

**(2000) 07 CAL CK 0031**

**In the Calcutta High Court**

**Case No :** Civil Appellate Jurisdiction G.A. No's. 2021 and 2022 of 2000 G.A. No. 1444 and 1445 of 2000 A.P.O.T. No's. 295 and 423 of 2000 W.P.Nos. 1394 of 1997

State of West Bengal

APPELLANT

Vs

M/s. Shrey Marcentile Pvt. Ltd. and Others

RESPONDENT

**Date of Decision :** 07-07-2000

**Acts Referred:**

Calcutta Municipal Corporation Act, 1980 — Section 170, 171, 183, 193, 602  
Constitution of India, 1950 — Article 110(2), 119(2), 14, 19(2), 246

**Citation :** (2001) 1 CALLT 58 : 104 CWN 1138

**Hon'ble Judges :** Satyabrata Sinha, J;Hrishikesh Banerji, J

**Bench :** Division Bench

**Judgement**

S.B. Sinha, J.—The vires of Calcutta Corporation (Taxation) Regulations, 1989 hereinafter referred to as the said regulation published in Calcutta Gazette on 1st February, 1990 is in question in these appeals. The relevant clauses of the said Regulation read thus :--

"1. (a) .....

3. Fees for recording of transfer or devolution of title of any land or building under sub-section (5) of section 183 of the Act shall be as per Schedule below :--

**Schedule**

(1) In the case of transfer/agreement for sale or cost of acquisition or in the case where there is certificate or in the case of testamentary succession--

Amount of fee in rupees

(a) If the price-value of the property declared, does exceeded rupees fifty thousand 0.5% of the price value

(b) Where such price/value exceeds rupees fifty thousand but does not exceed rupees one lakh 1% of the price value

(c) Where such price-value exceeds one lakh but does not exceed three lakh 1.5% of the price value.

(d) Where such price/value exceeds rupees three lakhs but does not exceed rupees five lakhs 2% of the price value

(e) Where such price-value exceeds five lakhs 2.5% of the price value

(2) In the case of transfer by a deed of lease/sub-lease/assignment or such other similar instrument, the amount to be paid will be at the same rates as at (1) above, on the value shown in the document for Stamp Duty:

Provided that in calculating the amount of free to be paid under (1) or (2) above any fraction of a rupee amounting to fifty paise or more shall be rounded off to the nearest rupee.

(3) In the case of intestate succession--

Amount of fee

(a) If the last decided annual valuation does not exceed rupees three thousand Rs. 25

(b) If such valuation exceeds rupees three thousand but does not exceed rupees six thousand Rs. 50

(c) If such valuation exceeds rupees six thousand but does not exceed rupees ten thousand Rs. 100

(d) If such valuation exceeds rupees ten thousand but does not exceed rupees fifteen thousand Rs. 200

(e) If such valuation exceeds rupees fifteen thousand Rs. 250

(4) In case of thika tenant but owner in a Bustee hut premises."

2. The learned trial Judge in the judgment under appeal held :--

"Mutation, simply put, is the process of change of the name of the owner in the books of the Municipal Authorities. Under the aforesaid section notice of transfer of ownership is to be given, and if notice is not given, the erstwhile owner will be liable for order as owner notwithstanding transfer of ownership"

3. Keeping in view the distinction between a tax and a fee, the learned trial Judge held that in view of the Constitution Bench decision in the case of Ratilal Panachand Gandhi Vs. The State of Bombay and Others, and Mahant Sri Jagannath Ramanuj Das and Another Vs. The State of Orissa and Another, , the subsequent two Bench judgments in Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others, and P. Kannadasan etc, etc. Vs. State of Tamil Nadu and others [OVERRULED], cannot be said to be a good law. The learned trial Judge also relied upon a decision of the apex Court in Secunderabad Hyderabad Hotel Owners Association and Others Vs. Hyderabad Municipal

Corporation, Hyderabad and Another, and held that mutation fee cannot be said to be a tax of some nature and that the impugned regulation has failed to satisfy the requirements to levy fee vis-a-vis the doctrine "Quid Pro Quo".

