HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR

DIVISION BENCH
JUSTICE SHEEL NAGU &
JUSTICE ANAND PATHAK

W.P.No. 10989/2020 (PIL)
Ram Bharose Sharma
Vs.
State of M.P. & Ors.

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Shri J.P.Mishra and Shri Aditya Sharma, learned counsel for the petitioner.

Shri Ankur Modi, learned Additional Advocate General for respondents No. 1 and 2/State.

Shri Deepak Khot, learned counsel for respondent No. 3-Municipal Corporation, Gwalior.

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Whether approved for reporting:- Yes

Law laid down:-

(i) *Issuance of public notice by way of publication in newspaper for mutation purpose is as per principles of Public Policy and Public Welfare. It brings transparency, fair play and clarity in the mutation proceedings;*

Concept of Public Policy- discussed & explained.

(ii) *Commissioner, Municipal Corporation has power to declare certain expenses to be improvement expenses as per Section 378 of the Municipal Corporation Act, 1956;*

(iii) *Commissioner, Municipal Corporation can seek publication of notice from the person concerned on his own expenses else expenses shall have to be borne by Municipal Corporation and shall have to be paid through public money; and*

(iv) *Earlier judgments of Division Bench in* ***Awas Smasya Niwaran Sansthan Vs. Municipal Corporation, Indore, 1986 (1) MPWN 290 & Ward Sudhar Samiti, Gwalior Vs. Municipal Corporation, Gwalior, 1991 MPJR 137*** *discussed and overruled as they pass sub silentio and stand per incuriam- reasons explained.*

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O R D E R

(Passed on 7th June, 2021)

Per Justice Anand Pathak, J

The present petition under Article 226 of the Constitution of India has been preferred by the petitioner as Pro Bono Publico in which quashment of resolution dated 8/4/2020 (Annexure P/1) and resolution dated 29/6/2020 (Annexure P/4) passed by Divisional Commissioner as Administrator of Municipal Corporation, Gwalior; whereby, the order dated 26/5/2020 (Annexure P/2) passed by Commissioner, Municipal Corporation, Gwalior and order dated 8/6/2020 (Annexure P/3) passed by Additional Commissioner, Municipal Corporation, Gwalior has been considered by the Administrator, Municipal Corporation, Gwalior

(respondent No. 3 herein) and it is resolved to accept Rs. 5,000/- as publication charges from the owners/applicants for mutation of immovable properties and in lieu thereof, they have been given facility to get the notice for mutation published in the format prescribed by the Corporation.

2. It is the grievance of the petitioner that Section 167 of the Municipal Corporation Act, 1956 (for short "Act of 1956") nowhere contemplates such mechanism whereby Corporation may seek mutation fees from applicants for publication of notice. Section 167 of the Act of 1956 does not enable charging of mutation fees, therefore, resolution passed by Corporation is illegal. In support of his submissions, learned counsel for the petitioner placed reliance over the judgment passed by Division Bench of this Court (Indore Bench) in the matter of **Awas Smasya Niwaran Sansthan Vs. Municipal Corporation, Indore, 1986 (1) MPWN 290** and later on another judgment passed by another Division Bench at Gwalior in the case of **Ward Sudhar Samiti, Gwalior Vs. Municipal Corporation, Gwalior, 1991 MPJR 137** while placing reliance over the said judgments. It has been submitted that action of the respondents is arbitrary and illegal. No other ground has been raised by the petitioner.

3. On the other hand, learned counsel for respondents/State opposed the prayer and submits that State Government has power as per **Part IX, Chapter XXXVI-Control** under Act of 1956. It is further submitted that if petitioner has any grievance; then he can

approach State Government under Section 421 of Act of 1956 for redressal of his grievances.

4. Learned counsel for the Corporation also vehemently opposed the prayer. According to him, Section 133 of Act of 1956 gives sufficient powers to the Corporation to impose fees by a resolution. He relied upon **Madan Gopal Agarwal Vs. District Magistrate, Allahabad, AIR 1972 SC 2656 and Gorkha Security Services Vs. Government (NCT of Delhi) and Others, (2014) 9 SCC 105.**

5. It is further submitted that as per Madhya Pradesh Municipal (Achal Sampatti Antaran) Rule, 2016, especially Rule 4, Corporation has the right to invite objections by publishing a notice in two daily newspapers, and therefore, Corporation has not tried to enrich it by taking money as publication charges, but the purpose is to intimate all concerned about the mutation proceedings of the property so that litigation may be avoided in future. He also stressed over the point that if any person who intends to mutate the property caused the publication of notice on his own expenses as per the format provided by the Corporation, then Corporation has no objection to such proposition and it would be accepted as service by publication and no further amount would be asked for mutation.

