

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Before:

**The Hon'ble Justice Subrata Talukdar
and**

The Hon'ble Justice Hiranmay Bhattacharyya

FMA 422 of 2021

With

I.A. No. CAN 1 of 2020

(Old No. CAN 1495 of 2020)

The North Dum Dum Municipality & Anr.

Vs.

Smt. Malabika Saha & Ors

For the Appellants : Mr. Hirak Mitra,
Mr. Debayan Ghosh,

..... Advocates

For the State-Respondents : Ms. Malabika Saha,
Mr. Subhankar Das,

.....Advocates

For the State-Respondents : Mr. T.M. Siddiqui

.....Advocates

Heard on : 13.04.2021

Judgment on : 02.07.2021

Hiranmay Bhattacharyya, J.:-

The instant appeal is at the instance of North Dum Dum Municipality (for short "NDM") and is directed against an order dated December 12, 2019 passed by an Hon'ble Single Judge in WP No. 11146 (W) of 2018.

The respondent nos. 1 and 2 claim to be the owners of a flat situated within the municipal limits of NDM. They claim to have purchased the flat for a valuable consideration. The said respondents applied for mutating their names in respect of the said flat in the records of the NDM. The authorities of the NDM after giving an opportunity of hearing to them on the application for mutation passed an order dated June 17, 2017 holding that the municipal authority shall charge 1% of the deed value at the time of mutation as per the resolution of the Board of Councillors. The said respondents challenged the authority of the NDM to charge/demand an amount at such rate as the same is in violation of Rule 121 of the West Bengal Finance and Accounting Rules, 1999 (for short “the 1999 Rules”) by filing the instant writ petition.

The Hon’ble Single Judge, by the order impugned, allowed the writ petition thereby setting aside and quashing the demand raised by the NDM on account of surcharge. Being aggrieved against such order, the NDM has preferred the instant appeal.

Mr. Hirak Mitra, learned Senior Counsel for the NDM contended that Section 117 of the West Bengal Municipal Act 1993 (for short “the 1993 Act”) empowers the Board of Councillors of a municipality to levy a surcharge on the transfer of immovable property. He further contended that in the meeting of the Board of Councillors of the NDM held on January 31, 2017 it was resolved that the municipality shall impose and collect mutation fee and surcharge during mutation of any immovable property. He also

contended that on the basis of the aforesaid resolution the Chairman of NDM issued an order dated February 2, 2017 to such effect. Mr. Mitra thus, contended that the amount demanded from the writ petitioners/respondents for mutating their names in the records of the NDM is on the basis of the aforesaid order of the Chairman, NDM dated February 2, 2017. Mr. Mitra contended that the Hon'ble Single Judge erred in law by misinterpreting the provision laid down under Sections 116 read with 117 of the 1993 Act inasmuch as the said Act empowers the municipality to collect mutation fee and surcharge at the time of mutation.

He, further contended that the Hon'ble Single Judge erred in law by restraining the NDM from levying surcharge without taking into consideration the Memo dated April 10, 2002 issued by the Director of Local Bodies, Government of West Bengal whereby the competence of the Municipal authorities to impose surcharge on transfer of immovable properties situated within the municipal area in terms of Section 117 (1) of the 1993 Act was well recognised.

He next contended that the Municipalities require the proceeds of the taxes and surcharge for the purpose of their own administration and for such purpose the 1993 Act has delegated the power of taxation to the municipalities. In support of such contention the Learned Senior Counsel for the NDM relied upon a judgment of the Hon'ble Supreme Court of India in the case of *Municipal Corporation of Delhi vs. Children Book Trust* reported at AIR 1992 (SC) 1456.

Smt. Malabika Saha, the respondent no. 1 appeared in person and seriously disputed the contentions made by Mr. Mitra. She drew the attention of the Court to a memo dated May 4, 2015 issued by the Joint Secretary to the Government of West Bengal, Department of Municipal Affairs whereby the Chairman/ Chair person of municipalities/Notified Area Authorities were directed to ensure strict applications of Rule 121 of the 1999 Rules in relation to imposition of mutation fees in the municipalities. By the said order the municipalities were also restrained from levying any other fees/charges such as processing fees, development fees etc. in mutation cases. Thus, according to Ms. Saha, the NDM can only charge mutation fees as prescribed under Rule 121 of the 1999 Rules and cannot levy surcharge at the time of mutation. Smt. Saha submitted that the Hon'ble Single Judge was justified in setting aside the demand raised by the NDM on account of surcharge. She relied upon a judgment delivered by the Hon'ble Supreme Court of India on 09.03.2005 in Appeal (Civil) no. 5631 of 2000 in the case of *Calcutta Municipal Corporation and Ors. vs. Shrey Mercantile Private Limited & Ors.* in support of her submission that the municipal authority cannot charge any amount depending on the value of the deed of transfer at the time of mutation.

