby. The power to make regulations does not necessarily follow that the power to lay down any policy has been conferred on the legislative authorities by the regulation. Under such circumstances the said submissions to the effect that the Act confers excessive delegation of authority on the municipal authorities cannot succeed. The contention of the petitioner that the provisos to a section may be incorporated either to create an exception or a qualification to the main provision may not always be correct. In this connection the judgment and decision in the case of Matiram Ghelabhai v. Jagan Nagar & Ors. reported in AIR 1935 SC 709 may be taken note of. The Supreme Court in the aforesaid decision considered the proviso to Section 50 of the Bombay Rent Restriction Act, 1930 and the Bombay Rents Hotel Rates and Lodging House Rates (Control) Act, 1944 and proviso thereto which was added subsequently. The question if the said proviso was introduced merely with a view to qualify or create exception what is contained in the main proviso of Section 50 or does it go beyond that purpose and enact a substantive law of its own by way of providing for special savings following upon the repeal of two earlier enactments of 1939 and 1944 Act. While considering the said question the Supreme Court in para 7 at page 713 of the said report observed as follows. "That a proviso could be of either type was not disputed before us by counsel for the appellant-defendant. In fact in Shah Bhojraj Kuverji Oil Mills and Ginning Factory Vs. Subbash Chandra Yograj Sinha, this Court after referring to two English decisions and a passage in Craies on statute law (5th Edition) at page 166 (of SCR): (at p. 1600 of AIR) has observed thus:

The law with regard to provisos is well-settled and well-understood. As a general rule, a proviso is added to an enactment, to qualify or create an exception to what is in the enactment and ordinarily a proviso is not interpreted as stating a general rule. But provisos are often added not as exceptions of qualifications to the main enactment but as savings clauses, in which cases they will not by considered as controlled by the section.

42. Considering the facts and circumstances of that case as also the substantive part of Section 50, the proviso thereto and the new para added at the end of the proviso it was held by the Supreme Court that the proviso was and has been enacted to provide for special saving which suggests that it has not been introduced merely with a view to qualify or create exceptions what is contained in substantive part of Section 50. It was also held that "the legislature while framing the Act (1947 Act) was enacting certain provisions for the benefit of tenants which conferred larger benefits on them then were in fact conferred by the earlier enactments which were repealed, (and this would be clear if regard be had to the wider definition of the expression ''tenant'' adopted in Section 5(11) of the Act) and, therefore; the legislature thought it advisable that in regard to pending suits and original proceedings also (of course of the description or categories specified therein in which the decrees and orders were not passed the provisions of the Act should be made applicable. It is with this intention that the proviso to Section 50 has been enacted is the manner it has been done. The Supreme Court also observed that proviso read with separate paragraph added thereto will have to be regarded as an independent provision enacting a substantive law of its own by way of providing for special savings and the contention contrary there was not accepted by the Supreme Court. The Supreme Court in this connection approved the view taken by the Bombay High Court in the case of Shankarlal Ramratan Shet Vs. Pandharinath Vishnu Phatak, . In the aforesaid decision it was held by the Division Bench of the Bombay High Court considering the same proviso to Section 50 of the Bombay Rents Restriction Act, 1939 and the Bombay Rents Hotel Rates and Lodging House Rates (Control) Act, 1944. The Bombay High Court while construing the said proviso held that the proviso in effect enacted a substantive provision in favour of the tenants and was

not merely a proviso to main part of Section 50. The Court at page 287 of the said report held as follows. "It is a normal rule of interpretation of a proviso that its proper function:

is to except & deal with a case which would otherwise fall within the general language of the main enactment & its effect is confined to that case. Where the language of the main enactment is clear and unambiguous, a proviso can have no repercassion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms.

(Vide M & S.M. Railway Co. ltd. v. Berwada Municipality, 47 Bom LR 587 : AIR 31, 1944 P.C. 71) This is no doubt that normal rule of construction as to the effect of a proviso, but if the proviso in clear and explicit terms enacts a substantive provision of this type, it cannot necessarily be controlled by the language of the main enactment. As we have observed above, the purpose of the enactment of this proviso in the term in which it is couched was to confer larger benefits on the tenants of the nature available in the provisions of the Bombay Act LVII (57) of 1947 and if that was so, the main provisions of Section 50 which was merely a repealing section would not fetter or limit or control the explicit or specific provisions contained in the proviso and the proviso to Section 50 could not be legitimately read as confined only to those cases which fell within the purview of the repealed Acts, Bombay Act XVI (15) of 1319 and Bombay Act VII (7) of 1944."

43. Under such circumstances. I am unable to accept the contention of the petitioner that the proviso cannot be taken to be an independent provision but should always be taken as in exception which curves out from main provision of the statute. The proviso to Section 234(1)(b) in my opinion, therefore, is an independent enabling provision authorising the Corporation to impose duties and cannot be struck down for the same reason. The legislature, in my opinion may incorporate a proviso for expressing the legislative intent independently. In my opinion under the Act the Calcutta Municipal Corporation is authorised to impose water fee and the provisions in the said Act to that effect does not impose unreasonable restrictions to enjoy life and property. Under the previous Act the Corporation used to issue consolidated rate bills - one for the owners and the other for occupier''s share of tax. The said two bills were consolidated rate bills including charges for water at the rate of 25% and sewerage at the rate of 5% as the amount charged. Under the existing Act only one rate bill is bring issued by the Corporation and in the same rate bill substantial amount has been imposed as water fee as appears from some of the bills annexed with the petition. Proviso to Section 234(b) states as follows: "Provided that the Corporation may at any time levy an annual fee subject to the regulations made in this behalf on the occupier of every house to which such supply is made". Therefore, on a plain reading of proviso to section 234(b) it appears that the Corporation may impose an annual fee on title occupier for supply of water. This really corresponds to the benefit rendered to the occupier that is for the surely of water to and

consumption by the occupier. Proviso also states that such imposition of fee shall be subject to the regulation that may be made. As appears in the instant case the petitioner has been supplied with a consolidated rate bill and water fee has been charged thereon. There is one consolidated rate bill at present meant for the owner but since proviso to section 234(b) makes it clear that water fee can be charged only on the occupier who uses and consumes water, the procedure adopted in the instant case by sending one consolidated rate bill to owner and realising water fee from the owner does not appear to be reasonable and in accordance with the provisions of the statute. In fact by issuing one consolidated rate bill and including within the same water fee the entire liability for payment of writer fee has been fixed upon the owner of the said premises although it may be that in a given case the premises in question has been let, out entirely and it is the tenant who enjoys the water. The procedure adopted, therefore, goes against the statute the purpose of which it to realise water fee from the person who occupies the house and enjoys the water there for. As I have already observed that under the said proviso to Section 234(b) provides that the Corporation may impose water fee and for that purpose regulation may be made under the Act but the regulation that may be so framed must be consistent with the statute. The definition of consolidated rate does not include water fee.