6. Therefore, according to respondent/Corporation, it is not a case of unjust enrichment by imposing mutation fees per se, but it is procedural / incidental charges at best.

7. It is further submission that judgments passed by the earlier Division Bench are to be seen in that perspective only. He prayed for dismissal of the writ petition.

8. Heard learned counsel for the parties and perused the documents appended thereto.

9. Sheet anchor of the case of petitioner is two orders passed by Division Bench of this Court earlier in almost identical facts situation; wherein, then petitioners also resisted the imposition of mutation fees. Therefore, case is to be seen on its own merits as well as the discussion so surfaced in earlier orders of Division Bench.

10. Concept of mutation is being provided in **part IV, Chapter XI-Taxation** under Act of 1956. Relevant provision, i.e. Section 167 of the Act of 1956 is hereby reproduced for ready reference; as under:-

> ***"167. Notice of transfer of title, when to be given.-***
> *(1) Whenever the title in any land or building or in any part or share of any land or building is transferred , the transfer and the transferee shall, within three months of the registration of the deed of transfer or if it be not registered, within three months of the execution of the instrument of transfer, or, if no such instrument be executed, after the transfer is effected, give notice in writing of such transfer to the Commissioner.*
> *(2) Every person liable for the payment of a tax on any property whose transfers his title to or over such property without giving notice of such transfers to*

the Corporation as aforesaid, shall in addition to any other liability which he incurs through such neglect , continue to be liable for the payment of all such taxes payable in respect of the said property until he gives such notice or until the transfer is recorded in the books of the Corporation.

(3) In the event of the death of the person in whom title to any land or building or in any part or share of any land or building vests,, the person who as an heir or otherwise takes the title of the deceased by descent or devise, shall, within three months from the death of the deceased, give notice of his title to the Commissioner in writing.

(4) Nothing in this Section shall be deemed to affect the liability of the heir or devise for the said taxes or to affect the prior claim of the Corporation for the recovery of the taxes due thereupon.

(5) (i) When any new building is erected, or when any building is rebuilt or enlarged, or when any building which has been vacant is re-occupied, the person primarily liable for the property taxes assessed on the building shall within fifteen days give notice thereof in writing to the Commissioner.

(ii) The said period of fifteen days shall be counted from the date of the completion or the occupation, whichever first occurs, of the building which has been newly erected or rebuilt, or of the enlargement, as the case may be, and in the case of a building which has been vacant, from the date of the re-occupation thereof."

11. It is to be noted that **Chapter XI** is segmented into three sub-divisions in which Section 167 falls under Supplemental

Provision and other two sub-divisions are Taxation and the Property Tax (Imposition of of Property Tax). At the first glance, it appears that Section 167 of the Act of 1956 contemplates issuance of notice in writing by the Transferer as well as Transferee, who claim any right, title or interest in the property and Corporation does not have to invite objections through publication but Clause 2 puts liability over a person (as transferer also) that the transferer shall continue to pay property tax, if he does not inform about the sale of the property to transferee within three months of the execution of the instrument. Therefore, to avoid such anomalous situation, transferer has to intimate the Corporation alongwith transferee. Same situation exists if the property is devolved upon a legal heir because Section 167 (3) contemplates death of title holder and therefore, legal heir of deceased (within three months of the death of title holder) has to give notice of factum of his devolved title to the Commissioner.

12. In both the situations, as contemplated under Section 167 (2) as well as under Section 167 (3), it is experienced by the authorities that at times mutations are being done with oblique motive by unscrupulous persons, who may not have any right, title or interest over the property or may be one of the claimants of the property, who intends to get the whole property in his name bypassing the claims of other legitimate claimants (or other existing legal heirs of a deceased owner). Therefore, to reconcile the same, as a regulatory measure, concept of publication of

intention of an applicant to mutate the property in his name has been formulated to avoid future complications. This thought is in line with concept of Fair Play, Public Welfare and Transparency.