4. Mr. P.K Roy, the learned counsel appearing on behalf of the Calcutta Municipal Corporation and Mr Samar Dutta, the learned senior standing counsel appearing on behalf of the State of West Bengal, submitted that the impost being a regulatory fee, the element of "Quid Pro Quo" is not attracted. Strong reliance in this connection has been placed on Corporation of Calcutta and Another Vs. Liberty Cinema, , The Secretary, Government of Madras, Home Department and Another Vs. Zenith Lamp and Electrical Ltd., and Municipal Corporation of the City of Baroda Vs. Babubhai Himatlal, .

5. Mr. Pradip Ghosh, the learned counsel appearing on behalf of the writ petitioners-respondents on the other hand, submitted that Mutation fee cannot be in the nature of a regulatory fee as there is no element of regulation in relation to mutation. According to the learned counsel, such a provision has been made for the benefit of the Corporation as the same enables it to recover rates and taxes from those, whose names are mutated. The said Act, the learned counsel urged, provides for penal provision for not applying for mutation and, thus, it must be held to be a tax and the same being in the nature of stamp duty or estate duty, was beyond the legislative competence of the State legislation. Apart from the decisions cited before the learned trial Judge, the learned counsel has placed strong reliance on ITC & Ors. v. State of Karnataka & Ors. reported in 1985(supp) SCC 476 and the Constitution Bench decision in Kewal Krishan Puri and Others Vs. State of Punjab and Another, . According to the learned counsel in view of the decision of the Constitution Bench of the Supreme Court of India the later two Bench decision in Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others, and the decisions following the same must be held to have not laid down the correct law. Reliance in this connection has been placed on The State of U.P. Vs. Ram Chandra Trivedi, .

6. With a view to consider the rival submissions, as noticed hereinbefore, it is necessary to consider the relevant provisions of Calcutta Municipal Corporation Act, 1980 (hereinafter called and referred to for the sake of brevity as the said Act).

7. Section 170 of the said Act empowers the Corporation to levy taxes in relation to the matters stated therein. Although there may not be any generic difference between a tax and a fee as has been held by the Apex Court in Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others, , there cannot be any doubt whatsoever that in terms of Article 266 of the Constitution of India, the power to levy tax must be expressly provided for in the Act. Apart from section 170 of the said Act no provision exists for levying a tax on mutation.

8. Section 602 of the said Act empowers the Corporation to make regulations not inconsistent with the provision of the Act or the rules made thereunder for

discharging its functions under the Act. No power in terms of section 602 of the said Act has been conferred or could be conferred for imposition of tax by reason of a delegated legislation keeping in view the express provision contained in section 170 thereof.

9. The question which now arises for consideration is as to whether the impost is a regulatory fee.

10. In *Corporation of Calcutta and Another Vs. Liberty Cinema*, the Apex Court was considering the case of levy of licence fee. "Licence fee" being a regulatory fee, it was held that the element of quid pro quo not required to be satisfied. The apex Court upon referring to the decision of the Commissioner, *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, and *H.H. Sudhundra Thirtha Swamiar Vs. Commissioner For Hindu Religious and Charitable Endowments, Mysore*, held :--

"Both these cases discussed other tests besides the requirement of the rendering of services for determining whether a levy is a fee, but with these we are not concerned in the present case. These cases also discussed the correlation of the costs of the services to the levy but with that also we are not concerned as it not sought to uphold the present levy on the ground of such correlation. We have referred to these cases only for showing that to make a levy a fee the services rendered in respect of it must benefit, or confer advantage on, the person who pays the levy."

11. The apex Court laid down a distinction between regulatory fee and compensatory fee. This aspect of the matter has again been considered in *State of Tripura and others Vs. Sudhir Ranjan Nath*, wherein the Apex Court not only noticed the decision in *Liberty Cinema (supra)* but also other decisions following the same, namely, *Van Organic Chemical Industries v. Collector of Central Excise* reported in *JT 1997(1) SC 611*, *Bihar Distillery and Another Vs. Union of India (UOI)* and *Others*, and held that every fee need not necessarily satisfy the test of quid pro quo.

12. By reason of the provisions contained in section 602 of the said Act the delegate was not permitted to lay down a legislative policy.