44. The Learned Advocate for the respondent Corporation is not right in my opinion in his submission that the meter can be installed and payment on the basis of reading with meter can be enforced only in respect of non-domestic consumption u/s 239. In this connection the provisions contained in Sections 261 to 235 of the Calcutta Municipal Corporation Act, 1980 may be considered. Section 261 provides power of Corporation to establish block meters. Section 262 provides the power of Municipal Corporation to provide meters. Section 263 provides for presumption as to correctness of the meters, and Section 265 provides for power of supply of water as recorded by meters. The said Section 265 provides that in a premises water meter has been attached on a supply pipe, the occupier shall be liable to pay for the water shown to have been consumed on the basis of the reading recorded by the meter attached to the supply pipe. Therefore, the statute clearly pro/ides that the water fee shall be imposed on the basis of actual consumption as recorded in the meter that may be fixed in the premises in question. Therefore, the fee imposed correspond to the service rendered and the quid pro quo principle has been made applicable in the statute but the regulation that has been framed does not provide for such imposition of fee on the basis of consumption as recorded in the meter. The relevant provision of the regulations are to be considered in this connection. The regulations provide for such imposition of annual fee on the basis of consumption as recorded in the meter. The relevant provision of the regulations are to be considered in this connection. The regulations provide for imposition of annual fee on the basis of ferrule size. If the size of the ferrule is bigger the fee will be higher and there will be no fee below the size of 10 m.m. ferrule and the fee will be charged for the second and subsequent water connection for domestic

purposes in the same premises. The said provisions for imposition of fee on the basis of ferrule size as prescribed in the regulation is in my opinion contrary to the provisions in the statute on the basis of which the water fee has to be imposed on the basis of actual recording of consumption in the meter that may be fixed in the premises. Proviso to Section 234(b) confers power on the corporation to impose fee on the basis of regulation that may be made but that does not mean that the corporation can make the regulation for imposition of water fee in the manner inconsistent with the provisions of the statute. As I have already noted that there is already provision for imposition of annual fee on the basis of recording of consumption in the water meter but the regulation does not provide fee fixation of water meter but provides for imposition of fee on the basis of ferrule size which in my opinion is inconsistent with the provision in the statute whereby water fee would be imposed on the basis of recording in the meter as aforesaid. The regulation so made, therefore, being inconsistent with the statute cannot stand and corporation should be debarred from giving effect to such regulation. As I have already observed that the statute provides sufficient power to the Calcutta Municipal Corporation to provide for imposition of water fee on the basis of regulation that may be framed by the Corporation but regularities should be made in consonance with the statute. The corporation, therefore, is entitled to impose water fee but on the basis of regulation which must be consistent with the statute. The corporation may take steps for fixing up of water meter and thereby record actual consumption and impose annual fee on the basis of regulation as may be framed by the corporation. Accordingly the imposition of water fee as has teen made in the instant case and mentioned in the consolidated rate bill meant for the owner cannot stand. Section 602 of the Calcutta Municipal Corporation Act 1980 provides that the Corporation "may make regulation not inconsistent with the provisions of this Act and the rules "made there under for discharging its functions under this Act". There is no provision in the statute for realisation of water fee on the basis of ferrule size. However, the statute provides that water fee may be imposed on the basis of actual recording of consumption in the water meter that may be fixed and as such the said regulation being contrary to the statute can not govern the procedure for realisation of water fee. Such contention of the learned Advocate for the respondent as noted aforesaid, however, cannot be accepted. The only procedure prescribed under the statute for measurement of consumption of water is fixation of meter. u/s 261 of the Act the Corporation is entitled to fix block meters. Section 265 provides the procedure for payment for supply of water as recorded by meters. No other procedure has been prescribed under the statute for measurement or recording of consumption. The regulation however, does not refer to measurement of consumption by meter but provides for measurement with reference to size of the ferrule. The procedure prescribed for recording of consumption by the ferrule size, therefore, is inconsistent with the Act. The contention of the learned Advocate for the respondent to the effect that for non-domestic consumption of water the measurement is already recorded by meter and for domestic consumption until the meter is fixed it is not wrong to record consumption on the basis of ferule size cannot be accepted for the aforesaid reasons that Act no-where provides for the said procedure of recording of consumption on the basis of ferrule size. The regulation also does not provide that it is a temporary measure and is going to be repealed after the meter is fixed. Under such circumstances the submission of the respondent, cannot be accepted. Unlike surcharge, water fee has not been included within the definition of consolidated rate u/s 2(20) of the said Act. Under such circumstances it is not permissible to include the water fee within the rate bill and to charge the owner thereof. Had it been included within the definition of consolidated rate the owner would have become primarily liable and could have recovered the amount from the occupier who ultimately consumes the water. In this case it cannot be said that the owner should be primarily responsible for the purpose of payment of water fee and proviso to section 234(b) also does not contemplate the same. Under such circumstances the procedure adopted in the instant case can not be sustained.

45. It has been argued on behalf of the petitioner and the added respondents who supported the petitioner that the valuation of the property sought to be made u/s 174 by providing a non obstante clause cannot override the principle of standard or fair rent provided under the Rent Control Legislation and the standard rent should be the basis for determination of valuation. In support of the said contention the learned advocates for the petitioners and the added respondents relied upon the following decisions:

1. Dr. Balbir Singh and Others Vs. M.C.D. and Others, .

2. Dewan Daulat Rai Kapoor and Others Vs. New Delhi Municipal Committee and Others, .

3. New Delhi Municipal committee v. M.N. Soi & Anr., reported in AIR 1977 SC 302.

46. The conflict that arises from the said section 174 of the present Act of 1980 with the insertion of the non obstante clause, can be resolved if the said section is construed harmoniously. In my opinion the said non obstante clause provided in the section 174 of the act of 1980 does not have the effect of nullifying the interpretation of annual value so made by the judicial decisions and the said section has to be read in the light of the principles so decided. In this connection I also note the submissions made by Mr. P.K. Das, learned advocate for Motilal Dhur one of the added parties who supported the case of the petitioner. As contended by Mr. Das referring to section 174 of the Act of 1980 that no effect should be given to the non obstante clause in the said section. In my opinion, the court should interpret the statute in conformity with law and should give reason. The non obstate clause in my opinion as held by the Supreme Court need not necessarily always be co-extensive with the operative part so as to have the effect of cutting down the clear terms of the enactment if the words of enactment are clear and capable of only one interpretation on plain and literal

construction of the words thereof. The non obstante Clause cannot cut the construction and restrict the scope of its operation. In my opinion the non obstante clause cannot override the principles laid down by the Supreme Court and a harmonious construction has to be made of the said section 174(1). Division Bench of this Court in the case of Corporation of Calcutta Vs. East India Commercial Company Pvt. Ltd., dealt with the question, namely, if it is possible to determine the value of a building on the basis of contractual rent in the light of the provisions contained in the West Bengal Premises tenancy Act, 1956. It was held by the Division Bench that the ratio of the decision of the Supreme Court in Dewan Daulatram Kapoor''s case would not strictly apply inasmuch as by virtue of Section 4 of the West Bengal Premises Tenancy Act landlord is entitled to realise contractual rent until the application is made to the controller and fair rent is determined. Therefore, there would be no statutory embargo on the recovery of the contractual rent until the fair rent is actually determined. Section 4 of the West Bengal Premises Tenancy Act, 1956 is set out herein below:

Excess over fair rent to be irrecoverable.

(1) A tenant shall subject to the provisions of this Act pay to the landlord:

(a) In cases where fair rent has been fixed for any premises such rent;

(b) In other cases the rents agreed upon until fair rent is fixed

(3) any sum in excess of fair rent referred to in sub-section (1) shall not be recoverable by the Landlord.