13. When any expenses or charges are levied without the element of *quid pro quo* then such imposition can be treated as a part of regulatory measure and this aspect has been elaborately discussed in the case of **Calcutta Municipal Corporation and Ors. Vs. M/s Shrey Mercantile Pvt. Ltd. & Ors., (2005) 4 SCC 245**. Relevant discussion is worth reproduction for clarity purpose:-

> ***"14.****According to "Words & Phrases", Permanent Edition, Vol. 41 Page 230, a charge or fee, if levied for the purpose of raising revenue under the taxing power is a "tax". Similarly, imposition of fees for the primary purpose of "regulation and control" may be classified as fees as it is in the exercise of "police power", but if revenue is the primary purpose and regulation is merely incidental, then the imposition is a "tax". A tax is an enforced contribution expected pursuant to a legislative authority for purpose of raising revenue to be used for public or governmental purposes and not as payment for a special privilege or service rendered by a public officer, in which case it is a "fee". Generally speaking "taxes" are burdens of a pecuniary nature imposed for defraying the cost of governmental functions, whereas charges are "fees" where they are imposed upon a person to defray the cost of particular services rendered to his account.*
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> *16.Therefore, the main difference between "a fee"*

and "a tax" is on account of the source of power. Although "police power" is not mentioned in the Constitution, we may rely upon it as a concept to bring out the difference between "a fee" and "a tax". The power to tax must be distinguished from an exercise of the police power. The "police power" is different from the "taxing power" in its essential principles. The power to regulate, control and prohibit with the main object of giving some special benefit to a specific class or group of persons is in the exercise of police power and the charge levied on that class to defray the costs of providing benefit to such a class is "a fee". Therefore, in the aforestated judgment in Kesoram's case, it has been held that where regulation is the primary purpose, its power is referable to the "police power". If the primary purpose in imposing the charge is to regulate, the charge is not a tax even if it produces revenue for the government. But where the government intends to raise revenue as the primary object, the imposition is a tax. In the case of Synthetics & Chemicals Ltd. Vs. State of U.P., reported in [(1990) 1 SCC 109], it has been held that regulation is a necessary concomitant of the police power of the State and that though the doctrine of police power is an American doctrine, the power to regulate is a part of the sovereign power of the State, exercisable by the competent legislature. ***However, as held in Kesoram's case (supra), in the garb of regulation, any fee or levy which has no connection with the cost or expense of administering the regulation cannot be imposed and only such levy can be justified which can be***

> ***treated as a part of regulatory measure. To that extent, the State's power to regulate as an expression of the sovereign power has its limitations. It is not plenary as in the case of the power of taxation."***

14. Therefore, asking for publication cost by Municipal Corporation, Gwalior from an individual is to be seen in that perspective only and not as an element of *quid pro quo* or a device to fill-up the treasury of Corporation. It is only meant for such regulatory purpose only because publication of notice brings transparency, fair play and clarity in the mutation proceedings and any intended or prospective mischief can be avoided. Therefore, Corporation is just and right in its approach to avoid future litigation and complication, rightly decided to go for publication. It is not a device to enrich the treasury.

15. Not only this, another facet of the controversy is drain of public money over personal use of property of an individual. If Corporation is saddled with the liability to publish notice for mutation purpose in newspaper for an individual's immovable property, then Corporation shall have to pay through the public money (deposited by the citizenry of that Corporation under different heads like property tax, service charges, etc.), and that would again create anomalous situation wherein the expenses of mutation proceedings of an individual are being paid by public money.

16. Therefore, the controversy from this perspective also does

not stand to Principles of Public Policy and Public Welfare rather it is opposed to it. Public Policy in its broad spectrum, as a system of Laws, Regulatory Measures, Source of Action and Funding Priorities concerning a given topic promulgated by a government entity or its representatives has basically three types of Policies (I) Restrictive, (ii) Regulatory and (iii) Facilitating. The evolutionary trend of Public Policy has been discussed in detail by Apex Court in the case of **Central Inland Water Transport Corporation Limited and Anr. Vs. Brojo Nath Ganguly and Ors., (1986) 3 SCC 156**. Para 92 is worth reproduction:-

> *"**92.** The Indian Contract Act does not define the expression "public policy" or "opposed to public policy". From the very nature of things, the expressions "public policy", "opposed to public policy" or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well-recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought -*

"the narrow view" school and "the broad view" school. According to the former, courts can not create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the ground of public policy unless that particular ground had been well-established by authorities. Hardly ever has the voice of the timorous spoken more clearly and loudly than in these words of Lord Davey in Janson v. Uriefontein Consolidated Mines Limited [1902] A.C. 484, 500 "Public policy is always an unsafe and treacherous ground for legal decision." That was in the year 1902. Seventy-eight years earlier, & Burros, J., in Richardson v. Mellish, [1824] 2 Bing. 229, 252; s.c. 130 E.R. 294, 303 and [1824-34] All E.R. Reprint 258, 266, described public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." The Master of the Rolls, Lord Denning, however, was not a-man to shy away from unmanageable horses and in words which conjure up before our eyes the picture of the young Alexander the Great taming Bucephalus, he said in Enderyby Town Football Club Ltd. v. Football Association Ltd., [1971] Ch. 591, 606. "With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles." Had the timorous always held the field, not only the doctrine of public policy but even the Common Law or the principles of Equity would never have evolved. Sir William Holdsworth in his "History of English Law", Volume III, page 55, has said :

> *In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.*
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> *It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which D covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority our courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in our Constitution.*

Therefore, with the changed circumstances, decision of Corporation regarding Publication is to be seen in the light of such broad principle of Public Policy and guidance given by Apex Court in this regard. It is a regulatory or at best a Facilitating Measure, nothing else.