13. Provision relating to mutation is to be found in section 183 of the said Act. Sub-section (5) of section 183 empowers the Municipal Commissioner on receipt of a notice of transfer or devolution of title under this section and upon payment of such transfer or devolution in a book and also in the Municipal Assessment Book. The Proviso appended to sub-section (5) of section 183 empowers the Corporation to refuse mutation in a case where there is arrear of any dues to the Corporation on account of the transfer or the predecessor-in-interest of the applicant.

14. Sub-section (5) of section 183 read with section 602, thus empowers the Corporation only to prescribe a fee.

15. The question which necessarily arises for considerations as to whether in the name of imposition of "fee", it in effect and substance imposes a compulsory impost which is in the nature of a tax without any sanction of law.

16. The answer to the said question must be rendered in the affirmative.

17. In *Kewal Krishan Puri and Others Vs. State of Punjab and Another*, the apex Court noticed its earlier decision including a Constitution Bench decision in *Indian Mica & Micanite Industries Ltd. v. State of Bihar* reported in (1997) Supp SCR 319 and laid down the following principles for satisfying the tests for valid levy of market fees on the agricultural produce in the following terms :--

"From a conspectus of the various authorities of this Court we deduce the following principles for satisfying the tests for a valid levy of market fees on the agricultural produce bought or sold by licensees in a notified market area :--

(1) That the amount of fee realised must be earmarked for rendering services to the licensees in the notified market area and a good and substantial portion of it must be shown to be expended for this purpose.

(2) That the services rendered to the licensees must be in relation to the transaction of purchase or sale of the agricultural produce.

(3) That while rendering services in the market area for the purpose of facilitating the transactions of purchase and sale with a view to achieve the objects of the marketing legislation it is not necessary to confer the whole of the benefit on the licensees but some special benefits must be conferred on them which have a direct, close and reasonable correlation between the licensees and the transactions.

(4) That while conferring some special benefits on the licensee, it is permissible to render such service in the market which may be in the general interest of all concerned with transactions taking place in the market.

(5) That spending the amount of market fees for the purpose of augmenting the agricultural produce, its facility of transport in villages and to provide other facilities meant mainly or exclusively for the benefit of the agriculturists is not permissible on the ground that such services in the long run go to increase the volume of transactions in the market ultimately benefitting the traders also. Such an indirect and remote benefit to the traders is in no sense a special benefit to them.

(6) That the element of quid pro quo may not be possible or even necessary, to be established with arithmetical exactitude but even broadly and reasonably it must be established by the authorities who charge the fees that the amount is being spent for rendering services to those on whom falls the burden of the fee.

(7) At least a good and substantial portion of the amount collected on account of fees, may be in the neighbourhood of two third or three-fourths must be shown with reasonable certainty as being spent for rendering services of the kind

mentioned above."

18. On the basis of facts and figures produced before it, held that although the levy of market fee upto Rs.2 per hundred rupees levied by the various market committees was justified, enhancement thereof to Rs.3/- as unsustainable, It observed :--

"Before we part with these cases we would like to observe that in future if the market fee is sought to be raised beyond the rate of Rs.2/- per hundred rupees, proper budgets, estimates, balance-sheets showing the balance of the money in hand and in deposit, the estimated income and expenditure etc. should carefully be prepared in the light of this judgment. It may be, as was submitted before us, that is not imperative either for the Market Committees or the Board to prepare balance sheets because their accounts are audited by Government auditors but for the purposes of raising the market fee any further, the balance sheets will give a true picture of the position also with the budgets and estimates. Then, and then only, there may be a legal justification for raising the rate of the market fee further to a reasonable extend. On drawing of the correct estimates and budgets the authorities as also the State Government will be able to know the correct position and to decide reasonably as to what extent the raising of the market fee can be justified taking an overall picture of the matter and keeping in view the reason behind the restrictions of sales tax law concerning the transactions of foodgrains and the other agricultural produce."

19. The same Bench in Ram Chandra Kailash Kumar and Company and Others Vs. State of U.P. and Another, , however, upheld the levy of market fees but directed the same to be regularised and be charged in the light of the said judgment.