Division Bench was of the opinion that unlike the provisions of Section 3 and 17(1) of the West Bengal Premises Rent Control (Temporary Provisions) Act 1950 there is no statutory prohibition in the West Bengal Premises Tenancy Act, 1956 against realisation of rent in excess of notional fair rent where such rent had not been fixed by the Controller. Moreover, under the new scheme the legislature not only withdrew the statutory prohibition against realisation of any rent other than fair rent as estimated by the statute but imposed an obligation on the tenant, to pay the agreed rent if the fair rent had not been fixed. The Division Bench in this connection also considered the decision of the Supreme Court in the case of Guntur Municipal Council v. Guntur Town Rate Payers Association, AIR 1971 SC 253 and Dewan Daulatram Kapoor v. Delhi Municipal Council, the Division Bench observed apart from the material difference between the provisions of Andhra Pradesh Buildings (Lease Rent, and Eviction) Control Act, 1960 and those of the West Bengal Premises Tenancy Act, in the Guntur case the Supreme Court was not called upon to consider the correctness of an assessment based on agreed rent where the parties abide by such rent and have not gone on for fixation by the controller and when the statute imposes no prohibition to the realisation of such rent. It was further observed by the Division Bench that "the point in the aforesaid perspective, however, came up for consideration before the Supreme Court in the case of Dewan Daulatram Kapoor v. New Delhi Municipal Committee (supra). In the said decision individual assessment on the basis of contractual rent where the standard rent has not been fixed by the Controller were challenged. Such assessment was upheld by the Delhi High Court. It was held by the Supreme Court that even, in case of a building in respect of which no standard rent had been fixed within the period of limitation prescribed by the statute and the tenant''s right to apply for fixation or standard rent is barred with the result that the landlord is lawfully entitled to continue to receive the contractual rent, the annual value must be limited to the measure of a standard rent determinable under the statute and not on the basis of the higher rent actually received even under those circumstances by the landlord from the tenant. No landlord can reasonably expect to receive from a hypothetical tenant anything more than what is determined by the Act and this would be so equally whether the building has been let out to a tenant who has lost his right of fixation of the standard rent or the building is self-occupied by the owner. The assessing authority would in either case have to arrive at its own figure of the standard rent by applying the principles laid down in the Delhi Rent Control Act, 1958, for determination of standard rent and determine the annual value of the building on the basis of such figure of standard rent. The principles initially laid down in The Corporation of Calcutta Vs. Sm. Padma Debi and Others, which was reaffirmed in the case of Corporation of Calcutta Vs. Life Insurance Corporation of India, . In our view it would be necessary to refer to the material provisions of the Delhi Rent Control Act, 1958, and the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960, in the light of the provisions whereof the Supreme Court held that the measure of rent as prescribed by the statute must prevail over the contractual rent for furnishing the basis for assessment of the annual value. Section 2(k) of the Delhi Rent Control Act, 1958 defines standard rent in relation to any premises to mean the standard rent referred to in Section 6 or where the standard rent has been increased u/s 7, such increased rent. This definition clause is similar to the one in the W.B. Premises Tenancy Act, 1956 Section 6 of the Delhi Act, like Section 8 of the West Bengal Premises Tenancy Act, statutorily fixes the standard rent. Section 7 permits certain increases. But section 4 and 5 of the Delhi Act are materially different from the corresponding provisions of the West Bengal Act. Section 4 provides in express terms that subject to one exception (not relevant for our present purposes) no tenant shall notwithstanding any agreement to the contrary be liable to pay to his landlord for the occupation of any premises any amount in excess of the standard rent of the premises unless such amount is a lawful increase of the standard rent in accordance with the provisions of this Act. Sub-section (2) of Section 4 goes on to provide that any agreement for payment of rent in excess of standard rent shall be construed as if it were an agreement for the payment of standard rent only. Sub-sec. (1) of Section 5 prohibits any person from claiming or receiving any rent in excess of standard rent notwithstanding any agreement to the contrary and sub-sec. (2) thereof incorporates such a prohibition against realisation of any premium or other consideration for grant, renewal or continuance of a tenancy. The Delhi Act incorporates a new innovation when in Sec. 12 it provides for limitation for filing an application to the Controller for fixation of rent u/s 9. This Act unlike the West Bengal Act does not; recognise the contractual rent and in substance supersedes the same by the standard rent fixed by the statute. That follows from the provisions of Sec. 4 and 5(1) of the Delhi Rent Control Act. It may be that in an individual case the right to have the standard rent fixed by the Controller may be lost to an existing tenant but the limitation prescribed by the statute as a result whereof it may not be unlawful for the landlord to realise the contractual rent from that tenant but that is not important because the statute does not recognise the contractual rent in any manner and when the assessment of the annual value has to be made not on the basis of rent paid but on what would be reasonably expected to be payable by a hypothetical tenant, it was pointed out by the Supreme Court that the hypothetical tenant cannot reasonably be expected to pay anything more than what is determinable under the statute because the limitation will never operate as against him."

47. The Division Bench, however, in the aforesaid decision interpreted the provisions of the West Bengal Premises Tenancy Act and held that it is permissible to realise contractual rent of the landlord until the fair rent is fixed by the controller in an application. Such interpretation has been made for the purpose of determination of the power of the Calcutta Municipal Corporation to determine the annual value of land or building u/s 168 as it contains statutory embargo on the municipal authority to determine the annual value in excess of the annual amount of the rent so fixed under the West Bengal Premises Tenancy act. The said Section 168(1) is set out herein below including the proviso thereof:

168. Amount of consolidated rate, how to fixed - (1) For the purpose of assessment to the consolidated rate the annual value of any land or building shall be deemed to be the gross annual rent at which the land or building might at the time of assessment be reasonably expected to let from year to year, less, in the case of a building, an allowance of ten per cent, for the cost of repairs and for all other expenses necessary to maintain the building in a state to command such gross rent:

Provided that in respect of any land or building the rent of which has been fixed under the provisions of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 or the West Bengal Premises Tenancy Act, 1956 (West Bengal Act XVII of 1950. West Bengal Act XII of 1956) the annual value thereof shall not excess the annual amount of the rent so fixed).

Section 174(1), however, provides that notwithstanding anything contained in West Bengal Premises Tenancy Act annual value can be determined on the basis of the amount that may be expected to be realised reasonably from such land or building.

48. In my opinion it cannot be construed from proper reading of the aforesaid judgment of the Division Bench that the municipal authority will be entitled to valued property on the basis otherwise than what is contained in the provisions

of the West Bengal Premises Tenancy Act. In my opinion the said section 174(1) should be - reasonably interpreted so as to mean that for the purpose of valuation of land or building municipal authority is entitled to value the property on the basis of contractual rent only when the fair rent or standard rent is not so fixed by the Controller but in case such fair rent or standard rent is fixed that should be the basis for determination of the annual value. The nonobstante clause contained in the said section cannot be as construed so as to override the provisions of West Bengal Premises Tenancy Act but the section should be reasonably interpreted as to provide a consistent meaning if read together with the provisions of the West Bengal Premises Tenancy Act. If the section is so construed as aforesaid there will be no difficulty and the conflict with regard to different decisions of the Supreme Court may be resolved harmoniously in the aforesaid manner. In my opinion it is not necessary to strike down the said section being contrary to the law of the land but should be interpreted in the manner aforesaid so as to give a reasonable meaning thereto. The contention of the petitioner and the added parties supporting the petitioner is that Section 174(4A) provides for excessive and arbitrary power requires close scrutiny. In my opinion the argument advanced by the petitioner and the added respondents that there is no scope for valuing a property on the basis of the value of the building of tenant by adding the estimated present cost of erecting the building at the time of assessment Less reasonable amount to be deducted on account of depreciation can not be accepted. u/s 174 sub-section (2) the fixation of annual valuation of land which is build upon shall be fixed at 7 per cent of the estimated marker value of the land. It has been contended that such a provision is arbitrary and unreasonable. It has been contended that u/s 174(4A) the corporation has been provided with unguided or uncontrolled power. The said section 174(4A) is as follows:

If the gross annual rent of any land or building or part thereof cannot be easily estimated, the gross annual rent of such land or building for the purpose of sub-section (1) shall be deemed to be seven and half per cent of the value of the building obtained by adding the estimated present cost of erecting the building at the time of assessment less a reasonable amount to be deducted on account of deprecation, if any, to the estimated present market value of the land;

Provided that the estimated present cost shall not include the cost of any plant or machinery, excepting those enumerated in Schedule VIII, on the land or the building aforesaid.