17. Even otherwise, it cannot be said that Corporation / Commissioner is completely bereft of any legal authority because Commissioner has power to declare certain expenses to be **improvement expenses** as per Section 378 of the Act of 1956 and said expenses are recoverable and payable by the owner / occupier of the premises as per the provisions of Section 379 of Act of 1956..

18. Section 377 and 378 of the Act of 1956 are reproduced hereinbelow for ready reference:-

> ***"377. Power of Commissioner to accept agreement for payment of expenses in installments.-*** *(1) When ever under this Act or under any rule or byelaw made there under, the cost of any work executed or of any measure taken or thing done, by or under the order of a municipal authority, any magistrate or any municipal officer empowered in this behalf, is payable by any person, the Commissioner may with the approval of the Mayor-in- Council instead of recovering any such cost in any other manner provided in this Act or in any rule or byelaw made there under, take an agreement from the said person to pay the same in installments of such amount and at such intervals as will secure the payment of the whole amount due, with interest there on at the rate not exceeding six per centum per annum, within a period of not more than five years. (2) If any installment is not paid on or before the date on which it falls due, the Commissioner may thence forward recover interest on the sum then due at such rate not exceeding nine per centum per annum as he*

may deem fit.

378. Power to declare certain expenses to be improvement expenses.- *If any cost or expenses removable under this Act have been incurred by the Commissioner under any provision of this Act or any rule or byelaw made there under in respect of, or for the benefit of, any land or building the Commissioner may with the approval of the Corporation declare such costs or expenses to be improvement expenses."*

19. Perusal of these provisions reinforces authority in the Office of Commissioner to declare any cost or expenses to be improvement expenses and therefore, source of power is not altogether held up or missing as tried to be projected by the petitioner. Both the judgments relied upon by the petitioner have not taken into account these provisions of Act of 1956, which are apparently the source of power of Commissioner.

20. Even otherwise, when issuance of public notice by way of publication in newspapers and its utility is being established then Section 371 of the Act of 1956 ought to be read in tendum with other provisions of Act of 1956 to bring home the point that Commissioner has the authority to ask for public notice through publication in local newspaper. Section 371 is to be read in conjunction with all other relevant provisions of Act of 1956. Section 371 is reproduced as under:-

"371. Public notice how to be made known.- *Whenever it is provided by or under this Act that public notice shall or may be given of anything, such*

> *public notice shall, in the absence of special provision to the contrary, be in writing under the signature of the Commissioner or of a municipal officer empowered under sub section (4) of section 69 to give the same, and shall be widely made known in the locality to be effected thereby, affixing copy thereof in conspicuous public places within the said locality, or by publishing the same by beat of drum, or by advertisement in the local newspapers, or by two or more of these means and by any other means that the Commissioner shall think fit."*

21. Perusal of the section reveals that Public Notice of "anything", "may" ("shall") be given as provided under the Section. When necessity of Public Notice is established in this time period as discussed above, then Public Notice can very well be published and expenses can be sought by commissioner as "Improvement Expenses". It is in line with Public Policy and Public Welfare also.

22. So far as, judgment of Divisions bench in case of **Awas Smasya Niwaran (Supra)** is concerned, it revolves around Section 167 and Section 366 of the Act of 1956. If the discussion as surfaced into it is accepted then it would render scope and object of Section 167 very limited and virtually redundant in some circumstances because in that condition only notice of intimation by the transferer / transferee would complete the proceedings. It would not address the problem of indeterminate class of persons who are not on record but have Right, Title or Interest in the

property. It is true that mutation is not the document of title and only presumptive in nature but it cannot be ignored that if mutation is being done in favour of a wrong man or without knowledge of all claimants / stakeholders then it may lead to further complications; wherein, said person after mutation; done surreptitiously, may go for construction of the building thus leading to more complications. Therefore, said reasoning as advanced in the judgment cannot be accepted on the basis of discussion made above.