20. Kewal Krishan Puri (supra) was distinguished by a Bench of three Judges in Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others, stating that the Kewal Krishan has not laid down any general law but the said decision was rendered in the fact situation of that case, although in Kewal Krishan Puri it was stated :

"How ill-conceived the second part of clause (xvii) is? Is it permissible to spend the market fees realized from the traders for any purpose calculated to promote the national or public interest obviously not. No market committee can be permitted to utilise the fund for an ulterior purpose howsoever benevolent, laudable and charitable the object may be. The whole concept of fee will collapse if the amount realized by the market fees could be permitted to be spent in this fashion."

21. While stating that the traditional view that there must be actual quid pro quo for a fee has under gone a sea change, in Sreenivasa General Traders (supra) it was held :-

"The distinction between a tax and a fee lies Primarily in the fact that a tax is

levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary motive of regulation in public interest"

22. The apex Court distinguished Kewal Krishan Puri in Sreenivasa General (supra) on the ground that the provision of Article 266 of the Constitution of India was not brought to its notice, only for the purpose of showing that even if collected fees are deposited in the consolidate account of the State, the same would not cease to be a fee. But it has not deviated from the rule that there exists a distinction between a tax and a fee. This aspect of the matter has again been considered in ITC Ltd & Ors v. State of Karnataka & Ors reported in 1985 (supp.) SCC 476 wherein it has been stated :-

"Most of these decisions were reviewed by this Court in judging the validity of fees imposed in the case of Kewal Krishan Puri and Others Vs. State of Punjab and Another, . Several principles deduced from the decision in Kewal Krishan Puri case have been noted hereinbefore. Prior thereto the question was considered in the case of The Government of Andhra Pradesh and Another Vs. Hindustan Machine Tools Ltd., . which was noted in Kewal Krishan Puri case. Kewal Krishan Puri case specifically noted that the element of quid pro quo might not be possible or even necessary to be established with arithmetical exactitude even broadly and reasonably it must be established by the authority which charged the fees that the amount was being spent for rendering services to those on whom fell the burden of the fee. At least a good and substantial amount collected on account of fees might be in the neighbourhood of two-third or three-fourth must be shown with reasonable certainty as being spent for rendering services to those from whom the fees are realised. The Court, however, noted that while conferring special benefits to the licenses or payers of fees, it was permissible to render other services in the market which might be in the general interest of all concerned in respect of transactions that take place in the markets. Services rendered to the licensees must be in relation to the transactions of purchase or sale of produce in the market. It is not necessary, however, to confer the whole of the benefit on the licensees but some special benefits must be conferred on them which have a direct, close, and reasonable correlation between the licensees and transactions. But imposition of fees for general benefit like augmenting the agricultural produce, its facility of transport in villages and to provide other facilities meant mainly or exclusively for the benefit of agriculturists was not permissible on the ground that such service in the long run augmented the volume of transaction in the market ultimately benefiting the traders. Such an indirect benefit could not be considered to be sufficient quid pro quo to justify imposition of market fee."

23. As regards subsequent decisions, it was observed :--

"It is not necessary, however, for the purpose of tills case to express any opinion as to whether the traditional concept of quid pro quo is undergoing any transformation and if so to what extent? Even on the basis of traditional concept

it is well settled that though there must be some special services to the payers of the fees, to be a fee it is not necessary that all the services must be to the payers of the fees nor can the correlation between payment of fee and services rendered be established with mathematical exactitude. It is permissible in the modern set-up to take into account projections into future and not only the present services can be utilised for justifying the imposition of fee. All planning, projects into the future for its existence and survival."

24. The essential purpose in terms of section 183 of the Calcutta Municipal Corporation Act is to mutate somebody's name. No other service of any kind whatsoever is required to be rendered to other tax payers. The mutation fee is merely to be prescribed by regulation but delegates cannot impose any tax in the name of a fee or in lieu thereof as no such delegation has been made in its favour.

25. In *P. Kannadasan etc, etc. Vs. State of Tamil Nadu and others* [OVERRULED], , the apex Court distinguished *Corpn. of Corporation of Calcutta and Another Vs. Liberty Cinema, .* It was observed that the taxes are raised for augmenting the general revenues of the State and not for any particular purpose much less for rendering a particular service.