49. It may be noted that the annual value is to be determined u/s 174 for the purpose of imposition of consolidated rate. Section 174 is substantially the same as Section 168 of the Calcutta Municipal Act 1951 and Section 127 of the Calcutta Municipal Act, 1923. The Supreme Court in the case of Patel Gordhandas Hargovindas Vs. Municipal Commissioner, Ahmedabad, observed that the word rate always had and still has the meaning of a tax on the annual value or rateable value of lands or buildings which has to be determined

according to one of the recognised modes of rating. The special meaning and significance of the "rate" is important for the purpose of apprehending the nature and character of the impost. It is not a kind of income tax, nor is it a tax on wealth. It is levy on the owner and/or occupier of the immoveable property, on the basis of a notional value of such property which is called the "rateable value" or the annual rental value (ARV). In the aforesaid judgment and decision in the case of Patel Gordhandaw vs. Municipal Commissioner, Ahmedabad (supra) the Supreme Court summarised the principles of rating as follows:

It will thus be clear the various statutes to which we have referred and the various books on rating in England that the rate always had the meaning of a tax on the annual value or rateable value of lands or buildings and this annual value or rateable value is arrived at by one of three nodes namely (1) actual rent fetched by the land or building where it is actually let, (2) where it is not let, rent based on hypothetical tenancy particularly in the case of building and (3) where either of these two methods is not available, by valuation based on capital value from which, annual value has to be found by applying a suitable percentage.

As stated by Faraday in his book on ''Rating (Fifth Edition at page 24) there are four recognised methods of arriving at the annual value of a building: -

(1) The "competitive or comparative method" i.e. by finding out rent actually paid for the building and/or others of a similar kind, adjusting them to bring them into line with statutory conditions, and thus arriving directly at an estimate of the rent.

(2) The "profit basis", or calculation by reference to receipts and expenditures, usually applied to public utility undertakings.

(3) The "contractor''s method", by which it is assumed, in the absence of any other and better way of estimating the rent, that the tenant would arrive at by dining the figure for which a contractor would provide him with premises, neither more or less suitable for his purpose, and the rate of interest on that cost which the contractor would charge him as rent.

(4) The "Unit method", by which schools may be valued at so much a place, hospitals at so much a bad, or certain industrial premises at so much a furnace or other unit of output.

50. In The Century Spg. and Mfg. Co. Ltd. Vs. District Municipality of Ulhasnagar, the Supreme Court was again called upon to interpret the word ''Rate'' as used in Bombay District Municipal Act, 1901. Relying on the earlier decision of the Court in Patel Gordhandas Hargovindas Vs. Municipal Commissioner, Ahmedabad, , it was held that the word "Rate" must be understood to mean a tax for local purpose imposed by the local authority, the basis of which is annual value of lands and buildings, arrived at in one of the three ways, viz. (i) actual rent where land or building is actually let, (ii) where it is not let, the rent based on hypothetical - tenancy. Particularly in the case of building and (iii) where either of

the two modes is not available by the valuation based on capital value from which the annual value has to be found by applying suitable percentage which may not be the same for lands and buildings.

51. Considering the said decisions of the Supreme Court it appears to me that one of the suitable methods of valuation may be based on capital value on which value has to be found by applying suitable percentage where either of the other two methods are not available. Accordingly the provision contained in Sec, 174(4A) cannot be said to be unreasonable or arbitrary.

52. The contention that section 174 does not contain any guideline is of no substance. In the first place, the provisions contained in section 174 are based on recognised principles of Rating and Valuation which have been traditionally followed and have been in operation in India for a long time as noted. Secondly, the Act provides for filing of return, consideration of such return, opportunity for lodging objection consideration of objection by Hearing Officer. It also provides for an Appeal to the Municipal Assessment Tribunal. Under similar circumstances the challenge to Madras Union Land Tax Act, 1966 was negatived by the Supreme Court in the case of The Assistant Commissioner of Urban Land Tax and Others Vs. The Buckingham and Carnatic Co. Ltd., etc., . Para 9 of the said decision deals with contention that the impugned Act did not contain any machinery for determination of market value. The Supreme Court pointed that when there was a provision for filing return, hearing of objection and of appeal it could not be contended that the machinery provided is inadequate or violative of Article 14 of the Constitution, it was also pointed out by the Supreme Court at the end of para 11 of the said judgment that if in any particular case there was an arbitrary valuation it would be open to the aggrieved party to challenge the validity of the particular valuation in any particular case by way of appeal under a statute or to move the High Court for grant of a writ under article 226 of the Constitution.

53. It was argued that Section 178 of the New Act contemplated the framing of the Municipal Assessment Code and that no such code has yet been framed and on this basis it was contended that in the absence of any Code the Assessment could not be made. This contention is also not accepted. In the first place, it may be pointed out that the Municipal Taxation Rules, 1987 were framed by the State Government and was published in the Calcutta Gazette by a Notification dated 11th August, 1987 and the same came into effect on the same day. The said Rules contained relevant provisions with regard to filing of return, service of notice, filing of appeal etc. Secondly, it has been held in the case of Corporation of Calcutta vs. Sambhu Das Pyne, 1985(1) CHN 195 that the non-framing of the Assessment Code cannot debar the Corporation from making valuation and because of the absence of the Code the valuation does not necessarily become illegal. Needless to say, if a particular assessment is made erroneous or illegal or in an arbitrary manner, that particular assessment may be challenged either in the Tribunal or in the High Court. But certainly the entire provision cannot be

declared to be ultra vires only because in one or two cases there may be an arbitrary valuation.

54. In view of the above, all the contentions and submissions made in respect of section 174 of the said Act for declaring the same as ultra vires appear to be without any substance and/or misconceived and the said provision is constitutionally valid.

55. On the question of commercial surcharge provision for imposition of which has been made u/s 171(4) of the Municipal Corporation Act it was contended on behalf of the Calcutta Municipal Corporation that the writ petitioner is not competent to challenge the provision relating to surcharge as there is no surcharge imposed on her. It has also been contended that although some of the intervenors are liable to pay surcharge the writ petition cannot be expended by the case of the intervenor on the basis of the grievance of the intervenors. In this connection the learned Advocate for the respondent Municipal Corporation relied upon a judgment of the Supreme Court in the case of Gammon India Ltd. and Others Vs. Union of India (UOI) and Others, . It appears from the petition that entire section 174 of the Calcutta Municipal Act 1980 has been challenged and prayer has been made for declaring the same as unconstitutional. The petitioner has also challenged the procedure of issuing one consolidated rate bill for the owners only causing serious prejudice to the owners. It has been alleged in para 47 of the petition that actual owners and occupiers of buildings and land in Calcutta within municipal area are to enjoy benefit of civic services that are provided. Accordingly under all the previous Acts the consolidated rates are realisable from the owners and occupiers in 50: 50 proportion excepting cases falling u/s 200 of the 1950 Act in which the entire consolidated rate could be realised from the owners of the lands or buildings. Under 1980 Act, however, consolidated rate can be realised from the owner of land only as only one consolidated rate bill is issued to the owner of the land and building. It has also been alleged that in many cases houses and buildings are occupied by tenants and sub-tenants either in whole or major part thereof and civic services provided by the Corporation are enjoyed by them but because of including one consolidated rate bill only the owner of land and building would not be in a position to realise the amount payable by the occupiers thereof. Thus the occupiers have no stake or liability to pay the taxes to the Calcutta Municipal Corporation. It has also been alleged in paragraph 49 of the petition that under the Act of 1980 the consolidated rate has been increased to unreasonable extent and provision for imposition of surcharge has been made. The percentage of consolidated rate has been increased. In the said paragraph the petitioner has also referred to the provision for determination of annual valuation on the basis of rent that might be expected to be realised although in many old buildings very low rent is actually realised. So the entire valuation process as contained in Section 174 has been challenged and it cannot be said that the question of surcharge has been accepted by the writ petitioner. Submissions have also bee made on behalf of the writ petitioner and the intervenors on the question of

surcharge and no preliminary objection was raised that the question of legality or validity of the imposition of surcharge cannot be decided by this Court. It would be wrong in my opinion under such circumstances after prolonged hearing to hold that the question of surcharge should not be decided by this Court and in my opinion the case of Gammon India Ltd. vs. Union of India (supra) will be of no assistance to the respondent. In that case it was held that an intervenor cannot raise points which are not canvassed by the petitioner in the Pleadings. As it appears from the facts pleaded in, the petition that the entire Section 174 was challenged and the question of surcharge was also mentioned in the petition it cannot be said that the said question was not canvassed in the petition. The concept of levy of surcharge proceeds on the basis of user of the property irrespective of whether the user is by the owner or the occupier but as already noted that the present definition of consolidated rate as provided in the Act u/s 2(20) includes the surcharge levied on the consolidated rate under this Act although the provision for surcharge as contained in Section 171(4) is linked with the mode of the use of the property, namely, surcharge will be imposed if the property is used for commercial or non residential purposes.