23. Later judgment of Division Bench **Ward Sudhar Samiti (supra)** is proceeded mainly on the assumption that Section 148 and 153 of the Act of 1956 nowhere contemplate issuance of public notice in newspaper and therefore, no public notice is required by law to be given in proceedings under Section 148 (1) and Section 153(1) of the Act of 1956. Section 371 has also been discussed accordingly.

24. In fact, proceedings under Section 148 and 153 fall under sub-section **Imposition of Property Tax in Chapter XI (Taxation);** whereas, Mutation falls under **Supplemental Provision**. Beside that Sections 148 and 153 are in respect of imposition of property tax and the rate at which it is to be charged, therefore, fundamentally, it is for assessment of the different variables used for ascertaining property tax / annual letting value of land and building. There, the owners or occupiers or stakeholders are known. Its a concept altogether different than

'Mutation', where multiple claimants/legal heirs as indeterminate class of persons may have right, title or interest in the property.

25. In computation of annual letting value / property tax, etc., the person concerned or owners are usually before the Corporation, therefore, recipients are determinant class of individuals; whereas, in mutation proceedings, most of the time nobody knows who has Right, Title or Interest in the property which is likely to be mutated because acquisition of property through sale deed or devolution/succession, may have multiple claims. Therefore, Corporation has to inform the **'indeterminate class of public'** for inviting objections. Therefore, purpose and scope of Section 148 / 153 is totally different vis-a-vis Section 167 which mainly falls under Supplemental Provision and not under other two sub-divisions which are Taxation and the Property Tax (Imposition of of Property Tax). Therefore, that analogy of judgment cannot be borrowed here and interpretation of scope of Section 371 vis-a-vis Sections 148/153 is misplaced in facts and circumstances of the case.

26. Division Bench in the case of **Ward Sudhar Samiti (Supra)** further proceeded on the point of service of notice as per Section 369 and 370 of Act of 1956 also and opined that those provisions also nowhere refer the service of notice through publication in newspapers and therefore, mutation proceedings cannot be proceeded with publication of notice in newspaper, but said service of notices as per Section 369/370 is for limited purpose and

nowhere deals for addressing question of intimation to **'indeterminate class of persons'**.

27. Even otherwise, Code of Civil Procedure also postulates service of notice through publication. (see: Order V Rule 20, substituted service) and provisions of CPC are not barred in the proceedings in hand. Rather provisions are accepted for realizing the objects of the Act.

28. Therefore, cumulatively, the decision of Division Bench in the case of **Awas Smasya Niwaran Sansthan (supra) as well as in Ward Sudhar Samiti (supra),** did not consider the interplay of different provisions of the Act of 1956 and their resultant effect in the light of principle of Public Policy, especially when provisions of issuance of public notice and authority to impose improvement charges lie with the Commissioner as per Section 371 and 378 respectively of the Act of 1956 and both judgments did not consider these provisions and point of law involved in given factual set up, then both these judgments pass *sub silentio* and cannot be relied upon being *per incuriam* on discussion made and reasons stated above.

29. Still, certain creases need to be ironed out.

30. In future, Commissioner, Municipal Corporation shall have to give liberty (as per the resolution itself) to the applicants / persons interested in mutation, to get the intimation notice published in a given format in any enlisted newspaper, which is widely circulated in the area (not any newspaper with poor

circulation), so that public at large may know the particulars of the property and person for mutation and that can only be the best possible solution in the controversy. Format of notice, dimensions of notice and list of newspapers should be transparent, clear and be in public domain, so that publication of mutation notice may become facilitator of disputes rather than its launching pad.

31. It is given to understand that several applications are pending consideration for mutation and because of interim order, such mutation proceedings are on hold and amount has been deposited in different head, therefore, Commissioner, Municipal Corporation, Gwalior is directed to proceed expeditiously with the applications as per law and amount which were already deposited by the applicants may be utilized for publication of notices and residuary amount if any remains, after publication charges, then same be returned back to the applicants in transparent and fair manner.

32. Still, even after this judgment if any anomaly or discrepancy exists then it would be the duty of Municipal Corporation as well as State to contemplate such difficulty in accordance with law especially as per the provisions of Act of 1956 inter alia as contained in Section 421 of Act of 1956 and come out with a legal framework or solution for facilitating process of mutation more transparent and smooth.

33. Resultantly, in the considered opinion of this Court, Municipal Corporation, Gwalior can direct the applicants to cause

notice to be published in newspapers and no illegality exists in getting the notice published in widely circulated newspapers at the expense of applicants.

34. Petition accordingly fails in substance, however, disposed of as referred above.

35. Ordered accordingly.

(Sheel Nagu)
Judge

(Anand Pathak)
Judge

jps/-