Mr. Siddique, learned advocate for the State contended that the municipalities do not have an independent power to levy tax. He submitted that the power to levy tax by the municipalities have to be specifically delegated by the State and such power is to be exercised only in accordance with such procedure and subject to

such limits as may be specified in the law. In support of such contention he relied upon a judgment of the Hon'ble Supreme Court of India in the case of *NDMC vs. State of Punjab* reported at (1997) 7 SCC 339. He, thus, contended that the NDM do not have the power and authority to levy surcharge at the time of mutation.

We have heard the learned advocates for the parties and have considered the materials on record.

Mutation is the process of change of the name of the owner in the books of the municipal authority. The provisions relating to mutation in case of transfer or devolution of title have been specifically laid down in Section 116 of the 1993 Act. Whenever the title of any person to any land or building is transferred, the transferor and the transferee are obliged to give notice of such transfer in writing to the municipality. If notice of such transfer is not given, the erstwhile owner shall continue to be liable for payment of property tax on such land or building notwithstanding the fact that ownership of such land or building has been transferred. The Municipal Authority is under a statutory obligation to record such transfer of ownership or devolution of title in the Municipal Assessment Book upon receipt of the notice of transfer when the documents evidencing the transfer or devolution is produced before the competent authority. Subsection 5 of Section 116 of the 1993 Act gives power to the municipality to charge fees for mutation but such fees has to be as prescribed by rules made under the 1993 Act.

The 1999 Rules have been framed in exercise of the powers conferred by Section 417 of the 1993 Act. Rule 121 thereof fixes the rates of realization of mutation fee. Rule 121 of the 1999 Rules provides that before making amendment and alteration of assessment list under Clause (a) of Subsection (1) of Section 113 read with Section 116, the Councillors shall realize mutation fee from the person who has succeeded by transfer or otherwise to the ownership of a holding. Different rates of fees have been fixed by the said Rule depending on the consideration money or the value of the property as expressed in the instrument of transfer in case of transfer by sale, gift or otherwise. Similarly, different rates of fees have also been specified on the basis of annual value of the holding in question in case of inheritance. Thus, the municipal authority can charge fee as per the rates specified in Rule 121 of the 1999 Rules for mutation.

Records reveal that the Board of Councillors of NDM in an ordinary monthly meeting held on January 31, 2017 unanimously resolved that the Municipal Authority shall impose and collect the following during mutation of any immovable properties-

“ 1. Mutation Fees will be collected U/S 121 of the W.B. Finance Accounting Rule 1999.

2. Levy of Surcharge on Transfer of Land and Buildings U/S 117 of the W.B.M. Act 1993 be imposed @ 0.50% (Point five percent) on the present market value up to 31.03.2010 and @ 1.00% (one percent) on the present market value of property mentioned in the Sale/Gift deed, Gift deed/otherwise with effect from 01.04.2010.

3. In the case of inheritance, levy of surcharge on the property will be charged @20% the annual value of the holding along with Mutation Fees.”

On the basis of the aforesaid resolution, the Chairman, NDM issued an order dated February 2, 2017 directing that mutation fees and surcharge as approved in the meeting of the Board of Councillors held on January 31, 2017 will be levied in case of change of municipal records due to transfer of property in case of inheritance etc.

The writ petitioners are aggrieved against the action of the NDM in realizing surcharge at the time of mutation in terms of the aforesaid order of the Chairman dated February 2, 2017.

Subsection 1 of Section 117 of the 1993 Act provides that the Board of Councillors shall levy a surcharge on the transfer of immovable property situated within the municipal area in the form of additional stamp duty.

Subsection 2 thereof provides that the rate of surcharge and the manner of collection of the surcharge, payment of the surcharge to the municipality and deduction of the expenses, if any, incurred by the State Government in course of collection of surcharge shall be such as may be prescribed in the rules framed thereunder.

Though, Section 117 empowers a municipality to levy surcharge on transfer of lands but the same can be realised only if rules have been framed with regard to the matters specifically

provided in Subsection 2 of Section 117 of the 1993 Act. The Learned Senior Counsel appearing for the NDM, in response to a query of the Court, submitted that no rules have been framed fixing the rate of surcharge and the manner of collection and payment of the same to the municipality and the deduction of expenses, if any, incurred by the State Government in course of collection of the surcharge.

The order of the Chairman, NDM dated February 2, 2017 is merely an administrative instruction which cannot by any stretch of imagination be a substitute of a statutory rule.

In view of the admitted position that no rules have been framed in this regard, this Court is of the considered view that the NDM lacks the authority to realise surcharge in exercise of powers under Section 117 of the 1993 Act at the time of mutation.