26. In *Secunderabad Hyderabad Hotel Owners Association and Others Vs. Hyderabad Municipal Corporation, Hyderabad and Another, ,* the apex Court was considering an increase in the licence fee for running a lodging house, hotel, restaurant, coffee house, tea stall levied u/s 622(2) of the Hyderabad Municipal Corporation Act. It was held :--

"In the present case, however, the fees charged are not just for services rendered but they also have a large element of a regulatory fee levied for the purpose of monitoring the activity of the licensees to ensure that they comply with the terms and conditions of the licence. Dealing with such regulatory fees, this Court in *Vam Organic Chemicals Ltd. and Another Vs. State of U.P. and Others, ,* observed that in the case of a regulatory fee no quid, pro quo was necessary but such fee should not be excessive. The same distinction between regulatory and compensatory fees has been made in the case of *P. Kannadasan etc, etc. Vs. State of Tamil Nadu and others* [OVERRULED], , as well as *State of Tripura and others Vs. Sudhir Ranjan Nath, .*"

27. The Court noticed that the fee although graded in the common fund are earmarked for the purpose for which they are collected and, thus, the intention to levy a fee which would be utilised for regulatory and compensatory purpose in the present case. Repelling a contention that fee in all cases has to be lump sum, it was held :--

"In the first place it is not necessary that a fee should only be in the form of a lump sum fee. A fee can also be graded as in the present case. The Corporation has chosen the quantum of rent paid as the criterion for the quantum of fee to be charged. The rent under the relevant provisions of law in that connection,

does have a nexus with the area in the occupation of the lodging house or eating house. In the case of activities carried on by these lodging houses and eating houses, the area in their possession has a direct nexus with the extent of business activities. The need for cleanliness and hygiene, the generation of garbage and the extent of regulation that may be required depend upon the size of the premises which in turn control the extent of activity. Undoubtedly in a given case if the premises are old, the rent may be less but that does not mean that classifying premises on the basis of the rent paid has no connection with the quantum of fee charged."

28. Thus, in that case also a distinction has been made between a regulatory fees and compensatory fees.

29. Keeping in view the aforementioned principle of law let us now consider the provisions of the said Act. As noticed hereinbefore, section 170 empowers the Corporation to levy a tax. Section 171 provides for imposition of consolidated rate of lands, buildings or surcharge which is one of the taxes referred to in section 170. Such tax is primarily leviable on the owner of the property as would be evident from section 193 thereof.

30. Chapters XII and XIII contain provisions as regard maintenance of particulars of ownership of lands and buildings. Section 191 specifically provides for maintenance of Municipal Assessment Book which would contain all the aforementioned particulars relating to ownership of building. Section 610 occurring in Chapter XXXVII read with the VIIth Schedule provides for penalty which would be attracted in the instant case keeping in view the fact that section 183 of the Act mandates giving of notice of transfer within 3 months after the execution of the instrument of transfer or after its registration, as also in case of death of the person whose name had been recorded.

31. The rate of levy in case of intestate or tested death or on transfer are different and ad valorem fee has been levied although such a notice of transfer or death is mandatorily required to be given under the provisions of the Act. The owners or occupiers of the building, therefore, have a statutory obligation to comply with the said provisions. The said provision is, thus, not legislated for benefit on the owner of the premises but it is a statutory obligation, failure to comply wherewith would attract penal consequences. It is indeed beyond anybody's comprehension as to how a statutory obligation so as to enable the Corporation to collect its levies, rates and taxes would confer any special benefit upon the owner. It is true that in case of revision of rates, the persons whose names appear in the records of the corporation would be entitled to notice and, thus, may have the right of filing objections. But even if a person's name is not mutated, and he is in occupation of the building, he may file objection on the basis of a general notice. Even a person whose name is not recorded in the Municipal Records is entitled to sanction of building plan if he can satisfy the authorities that he is otherwise entitled thereto. The extent of benefit rendered to the applicants for mutation is a relevant factor.

32. The nature of services rendered to the applicants for mutation and the extent thereof must have same meaning within the quantum of fees sought to be levied.