56. The learned Advocate for the respondent relied upon a judgment and decision in the case of Satish Chandra Agarwalla vs. State Bank of India, reported in 1988(1) CLJ 536. In the aforesaid case the plaintiff''s contention was that they received several bills from the Calcutta Municipal Corporation, the second defendant inter alia, claiming surcharge in accordance with the provision of the Calcutta Municipal Corporation Act, 1980 amounting to Rs. 2,26,911.30. The first defendant was liable to pay the said surcharge but inasmuch as it failed and neglected to make payment of the said also the penalty which the second defendant could have recovered in the event in delay of payment of the said bills the plaintiff without prejudice to the rights and contentions made payment of the said amount to the second defendant. According to the plaintiff the first defendant was obliged and bound to pay and bear the entire amount of surcharge on the consolidated rates since the first defendant is using the said premises for commercial purpose. The contention of the plaintiff is that in view of Section 230 and 231 of the Calcutta Municipal Corporation Act, 1980 the said surcharge levied by the Calcutta Municipal Corporation in respect of the tenanted portion really amounts to occupiers share of rates and taxes which the first defendant is obliged to pay under the terms and conditions of the tenancy in the first floor of No. 33A, Chowringhee Road, Calcutta used for commercial purpose. It was contended that the first defendant is under an obligation to pay surcharge amounting to Rs. 28,363.65 per qtr. to the Calcutta Municipal Corporation but in breach of such obligation existing in favour of the plaintiff the first defendant has failed and neglected and/or refused to make such payment. In the circumstances the plaintiff prayed for a decree for mandatory injunction directing the first defendant to pay the entire amount of surcharge on the consolidated rate in respect of the first floor of the said premises No. 33A, Chowringhee Road, Calcutta on presentation and/or submission of appropriate bills in respect

thereof. The said suit was decreed in favour of the plaintiff and it was held by Ajit Kumar Sengupta, J. that the defendant No. 1 is under an obligation to pay the said surcharge and the said amount is recoverable by the plaintiff. While decreeing the suit the learned Judge inter alia held as follows:

(A) consolidated rate defined in Section 2(2) includes surcharge.

(B) If under any agreement by and between the owner or the landlord and the tenant surcharge is payable by the owner or the landlord, it remains payable by him.

(C) In the absence of any indication to the contrary in any agreement, section 193 of the Calcutta Municipal Act, -1980 operates and the landlord is primarily liable to pay the consolidated rates and taxes including, the surcharge. This provision has been made as a matter of convenience so that the Calcutta Municipal Corporation is not compelled to run after the various occupiers for collection of occupiers tax. This is a primary liability.

(D) As to ultimate liability for surcharge payable to Corporation it was held that surcharge although leviable on the land and the building, it is on the commercial use or nonresidential use of the building. The tenant by using the premises for commercial purpose or for non-residential purpose gets a benefits as it can carry on the business or profession in the tenanted portion. The question of payment of surcharge would not have arisen had the land or building not been used for commercial or non-residential, purposes. Therefore, whoever shall use the premises for commercial or non-residential purposes shall be liable to pay the surcharge. The owner and occupier however may enter into an agreement to make an apportionment of the surcharge if they so desire. But if the agreement does not specifically provide who shall pay the premises for commercial or non-residential Purposes shall be liable to pay such surcharge. The agreement by and between the State Bank of India and the erstwhile owner of the premises does not provide as to who shall bear the liability for surcharge. The State Bank of India has been using the premises occupied by it for commercial purposes. Accordingly the State Bank of India shall pay and bear the surcharge for using the premises for commercial purpose.

57. The question really that came up for consideration in the said suit is whether in view of the provisions of the Calcutta Municipal Corporation Act, 1980 time liability to pay surcharge is on the occupier or on the owner. No doubt in the said suit, however, the provisions relating to imposition and realisation of surcharge was not the subject matter of challenge. Under such circumstances the court interpreted the provisions as it is. It cannot be disputed that the primary liability for payment of consolidated rate bills including surcharge is upon the owner or landlord of the building although the surcharge is dependent upon the user of the building. It is common knowledge that if the land or building is used for commercial purpose or for nonresidential purpose the rate of consolidated rates of taxes would be enhanced as the annual value would be determined at a higher

figure. The tenant by using the premises for Commercial purpose or for non-residential purpose gets a benefit from the said landlord. Surcharge although leviable on the land or building is really an additional imposition for commercial use or non-residential use of the building. Section 230 of the Calcutta Municipal Corporation Act provides as follows:

Save as otherwise provided in this Act, the person primarily liable to pay the consolidated rate in respect of any land or building may recover -

(a) If there be but one occupier of the land or building, from such occupier half of the rate so paid, and may, if there be more than one occupier, recover from each occupier half of such sum as bears to the entire amount of rate so paid by the owner the same proportion as the value of the portion of the land or building in the occupation of such occupier bears to the entire value of such land or building. Provided that if there be more than one occupier, such half of the amount may be apportioned and recovered from each occupier in such proportion as the annual value of the portion occupied by him bears to the total annual value of such land or buildings;

(b) the entire amount of the surcharge on the consolidated rate on any land or building from the occupier of such land or building who uses it for commercial or non-residential purposes;

Provided that if there is more than on such occupier, the amount of surcharge on the consolidated rate one such occupier, the amount of surcharge on the consolidated rate may be apportioned and recovered from each such occupier in such proportion as the annual value of the portion occupied by him bears to the total annual value of such land or building.

58. Under the aforesaid section the primary liability to pay consolidated rate in respect of any land or building vests on the owner. The said Section 230 makes the position clear that although the owner is primarily liable to pay consolidated rate including surcharge, the owner can recover the said amount from the occupier. Therefore, in a suit filed by the owner for such realisation the owner is entitled to get a decree.

59. It appears on a proper const ruction of Section 230 of the Calcutta Municipal Corporation Act that the owner of the building is primarily liable to pay consolidated rates the definition of which includes surcharge also. Provision has been made in sub-section (b) also provides for recovery of the entire amount of surcharge on the consolidated rate on any land or building from the person who used it for commercial or non-residential purpose. Proviso to sub-section (b) also provides if there be more than one occupier the amount of surcharge of consolidated rate may be apportioned and recovered from each such occupier in such proportion as the annual value of such land or building. Section 231 provides for mode or recovery of such amount as follows:

If any person is primarily liable to pay any consolidated rate on any land, or building and is entitled to recover any sum from occupier of such land or building, he shall have, for recovery thereof, the same rights and remedies as if such sum were rent payable to him by the person from whom he is entitled to recover such sum.

Therefore, the provision has been made for recovery of the amount from the occupier. It is possible that the owner may recover the amount of surcharge which has been paid by him by including the same in his rent bill since it has been provided u/s 231 that the owner shall have for the recovery of the amount which he has paid being primarily liable to pay any consolidated rate on any land or building, the same rights and remedies as if such sum of rent are payable to him by the person from whom he is entitled to recover such sum since surcharge has been included within the definition of consolidated rate bill. There will be no difficulty for the owner to include the surcharge in the rent bill itself and to realise the same by virtue of Section 230(b) and also u/s 231. Under such circumstances it cannot be said that the provision for surcharge and recovery thereof and procedure for collection thereof is unreasonable.