It further appears from the Memo dated May 4, 2015 that the Joint Secretary, Department of Municipal Affairs, Govt. of West Bengal directed the municipalities to ensure strict compliance of Rule 121 of the 1999 Rules in relation to imposition of mutation fees in the municipalities and also restrained it from levying any other fees/charges such as processing fees, development fees etc. in mutation cases. Thus, the said Memo dated May 4, 2015 restrains the municipalities from charging and/or levying any other fees other than mutation fees for the purpose of mutation.

It appears from the Memo dated April 10, 2002 relied upon by the Learned Senior Counsel for the NDM that the NDM approached the Government for approval of the proposal for imposition of surcharge under Section 117 of the 1993 Act on the basis of a resolution adopted in a meeting dated February 28, 2002. The said memo also specifically states that no rate of surcharge, manner of collection and deduction of expenses, if any incurred by the state government in course of collection of surcharge etc., has been prescribed. The said memo has no relevance in the instant case as the NDM has sought to levy surcharge under Section 117 of the 1993 Act upon the writ petitioners in terms of a resolution adopted by the Board of Councillors in the meeting held on January 31, 2017 and not in terms of the resolution adopted in a meeting dated February 28, 2002.

Let us now deal with the decisions cited at the Bar.

The Hon'ble Supreme Court of India in *Children Book Trust (supra)* while dealing with the power of a municipal corporation to impose and collect property tax held that the local body needs the proceeds of taxes for their administration. The power of taxation is a necessary adjunct to their other powers. However, the powers and extent of the powers to impose and collect tax must be founded in the statute which creates them with such powers.

In the instant case as this Court has already held that in the absence of any rules being framed in this regard the NDM has no

power and/or authority to levy surcharge, the aforesaid judgment cannot be of any assistance to the appellant herein.

The Hon'ble Supreme Court of India in the case of *Sarojini Tea Co. (P.) Limited vs. Collector of Dibrugarh, Assam & Anr. reported at AIR 1992 (SC) 1264*. held that the expression 'surcharge' in the context of taxation means an additional imposition which results in enhancement of the tax and the nature of the additional imposition is the same as the tax on which it is imposed as surcharge. It was further held therein that surcharge on land revenue is an enhancement of the land revenue to the extent of the imposition of surcharge. There is no quarrel to the aforesaid proposition of law but the same do not have any applicability in the instant case.

The Hon'ble Supreme Court of India in the case of *Shrey Mercantile* (supra) while considering the provisions of Calcutta Corporation (Taxation) Regulations 1981 wherein provisions were made for realization of fees for recording of transfer or devolution of title of any land or building on *ad valorem* basis held that the impugned levy is in the nature of tax and not in the nature of fee. The Hon'ble Supreme Court of India further held that quantum of fees prescribed in the said regulations is disproportionate to the so called services which shows that there is arbitrariness in the levy of such imposition.

In the instant case this Court has already held that the NDM cannot charge surcharge on *ad valorem* basis as no rules have been framed in terms of Section 117(2) of the 1993 Act. As such the

judgment in the case of *Shrey Mercantile* (supra) do not have any manner of application to the facts of the instant case.

The Hon'ble Supreme Court of India in the case of *NDMC vs. State of Punjab* reported at (1997) 7 SCC 339 held that while certain bodies have been vested with legislative power, including the power of levying taxes by the Constitution for specific purposes, the plenary power to legislate, especially in matters relating to revenue still vests with the Union and State Legislatures. There is no quarrel to the proposition of law laid down by the Hon'ble Supreme Court of India in *NDMC* (supra) but the same do not have any manner of application to the instant case as Section 117 of the 1993 Act empowers the municipality to levy surcharge but the same has to be in accordance with the Rules and no rules have yet been framed in that regard.

For the reasons as aforesaid this Court accordingly holds that the NDM is authorized to realise only the mutation fees as per the rates specified under Rule 121 of the 1999 Rules. The Hon'ble Single Judge was thus, perfectly justified in setting aside the demand raised by NDM on account of surcharge for the purpose of mutation.

The impugned order does not suffer from any infirmity warranting interference by this court in an intra-court mandamus appeal.

FMA 422 of 2021 stands accordingly **dismissed**. There shall be, however, no order as to costs. In view of dismissal of appeal the application being **CAN 1 of 2020** has become infructuous and the same also stands **disposed of** accordingly.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

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

I agree.

(Subrata Talukdar, J.)

(Hiranmay Bhattacharyya, J.)

Later:-

02.07.2021

After the judgment was delivered the learned Counsel for the appellants prayed for stay of operation of the said judgment.

Ms. Malabika Saha, appearing in person, opposes such prayer for stay.

Having considered the submissions of the parties and, for the reasons as indicated above in this judgment, we are not inclined to pass an order of stay.

The prayer for stay stands accordingly rejected.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

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

I agree.

(Subrata Talukdar, J.)

(Hiranmay Bhattacharyya, J.)