33. As noticed hereinbefore, levy is ad velorem in nature. The rendition of service by way of fees has got nothing to do with the testamentary or interstate succession or transfer. Such type of ad velorem levy, in the opinion of this Court, is unsustainable being wholly unreasonable. This aspect of the matter has also been considered by one of us in C.O No. 9120(W) of 1996 (J.K. Industries Ltd. & Anr. v. Registrar of Companies West Bengal & Ors.) disposed of on 17th July, 1997 wherein dealing with a similar provision under the Companies Act, it was held :--

"For the purpose of registration of the increase in share capital only certain amendments have to be made in the certificate issue therefore and certain alteration have to be made in the Registers maintained by the respondent No.1 for that purpose. Such a fee is not meant to be a profit making venture nor thereby a retrospective effect can be given so as to completely given a go-bye to the amount paid by the petitioners at the time of initial registration and/or subsequent increased in the authorised share capital prior to coming into force of the impugned notification. Imposition of enhanced fee in such a manner must also be held to be wholly unreasonable."

34. Even, no guideline has been given for fixation of a minimum and maximum fees.

35. The purpose for levying the fees on ad velorem basis has no direct nexus with the services rendered as was in the case of Secunderabad Hyderabad Hotel Owners Association (supra).

36. The Constitution of India as would appear from the provisions contained in Articles 265, 266 as also several items in the VIIth Schedule clearly made a distinction between a tax and fee for legislative purposes. Tax normally is levied for augmenting the general revenue and the same is a common burden, the quantum whereof can generally be determined upon the capacity of the tax payer to pay.

37. In none of the cases the Supreme Court has held that there does not exist any distinction between a tax and a fee despite holding that element of compulsion or coerciveness is present in both the cases. Rendition of some services which must have a broad correlation ship is necessary with the case of levy of fee although, the element of quid pro quo may not involve mathematical accuracy. The only requirement is that a substantial amount, as has been held by the apex Court in Kewal Kishan (supra) should be spent on the payers of fees. The Court may, also in a given case, declare a rate of fee to be invalid where capital accumulation may reach a point when levying fee at the same rate ceases to be a fee.

38. A fee or a compensatory tax like toll tax must be levied for certain purpose.

See State of U.P. and Others Vs. Devi Dayal Singh, .

39. The mutation of the name of the transferees or the heirs executors or legatees cannot be said to be regulatory in nature. The provisions of sub- section (5) of section 183 of the Calcutta Municipal Corporation Act clearly provides for imposition of a fee which will have a direct nexus as regard the services to be rendered namely mutating the names of the applicants. The said provision could not be utilised for the purpose of augmenting revenue.

40. It may be noticed that a local authority like Calcutta Municipal Corporation is statutorily bound to render services of conservancy, water supply, maintenance of road and building, towards establishment and administration cost of running CMC where for rates and taxes are already levied.

41. The allegations made in the petition to the effect that the mutation fees have been increased in order to meet the cost of establishment and administration of the CMC has not been specifically disputed. In fact, in the affidavit-in-opposition it has been stated :--

"It is stated in this connection that the fees are recorded from different heads as per particulars given below :

- (a) Mutation,
- (b) Certified copy of Assessment Register Book,
- (c) Certified copy of the Inspection Book,
- (d) Certified copy of the Objection Docket,
- (e) Licence fee of different Departments,
- (f) Conservancy fee,
- (g) Water fee for supply of water to outside ships coming from different countries, marriage parties and other functions, etc."

42. At page 10 of the Affidavit-in-opposition although a Tabular Statement of income and Expenditure of different financial years have been stated the same does not reveal in any way as to how any special service is being provided to the applicant for mutation.

43. In Nagar Mahapalika Varanasi Vs. Durga Das Bhattacharya and Others, , the apex Court struck down the levy of fees on the owner of Rickshaws on the ground that spending the amount of licence fee for lighting the streets and/or for constructing or maintaining public streets cannot be a valid justification therefore which the Municipality was bound to perform in discharge of its statutory duties. The apex Court in that case has upheld the decision of the The India Sugars and Refineries, Ltd., a limited liability company Vs. The Municipal Council, .

44. The Regulation in any view of the manner appears to be discriminatory. No

reason has been assigned as to why a change of ownership based on transfer should be subjected to a higher fee than change of ownership by way of interstate succession. There does not appear to be any rational basis for classification commensurate with the object of the legislation as enshrined in Articles 14 and 246 of the Constitution of India. See *M.P. Singh and Others Vs. Union of India (UOI) and Others*, and *Railway Board Vs. A. Pitchumani*, .