60. Legislature on different occasions imposed surcharge on existing tax. Article 271 of the Constitution of India authorises imposition of surcharge. Surcharge is only an additional imposition and not a new tax has been the view of the Supreme Court. In the case of Sri Vishwesha Thirtha Swamiar & Anr. v. The State of Mysore & Anr., reported in AIR SC 2377 it has been held that surcharge is only an additional imposition. Surcharge need not be separately assessed. It is based on the consolidated rate which is imposed on the annual valuation determined according to the provisions of the statute. The assessable portion can be easily ascertained on the basis of commercial or non-commercial user. Provision has been made for inspection and return u/s 181 which will make it easier to ascertain the assessable portion on the basis of commercial or non-residential user. Under the new scheme of 1980 Act the owner acts as the Collector of tax on behalf of the corporation in respect of one half of the consolidated rate being the occupier''s share which initially he has to pay. Similarly the surcharge which is ultimately payable by the occupier has to be initially paid to the corporation by the owner and may be recovered by him from the occupier. u/s 231 the owner shall have the same rights and remedies as if such sums were payable to him by the person from whom he is entitled to recover such sum. It gives an additional right to the owner to treat the surcharge as rent payable and in default of payment of the same by the occupier to the owner to treat him as a defaulter in payment of rent and may enable the owner to file suit for eviction also. Under the previous Act of 1951 also there was such a provision u/s 200 of the said Act. Whenever there was more than one occupier the owner was always saddled with the liability of paying the occupier''s share. (In the case of Rupeswari Debi Vs. Lokenath Hosiery Mills, such provision has been found to be valid).

61. It has been argued by the learned Advocate for the petitioner and some of the added respondents that provision for imposition of commercial sub-charge on

the consolidated rate on land or building if used for commercial or non-residential purpose is wholly ''illegal and bad. In this connection the learned Advocate relied upon a Division Bench judgment and decision in the case of Al Haj Amir Hassan & Properties v. Corporation of Calcutta & Ors., reported in 84 CWN 172. While considering similar provision u/s 165(1) of the Calcutta Municipal Act, 1951 as inserted by the Calcutta Municipal Third Amendment Act, 1976 it was held by the Division Bench that the Corporation, is not entitled to include the surcharge contemplated by the second proviso of Clause 1 of the said Section as amended by Third Amendment Act of 1976 in the bill for the occupier''s share of the consolidated rate. Against the said judgment of the Division Bench the Calcutta Municipal Corporation filed an appeal before the Supreme Court and the said appeal was disposed of on the following terms

There will be an order in terms of prayer(a) of para 20 of C.M.P. No. 28001 of 1984, with modification that the bills submitted by the Calcutta Municipal Corporation will show separately the total amount payable by the occupiers. It would not be necessary for the Corporation to show in those bills the amount payable by each of the occupiers. The judgment of the High Court is modified to the extent indicated above.

Sri Tapas Roy, appearing on behalf of the appellants, agrees that the appeal may be disposed of in terms of this order.

There will be no order as to costs.

Prayer (a) of the petition(a) an interim order permitting the petitioners to recover and/or collect the surcharge payable u/s 165 read with Section 191A of the Calcutta Municipal Act, 1951 by including the same in the occupiers share of the Rate Bills and treating it to be a part of the Consolidated Rate for the purpose of such recovery with such suitable direction as may be deemed fit and proper.

The said appeal was disposed of really with direction that the bill submitted by the Calcutta Municipal Corporation would show separately the total amount payable by the Corporation. In view of the fact that the "consolidated rate" as defined u/s 2(20) of the Act of 1981 includes surcharge levied on the consolidated rate under this Act, in my opinion there is no scope for controversy at the moment since it will be included within the consolidated rate bill itself as already noted although the owner is primarily liable, the same will not create any difficulty since the owner will be entitled to realise the same from occupier by way of arrears of rent under the- Act. Under such circumstances it cannot be said that the provision for commercial surcharge imposed under the act is unconstitutional.

62. The other contention of the learned Advocate for the petitioner is that, u/s 189(b) of the Calcutta Municipal Corporation Act, 1980 the provision for deposit of the amount determined on the basis of the valuation made u/s 188 as condition precedent for entertaining an appeal as sub-section (6) thereof is bad inasmuch as it takes away the right of appeal and in support of his said

contention he referred to several decisions which are already noted. In the case of Anant Mills v. State of Gujrat (supra) it was held by the Supreme Court that such a provision contained in section 406 (2-E) as amended that no appeal would be entertained unless the amount claimed on the appellant on the basis of rateable value is deposited is not discriminatory. It was also held by the Supreme Court that since there is provision in the statute authorising the appellate authority to dispense with the requirement of deposit in case that would cause undue hardship and as such according to the Supreme Court has not the effect of nullifying the right of appeal specially when the fact that discrimination is vested in the appellate Judge to dispense with the compliance of the above requirement. In the instant case, however, there is no such provision in the statute authorising the appellate authority to dispense with the requirement of deposit considering the case of undue hardship. There was similar provision for deposit of the amount under subsection (3A) in Section 183 of the Calcutta Municipal Act, 1951 which was amended in 1976. The said sub-section (3A) of Section 183 is set out herein below:

No appeal under this section shall be entertained unless the consolidated rate payable up to the date of presentation of the appeal on the valuation determined-

(a) by an order u/s 182, in the case of an appeal to the court of Small Causes

(b) by the decision of the court of Small Causes, in the case of an appeal to the High Court, has been deposited in the municipal office and such consolidated rate is continued to be deposited until the appeal is finally decided.

63. The said sub-section (3A) of Section 183 inserted by the Calcutta Municipal (3rd Amendment) Act, 1976 was challenged in this Court as ultra vires. In the case of Chattar Singh v. Corporation of Calcutta, reported in AIR 1984 Cal 287 it was held that the said sub-section (3A) of Section 183 of the Act does not make the appellate provision u/s 183(1) nugatory or illusory but by his own default to comply with the condition for deposit the appellant himself may fail to avail of the remedy by way of appeal u/s 183(1) of the Act. It was held that a law cannot be declared unconstitutional because an alleged possibility which may occur in future. Therefore, the court did not find any merit in the petitioner''s apprehension that in a given case the consolidated rate if determined according to the new valuation may be so high that it might be impossible for the appellant u/s 183(1) to deposit the consolidated rate according to the said valuation is not a relevant point for deciding the validity of the statute. In my opinion the provision for deposit of the amount of tax payable on the basis of the valuation determined as a condition precedent for filing of appeal is not ultra vires the Constitution of India. It may be noted in this connection that in view of the 1976 Amendment Act to the CPC in case of money decree if stay is prayed for in an appeal, stay can be granted only upon furnishing security for the amount decreed. It is obligatory for the court to impose such condition of security while granting stay in an appeal from a money decree. Under such circumstances in my opinion such condition for deposit of the amount of tax payable on the basis

of valuation determined as a condition precedent for filing of appeal does not appear to be ultra vires.

64. Section 442 of the Calcutta Municipal Corporation Act 1980 provides as follows:

Sec. 442 (1) The Municipal Commissioner may, by a written notice, require the owner of any building to submit, within fifteen days from the date of service of the notice, a signed statement with returns giving the following particulars with respect to such building or part thereof: -

(a) total plot area on which the building stands and the abutting open area;

(b) total covered area of the building;

(c) details of sub-division of the building into dwelling units flats or apartments;

(d) floor area under different occupancies and nature of such occupancies in terms of the use or occupancy groups defined in this Act;

(e) any other information that may be specified.

(2) The Municipal Commissioner may, by a separate notice require the occupier of a building or any portion thereof to submit within fifteen days from the date of service of the notice a signed statement containing such portion occupied by him.

(3) The Municipal Commissioner may, if the owner fails to submit the returns under sub-section (1), engage a Licenced Building Architect to collect such information, and the expenses incurred in this behalf shall be recovered from the owner as an arrear of tax under this Act.

