State Of Himachal Pradesh & Ors vs M/S. Shivalik Agro Poly Products & Ors on 14 September, 2004

Equivalent citations: AIR 2004 SUPREME COURT 4393, 2004 (8) SCC 556, 2004 AIR SCW 5207, (2004) 22 INDLD 349, (2004) 22 ALLINDCAS 10 (SC), (2004) 2 CLR 538 (SC), (2005) 1 LANDLR 83, (2004) 4 PAT LJR 177, (2004) 97 REVDEC 507, (2004) 7 SUPREME 78, (2004) 4 RECCIVR 349, (2005) 2 CIVLJ 299, (2004) 4 JLJR 281, (2004) 7 SCALE 658, (2005) 1 MAD LW 1, (2004) 4 ALLMR 1157 (SC), (2004) 2 WLC(SC)CVL 695, (2004) 4 ALL WC 3304, (2004) 2 CURLJ(CCR) 445, (2004) 7 JT 371 (SC)

Author: G.P. Mathur

Bench: Chief Justice, G. P. Mathur, C. K. Thakker

CASE NO.:
Appeal (civil) 2122 of 1999

PETITIONER:
State of Himachal Pradesh & Ors.

RESPONDENT:
M/s. Shivalik Agro Poly Products & Ors

DATE OF JUDGMENT: 14/09/2004

BENCH:
CJI., G. P. MATHUR & C. K. THAKKER.

JUDGMENT:

J U D G M E N T G.P. MATHUR, J.

1. This appeal, by special leave, has been preferred by the defendants (State of Himachal Pradesh and three others) against the judgment and decree dated 10.12.1997 of the High Court of Himachal Pradesh by which the Second Appeal filed by the appellants was dismissed and the judgment and decree passed by the District Judge and also Senior Sub-Judge, Solan decreeing the plaintiff's suit were affirmed.

2. M/s. Shivalik Agro Poly Products Ltd. and others filed the suit seeking a declaration that the notification dated 14.4.1969 issued by the State of Himachal Pradesh under section 78 of the Registration Act be declared void and ultra vires and for recovery of Rs.27,771/- paid by them as registration fee for registering the mortgage deed dated 30.10.1978. The case of the plaintiffs, in brief, was that they were allotted an industrial plot in Parwanoo by the Himachal Pradesh Housing

Board for establishing an industrial unit. They were sanctioned two loans of Rs. 30 lacs and Rs.27.76 lacs by Himachal Pradesh Financial Corporation and Himachal Pradesh Mineral and Industrial Development Corporation respectively and in order to secure the loan, they were required to mortgage and hypothecate the fixed assets of their leasehold rights in the industrial plot and the machinery installed therein with the aforesaid Corporations for which a deed of simple mortgage was required to be executed. At the time of the execution of the mortgage deed, the plaintiffs were required to pay stamp duty of Rs.45,804/- and registration charges amounting to Rs.27,760/- in accordance with the notification issued under sections 78 and 79 of the Registration Act by the State of Himachal Pradesh. The plaintiffs challenged the vires of the notification fixing the registration fee by filing Civil Writ Petition No. 105 of 1979 which was summarily dismissed by a Division Bench of the High Court on 22.5.1979 on the ground that the plaintiffs had an equally efficacious alternative remedy of filing a civil suit wherein the validity of the notification could be challenged. After dismissal of the writ petition, the suit was instituted claiming the reliefs mentioned above. The defendant- appellants contested the suit on the grounds, inter alia, that the impugned notification had been issued by the State Government in exercise of the statutory power conferred by Sections 78 and 79 of the Registration Act and, therefore, it was a sovereign function of the State for which no suit was maintainable; that the notification was perfectly legal and valid; that the registration fee had been charged in accordance with the schedule of fee fixed by the State Government in the notification for the registration of documents and that the registration fee charged was perfectly justified.

3. The Senior Sub-Judge, Solan, decreed the suit and declared the notification dated 14.4.1969 issued by the State Government prescribing the registration fee to be null and void and also passed a decree for refund of Rs. 27,771/- in favour of the plaintiffs, which was affirmed in appeal by the District Judge and also in Second Appeal by the High Court. The main ground on which the plaintiffs' suit has been decreed is that there is a distinction between tax and fee. Fee is levied for certain services given to individuals and the amount realized has to be earmarked to meet the expenses incurred in rendering the services and the amount should not go to the general pool nor should be spent for any other purposes. The State had not led any evidence to show that the amount realized by way of registration fee is deposited under a separate head and that it is exclusively utilized for the maintenance of the registration department. In absence of any evidence, the conclusion was inevitable that the amount realized was put in the Consolidated Fund of the State Government and was being utilized by the government for general purposes. Placing reliance upon Commissioner Hindu Religious Endowments Madras vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt AIR 1954 SC 282, (for short 'Shirur Mutt case') a conclusion has been drawn that it is a tax and not a fee and consequently the impugned notification is ultra vires the Registration Act.

4. The principal question which requires consideration in the present appeal is whether the notification issued by the State Government on 14.4.1969 prescribing the registration fee on a graduated form on the basis of value of subject matter of the instrument is in accordance with the spirit of section 78 of the Registration Act and is valid in law.