45. In *Krishi Upaj Mandi Samiti and Others Vs. Orient Paper and Industries Ltd.*, , it has been held :--

"Thus what emerges from the conspectus of the aforesaid decisions is as follows :

(1) Though levying of fee is only a particular from of the taxing power of the State, our Constitution has placed fee under a separate category for purposes of legislation- At the end of each one of the three Legislative List, it has given power to the particular legislature to legislate on the imposition of fee in respect of every one of the items dealt with in the list itself, except fees taken in Court.

(2) The tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered. There is no quid pro quo between the taxpayer and the public authority. It is a part of the common burden and the quantum of imposition upon the taxpayer depends generally upon his capacity to pay.

(3) Fee is a charge for a special service rendered to individuals or a class 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 some cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are various kinds of fees and it is not possible to formulate a definition that would be applicable to all cases.

(4) The element of compulsion or coerciveness is present in all kinds of impositions though in different degrees and it is not totally absent in fees. Hence it cannot be the sole or even a material criterion for distinguishing a tax from fee. Compulsion lies in the fact that payment is enforceable by law against an individual in spite of his unwillingness or want of consent and this element is present in taxes as well as in fees.

(5) The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of the common burden while a fee is a payment for a special benefit or privilege. Fees confer a special capacity although the special advantage is secondary to the primary motive of regulation in the public interest. Public interest seems to be at the basis of all impositions but in a fee it is some special benefit which is conferred and accruing which is the reason for imposition of the levy. In the case of a tax, the particular advantage if it exists at all, is an incidental result of State action. A fee is a sort of return or consideration for services rendered and hence it is primarily necessary that the levy of fee should

on the face of the legislative provision be correlated to the expenses incurred by Government in rendering the services. As indicated in Article 110(2) of the Constitution ordinarily there are two classes of cases where Government imposes fees upon persons. The first is of grant of permission or privilege and the second for services rendered. In the first class or cases, the cost incurred by the Government for granting of permission or privilege may be very small and the amount of imposition levied is based not necessarily upon the costs incurred by the Government but upon the benefit that the individual receives. In such cases, the tax element is predominant. If the money paid by privilege holders goes entirely for the expenses of matters of general public utility, the fee cannot but be regarded as a tax. In the other class of cases, the Government does some positive work for the benefit of persons and the money is taken as the return for the work done or service rendered.

(6) There is really no generic difference between tax and fee and the taxing power of the State may manifest itself in three different forms, viz., special assessment, fees and taxes. Whether a cess is tax or fee, would depend upon the facts of each case. If in the guise of fee, the legislature imposes a tax it is for the Court on a scrutiny of the scheme of the levy, to determine whether the levy is a fee, the true test must be whether its primary and essential purpose is to render specific services to a specific area or classes. It is of no consequence that the State may ultimately and indirectly be benefited by it. The amount of the levy must depend upon the extent of the services sought to be rendered and if they are proportionate, it would be unreasonable to say that since the impost is high it must be a tax. Nor can the method described by the legislature for recovering the levy by itself alter its character. The method is a matter of convenience and though relevant, has to be tested in the light of other relevant circumstances.

(7) It is not a postulate of a fee that it must have relation to the actual service rendered. However, the rendering of service has to be established. The service, further, cannot be remote. The test of quid pro quo is not to be satisfied with close or proximate relationship in all kinds of fees. A good and substantial portion of the fee must, however, be shown to be expended for the purpose for which the fee is levied. It is not necessary to confer the whole of the benefit on the payers of the fee but some special benefit must be conferred on them which has a direct and reasonable correlation to the fee. While conferring some special benefits on the payers of the fees, it is permissible to render service in the general interest of all concerned. The element of quid pro quo is not possible or even necessary to be established with arithmetical exactitude. But it must be established broadly and reasonably that the amount is being spent for rendering services to those on whom the burden of the fee falls. There is no postulate of a fee that it must have a direct relation to the actual services rendered by the authorities to each individual to obtain the benefit of the service. The element of quid pro quo in the strict sense is not always a sine qua non for a fee. The element of quid pro quo is not necessarily absent in every tax. It is enough if there is a broad, reasonable

and general co relationship between the levy and the resultant benefit to the class of people on which the fee is levied though no single payer of the fee receives direct or personal benefit from those services. It is immaterial that the general public may also be benefited from some of the services if the primary service intended is for the payers of the fees.