The petitioner has challenged the authority of the Mayor, Calcutta Municipal. Corporation to issue notice under the heading ''An Appeal'' which was published in The Statesman on February 7, 1986 asking the owners of the houses and buildings to file return u/s 442 of the Calcutta Municipal Corporation Act. The petitioner has also challenged the provisions of Section 442 of the said Act on the ground that the said Section imposes in reasonable restrictions on the right of the petitioner to hold property guaranteed under the Constitution and is ultra vires. It has also been alleged that the imposition of penalty as mentioned in the printed return is illegal and wrongful and neither the Mayor of Calcutta nor the Calcutta Municipal Corporation has any right according to the petitioner to impose the penalty under the Calcutta Municipal Corporation Act, 1980. It has also been taken as a ground in the writ petition that penalty for non-filing of returns u/s 442 of the Calcutta Municipal Corporation Act as mentioned in the printed forms of return there under are in violation of the provision contained in Section 442(2) and (3) of the Act. It appears from the said notice published in The Statesman on February 7, 1986 in the form of an appeal by the Mayor that in order to up-date the record of the Corporation and also to safeguard the interest of the rate-payers the owners and occupiers are required under the provision of Section 442(1) and (2) of the Calcutta Municipal Corporation Act, 1980 to furnish a signed statement with returns giving particulars of their premises in a printed form to be had from the Keeper of the records at the Central Municipal Office on payment of 0.25p for each form. Such form should be submitted in triplicate at the office of the Chief Municipal Architect and Town Planner at the Central Municipal Office at S.N. Banerjee Road during office hours within 31st March, 1986 from the date of publication of this notice. One copy of such form be kept with the applicant for reference. The petitioner has obtained such copy of the return from the Kepper of records which is also made annexure "B" to the petition. At the bottom of the said form of notice calling for returns it has been provided as follows:

Any owner who fails to comply with the requisition for return on land or building shall be liable to a fine of rupees five hundred and a daily fine of rupees fifty may be imposed for such failure under provision of Section 610 of the Act.

65. It appears on a plain reading of Section 442 of the Act that the Municipal Commissioner may be a written notice require the owner to submit a signed statement with returns giving the particulars mentioned in the said Section itself. There is no provision for issue of such notice u/s 442 by the Mayor calling upon the owners and occupiers of lands and buildings and but premises to submit returns u/s 442(1) and (2) of the Act. The wordings of the section are very clear. It is only the Commissioner who may require the owner of any building to submit such returns as provided u/s 442 and the impugned notice in the form of an appeal is bad on the face of it firstly, because the Mayor has no authority to issue such notice under the provision of Section 442 of the act and secondly such notices may be issued by the Commissioner requiring the owner of any building to submit returns. The section does not contemplate issuance of notice upon any other person viz., upon the owners and occupiers of land without, a building or of but premises as provided in the said notice in the form of appeal issued by Mayor. Thirdly, there is no provision requiring the returns to be filed by such person by obtaining a form upon payment of 0.25p. In my opinion the provision u/s 442 may be complied with by an owner of a building if he furnishes a return pursuant to the notice in the manner contemplated in the Act itself. Compelling a person to obtain a form from the municipal office and to submit a return in the printed from also has not been envisaged in the said section of the Act. In my opinion the imposition of fine as provided in the said return is also contrary to the provisions contained in Section 442. Section 442(2) only contemplates that if the owner fails to submit the return under Sub-section (1) the Municipal Commissioner may engage a Licenced Building Architect to collect such information and the expenses incurred in this behalf shall be recovered from the owner as an arrear of tax under the Act. Therefore, the provision for fine as provided in the said Form of return is also bad. In my opinion the manner in which the Calcutta Municipal Corporation seeks to enforce the filing of return is also bad and contrary to Section 442 is a valid piece of legislation and it cannot be said to be unreasonable or arbitrary. Therefore, the said notice in the form of an appeal should be quashed and set aside. But the Calcutta Corporation will be

at liberty to act on the basis of Section 442 which I have already noted as valid and does not confer unguided or unbridled power on the authority as alleged in the petition.

66. The other provisions challenged in the Act are Sections 182, 189, 195 and 219 of the Act of 1980. Section 182 of the Act provides for submission of returns for the purpose of revision in the annual valuation of lands and buildings. Section 182 provides as follows:

Sec. 182 - To enable the Municipal Commissioner to revise the annual value of any land or building governed by any circumstance specified in sub-section(2) of section 180, except in respect of a case under clause (v) thereof, the owner or the person liable to pay the consolidated rate for such land or building shall furnish to the Municipal Commissioner, not later than the 31st day of March of the year immediately following, a return in such form as may be prescribed.

67. In my opinion there is nothing wrong in providing in the act for submission of return for the purpose of revision of annual valuation. In fact that gives an opportunity to the owner to state his own case on the return. Section 442 also provides for general power to call for return on lands and buildings. Such power is conferred on the Commissioner, whereas Sec. 442 is a general power conferred on the Commissioner to call for returns with regard to particular items mentioned therein. Section 182 is an enabling provision which provides for the purpose of revision of annual valuation of lands and buildings, such returns may be submitted. At the time of hearing of objection such returns would be considered. u/s 182-A it has been provided that whoever fails to comply with notice or commits defaults in furnishing return under Sec. 181 or 182 shall not be entitled to raise objection. Sec. 181 provides for submission of return and inspection of lands and buildings for the purpose of assessment. It does not appear to me that such provision for filing of returns constitute unreasonable restriction upon the petitioner''s right to hold property and violates Articles 14 and 19 of the Constitution of India. In fact the said returns are intended for the benefit of the owner or occupier as also for proper determination of the controversy that may be raised for hearing of assessment cases or for the revision of assessment cases. The particular procedure prescribed cannot be said to have infringed Articles 14 and 19 of the Constitution of India. It has not been specifically pleaded in the petition as to how the said Section is discriminatory or imposes unreasonable restrictions on the right to hold property and thereby violates articles 14 and 19 of the Constitution. Accordingly the said sections cannot be said to be ultra vires. In my opinion, Section 189 provides for appeal before the Municipal Assessment Tribunal. It has been alleged in the petition and also contended by the learned Advocate for the petitioner that the tribunal being part and parcel of the Calcutta Municipal Corporation combines a role of prosecutor and judge and any decision of such tribunal will vitiate by non-compliance of rule of natural justice which demands that justice must not only be done manifestly but must also be seen to be done. Such apprehension on the

part of the petitioner appears to be absolutely unfounded. Sub-section (2) of Section 189 provides that tribunal shall consist of a Chairman and such number of other members not exceeding five as the State Government may determine. Sub-sec. (3) provides that "the Chairman and other members shall be appointed by the State Government on such terms and conditions as it may determine and shall be paid from the municipal fund." It appears, therefore, that the tribunal will really be constituted by the State Govt. and the Chairman and the members shall be appointed by the State Govt. Under such circumstances it cannot be said that the tribunal is a part and parcel of the Calcutta Municipal Corporation. It has been also contended that sub-sec. (9) of Sec. 189 makes the decision of the tribunal final and ousts the jurisdiction of the courts in the matter of fixation of annual valuation of lands and buildings. Such submission also cannot be accepted. Calcutta Municipal Corporation Act provides the machinery for assessment for valuation and Sec. 189 provides for appeal after such assessment is made. The Act is a complete code by itself with regard to assessment, hearing of objection and appeals. Under such circumstances the Act itself provides for complete relief to the parties with regard to the determination of dispute involving assessment upto the stage of appeal. In the premises there is no further need for filing a suit. In this connection provisions contained in Section 9 of the CPC may be taken note of. The said section provides as follows: -

The courts shall (subject to provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly of impliedly barred.