(8) Absence of uniformity is not a criterion on which alone it can be said that the levy is of the nature of tax. The legislature has power to enact appropriate retrospective legislation declaring levies as fees by denuding them of the characteristics of tax.

(9) It is not necessary that the amount of fees collected by the Government should be kept separately. In view of the provisions of Article 266, all amounts received by the Governments have to be credited to the Consolidated Funds and to the public accounts of the respective Governments."

46. In *State of Tripura and others Vs. Sudhir Ranjan Nath*, , it was held :--

"We shall first deal with the validity of sub-rule (5) of Rule 32 which empowers the State Government to levy export duty extending upto hundred per cent of the market value of timber/firewood concerned. We agree with the High Court that there is nothing in section 41 which empowers the State Government to levy export duty. The power to levy duty is conferred only upon the Central Government by section 39 and that power is neither delegated to the State Government nor is the State Government empowered to make rules with respect to the said levy. Neither the powers conferred upon the State Government by section 41 nor the power conferred by section 76 comprehend the levy of export duty. The power to levy duty is conferred only upon one named authority, viz., the Central Government. It must accordingly be held that sub-rule (5) has been rightly declared bad.

47. We next take up the validity of the levy of application fee and licence fee of Rupees one thousand and Rupees two thousand respectively. In our opinion, the High Court was not right in holding that the said fee amounts to tax on the ground that it has not been proved to be compensatory in nature. In our opinion, the fee imposed by sub-rules (3) and (4) is a fee within the meaning of clause (c) of sub-section (2) of section 41. It is regulatory fee and not compensatory fee. The distinction between compensatory fee and regulatory fee is well established by several decisions of this Court. Reference may be made to the decision of the Constitution Bench in *Corporation of Calcutta and Another Vs. Liberty Cinema*, . It has been held in the said decision that the expression "licence fee" does not necessarily mean a fee in lieu of services and that in the case of regulatory fees, no quid pro quo need be established. The following observations may usefully be quoted (at p. 1113 of AIR) :

"This contention is not really open to the respondent for section 548 does not use the word "fee", it use the words "licence fee" and those words do not necessarily mean a fee in return for services. In fact in our Constitution fee for licence and

fee for services rendered are contemplated as different kinds of levy. The former is not intended to be a fee for services rendered. This is apparent from a consideration of Article 110(2) and Article 119(2) where both the expressions are used indicating thereby that they are not the same. In *Shannon v. Lower Mainland Dairy Products Board*, 1938 AC 708 : AIR 1939 PC 36. It was observed at Pp. 721-722 of (AC) : (at Pp. 38-39 of AIR) :

"If licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province or for both purposes .....It cannot, as their Lordships think, be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue."

It would, therefore, appear that a provision for the imposition of a licence fee does not necessarily lead to the conclusion that the fee must be only for services rendered."

48. In *Municipal Corporation of the City of Baroda Vs. Babubhai Himatlal*, , wherein strong reliance has been placed by Mr. Roy does not militate against the contentions raised by the writ petitioner. In that case the apex Court upheld the standing orders framed u/s 466(1) (A) (f) read with section 147 of the Bombay Provincial Municipal Corporations Act. not only on the ground that the fee is charged for the privilege or services rendered to the payer and it satisfies the quid pro quo principle it further held the Standing Order does not impose any compulsory levy but it only gives an option to the transporter to take advantage of the provision by paying fees and if they so choose they may follow this Standing Order and save themselves from the hardship of paying the octroi and then claiming the refund and for that purpose stopping at the entry check post and again at the exist check post and also to satisfy the check post authorities that the goods which had entered the Corporation limits are being taken out in the same State and it also involved handling of sum by the transporter so that it may be possible for him to pay the octroi on the entry check post itself. In that case even on facts quid pro quo principle was satisfied.

For the reasons aforementioned there is no merit in this appeal which is accordingly dismissed but in the facts and circumstances of this case there will be no order as to costs.

M. Banerji, J.

49. I agree.

50. Appeal dismissed