68. In this connection the judgment and decision in the case of Firm Seth Radha Kishan (Deceased) Represented by Hari Kishan and Others Vs. The Administrator, Municipal Committee, Ludhiana, may be taken note of. In that case it has been held by the Supreme Court as appears from para 7 of the said judgment at page 1551 of the said report as follows: -

Under Section 9 of the CPC the court shall have jurisdiction to try all suits of civil nature excepting suits of which cognizance is either expressly or impliedly barred. A statute, therefore, expressly or by necessary implication, can bar the jurisdiction of civil courts in respect of a particular matter. The mere conferment of special jurisdiction on a tribunal in respect of the said matter does not in itself exclude the jurisdiction of civil courts. The statute may specifically provide for ousting the jurisdiction of civil courts, even if there is no such specific exclusion, it is create to a liability not existing before and gives a special and particular remedy for the aggrieved party, the remedy provided by it must be followed. The same principle would apply if the statute had provided for the particular forum in which the remedy could be had. Even in such cases, the civil court will always lie to question the order of the tribunal created by a statute, even if its order is, expressly or by necessary implication made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions.

69. Considering the fact that the. Calcutta Municipal corporation Act, 1980 is, a

special statute and is a complete code by itself and the adequate provision has been for hearing of disputes cases upto the stage of appeal, such a bar with regard to the filing of suit has been provided in the Act itself and the Sec. 9 of the CPC also provides that the courts shall have jurisdiction to try suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. Accordingly in my opinion there is no wrong in the provisions of the said Act providing bar to the filing of the suit in the civil court. It cannot be said that Section 189 is ultra vires the Constitution of India for the reasons as aforesaid. It has also been contended that Sec. 195 of the Act should be declared as ultra vires. Section 195 provides as follows:

Sec. 195 - (1) On the failure to recover any sum due on account of consolidated rate on any land or building from the person primarily liable thereof u/s 1931 (the Municipal Commissioner shall notwithstanding anything contained in the West Bengal Premises Tenancy act, 1956 or in any other law for the time being in force, recover) from every occupier of such land or building, by attachment of the rent payable by such occupier, a portion of the total sum due which bears, as nearly as may be, the same proportion to that sum as the rent annually payable by such occupier bears to the total amount of rent annually payable in respect of the whole of such land or building.

(2) An occupier, from whom any sum is recovered under sub-section (1), shall be entitled to be reimbursed by the person primarily liable for the payment of such sum and may, in addition to having recourse to other remedies that may be open to him, deduct the amount so recovered from the amount of any rent becoming due from time to time from him to such person.

70. Under Sec. 193(1) the consolidated rate on lands and buildings shall be primarily liable ?

(a) If the land or building is let, upon the lessor;

(b) If the land or building is sub-let, upon the superior lessor;

(c) If the land or building is unlet, upon the person in whom the right to let such land or building vests.

71. Section 195 authorities the Municipal Corporation to recover from every occupier of such land or building by attachment of the rent payable by such occupier in the manner provided therein. It has also been provided in sub-sec. (2) of Sec. 195 that an occupier from whom any sum is recovered under sub-sec. (1) shall be entitled to be reimbursed by the person primarily liable for the payment of such sum and may in addition to having recourse to other remedies that may be open to him, deduct the amount so recovered from the amount of any rent becoming from time to time from him to such person. It has been contended on behalf of the petitioner and other added respondents that such provision for attachment is bad and arbitrary and as such the said provision should be declared as ultra vires. I am unable to accept such contention. In my

opinion the occupier does not suffer any prejudice, taking both the sub-sec. of Sec. 195 adequate safeguard has been provided in the Act itself for the protection of the interest of the occupier. The occupier under sub-sec. (2) is entitled to be reimbursed and also entitled to deduct the amount so recovered from the amount of any rent becoming due from time to time. Accordingly the said Sec. 195 is also in my opinion a valid piece of legislation and cannot be said to be unreasonable and arbitrary and cannot be said to be ultra vires. The contention of the learned Advocate for the petitioner and added respondents that Section 193(1)(c) if read along with Section 232 may mean that in respect of the properties under a Trust or under a Receiver the Trustee or the Receiver is liable to make payment and if the rates and taxes are not paid the personal property of the Trustee and the Receiver will stand charged and that the said provision will create serious difficulties in implementation. It has been contended that sec. 193(1)(c) provides that the consolidated rate on lands and buildings shall be primarily leviable, if the land or building unlet upon the person in whom such land or building vests in cases where the properties are under the custody of the receiver or Trustee right to let such lands or buildings vest in such receiver or Trustee and as such in terms of this Section the consolidated rate on lands and buildings shall be primarily leviable on such Trustee or receiver although they may not be the owner of such lands or buildings and in terms of Sec. 232 land or building belonging to such Receiver will stand charged for payment of the consolidated rates on lands and buildings that will remain due. Therefore, according to the petitioner and some of the added respondents for nonpayment of such dues the personal properties of the receiver or Trustee will remain charged for non payment of the dues in respect of which they are Receiver or Trustee. In my opinion such apprehension, on the part of the petitioner, and some of the added respondents are not well founded. Although it may be that under sec. 193(1)(c) the right to let out such lands or buildings may vest in the receiver, or the Trustee in cases where such property is under the custody or Receiver or Trustee and the consolidated rate in such cases shall be primarily leviable upon such Receiver or Trustee. It cannot be said that Section 231 contemplates that the personal properties belonging to such Receiver or Trustee will remain charged for non-payment of such dues. What sec. 232 really contemplated that the consolidated rate on lands and buildings due from any person shall be a first charge upon the land or building belonging to such person. The consolidated rate can only due from the owner of the building although it may be leviable on the person who has right to let out the building. Therefore, taking both the sections together it means where as the consolidated rate shall be leviable on the person who has a right to let out in some cases Receiver or Trustee but since the Receiver or Trustee not being the owner of the said premises the rate is not personally due from them and it cannot be said that their personal properties belonging to the person from whom the consolidated rate is due and payable shall stand charged for payment of such consolidated rate due. Therefore, it means that the property of the owner from whom the consolidated rate is due will remain charged and not the personal properties of

Receiver or Trustee. Accordingly such contention of the petitioner and the added respondents cannot be accepted.

72. The other section challenged, viz., Sec. 219 provides for recovery of tax. It has been contended that the said section provides uncontrolled power upon the municipal authorities to realise tax by issuing distress warrant and sale of movable property as movable property has not been defined under the Act and as such provision enabling the corporation to issue distress warrant and for sale of movable property will provide unfettered and arbitrary power. In my opinion the said section cannot be said to be invalid on that ground. If there is no definition of movable property the provisions of General Clause Act will apply and the moveable property as defined under the Transfer of property Act should also be made applicable. Accordingly this provision also cannot be said to be invalid and should not be declared as ultra vires with regard to the other sections, viz., Sections 171, 174 and 442 I have already expressed my opinion that the said sections are valid piece of legislation and should be construed in the light of the judgment already recorded. I am not inclined to deal with other points urged on behalf of the added respondents who have intervened in the proceedings inasmuch as the said points are not canvassed by the petitioners in the pleadings. As held by the Supreme Court in the case of Gammon India Ltd. and Others Vs. Union of India (UOI) and Others, in para 39 of the said judgment at page 963 of the report that an intervenor "cannot raise points which are not canvassed by the petitioner in the pleadings". Accordingly in my opinion the petitioner is not entitled to declaration that the provisions contained in Sections 171, 174, 182, 189, 195, 219 and 442 of the Calcutta Municipal Corporation Act, 1980 are unconstitutional and void as prayed for in prayer (b) for the reasons already noted. The petitioner is also not entitled to any relief in terms of prayer (c). There will, however, be a writ in the nature of mandamus directing the respondents to cancel the rate bills being Annexures "D" and "E" of the petition and further directing the respondents not to take any action pursuant to the said rate bills. This will, however, not prevent the respondent Calcutta Municipal Corporation to realise water fees in accordance with the statute on the basis of the regulations which may be made in compliance with the statute. The writ petition is thus disposed of with the observations and directions noted above. There will be no order as to costs.