5. By the very nature of things recognition of rights or title over immovable property and transactions therein give rise to manifold problems. Movable property, depending upon its size or

dimension, can be kept in absolute control in possession of its owner and a third party may not be in a position even to know where the same has been kept. But this is not so for an immovable property which lies in the open attached to the earth at a particular place and the owner may be residing at a far away place. The owner may give the property on lease or licence to someone else who may get physical possession thereof and enjoy the usufruct thereof. In order to get over this difficulty, a system of registration of title to immovable property has been evolved which is followed in many countries. In the United States the legal position has been described as under in Vol. 76 Corpus Juris Secundum Page 525:

> "Systems looking toward the registration of titles to land, as distinguished from the practice under recording acts generally of recording or registering the evidence of such title, are in effect by virtue of statute in several of the United States, and the courts are bound by such provisions rather than by any doctrine of the common law which is in contravention thereof. These systems are quite generally known as "Torrens systems" and the statutes providing therefore as "Torrens acts" from the name of the author of the Australian Act of 1857, the underlying principle of which they follow. These systems are limited in their application to titles to land.
>
> The predominant object of such legislation is the establishment of a method whereby the title to a particular tract or parcel of real estate will always be ascertainable by reference to a register of conclusive veracity, maintained by the designated public official. In other words, the purpose of these laws is to simplify the transfer of real estate, and to render titles thereto safe and indefeasible through the registration of such titles, the bringing together in one place of all of the facts relative to the title to each particular tract which is registered, and the use of certificates which shall conclusively show at all times the state of such title and the person in whom it is vested. The Torrens system serves a broader purpose than merely to notify the record owner of instruments affecting the title; it is notice to all the world of the condition of the title.
>
> ."

6. The position in the United Kingdom has been described in Vol.26 Halsbury's Laws of England Paras 701 and 705 as under:

> "701. Legislation referable to centrally maintained register. The legislation relating to registration of the title is directed to the manner in which the law and practice of conveyancing are to be adapted to the use of a centrally maintained register of title to land. As the use of the register has been extended, so the successive statutes mark the historical development of a system of conveyancing, commonly known as registered conveyancing , which approached maturity as part of the real property legislation of 1925.

> The result of that legislation, as respects registered land, is to produce on first registration a state insured record of entitlement to legal estates in land, open to public inspection, which is to be kept up to date in respect of subsequent transactions in accordance with the conveyancing technique for which the legislation provides.
>
> Indirect reference to the earlier legislation is found at the commencement of the Land Registration Act 1925 in the provision that requires the Chief Land Registrar to continue to keep a register of title to freehold and leasehold land.
>
> 705. The Land Registry Act 1862. The Land Registry Act 1862 marked the first attempt to introduce registration of title as distinct from registration of deeds by memorial. Registration was on a voluntary basis and subject to conditions, which included conditions (1) that a marketable title should be shown; (2) that the boundaries of the land should be officially determined and defined as against adjoining owners; and (3) that partial interests should be disclosed and registered. The Act continues to apply to estates registered under it as if the Land Registration Act 1925 had not been passed, until such time as those estates are registered pursuant to the Act of 1925. The intention that the registration of such estates is to be transferred to the modern register is confirmed by power given to the Lord Chancellor to provide by order that all titles registered under the Land Registry Act 1862 should be registered under the Land Registration Act 1925 without cost to the parties interested."

7. The law relating to transfer of immoveable property in India is contained in the Transfer of Property Act 1882. Section 54 of this Act defines "sale" and it provides that transfer of ownership in the case of intangible immoveable property of the value of one hundred rupees and upwards can be made only by a registered instrument. Section 107 provides that a lease of immoveable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument. Similarly, section 123 provides that a gift of immoveable property must be effected by a registered instrument. Section 17 of the Registration Act gives a long list of instruments for which registration is compulsory and clause (b) of sub-section (1) provides that non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immoveable property must be registered. These statutory provisions indicate the importance of registration of documents. In fact, it will be impossible to have any transaction relating to immoveable property in any manner like transfer, gift, giving on lease or creating a mortgage, etc. without a system of registration of documents. For smooth functioning of the system, the Registration Act has cast certain duties and obligations upon the State Government. Section 3 enjoins that the State Government shall appoint an officer to be called the Inspector General of Registration. Section 5 enjoins that for the purpose of the Act, the State Government shall form districts and sub-districts and the districts and sub- districts so formed together with the limits thereof, and also every alternation of such limits, shall be notified in the Official Gazette. Section 7 enjoins that the State Government shall establish in every district an office to be styled the office of the Registrar and in every sub-district an office or offices to be styled

the office of the Sub-Registrar. Section 6 enjoins the State Government to appoint Registrars and Sub-Registrars. Section 16 enjoins the State Government to provide for every registering officer the books necessary for the purposes of the Act and further in each district suitable provision for the safe custody of the records connected with the registration of documents in such districts. By amending Act No. 48 of 2001, section 16A (1) has been inserted in the Act. This section provides that notwithstanding anything contained in section 16, the books provided under sub-section (1) of that section may also be kept in computer floppies or diskettes or in any other electronic form in the manner and subject to the safeguards as may be prescribed by the Inspector General with the sanction of the State Government. The office of Sub-Registrar has naturally to be provided with other staff like clerks and other persons for carrying on various kinds of works which are associated with the registration of documents, which involve recording the contents thereof in the register maintained for the purpose, issuing certified copies and giving replies to the search applications. The State Government has to incur considerable expenditure in maintaining the offices of Sub-Registrars which are normally located at the headquarters of a sub-division in a district and in payment of salaries to the staff functioning therein.

8. The District Court and also the High Court have decreed the suit on the finding that the registration fee charged for registration of the documents is a tax and not fee and, therefore, it is ultra vires Section 78 of Registration Act and for holding so reliance has been placed upon the decision of this Court rendered in Shirur Mutt case (AIR 1954 SC 282).

In the said decision the indicia of fee was explained as under in paras 44 and 45 of the reports :

> "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 abilities of different recipients to pay."

And the distinction between a tax and fee was stated in the following manner in para 45 of the reports :

> "The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege. Fees confer a special capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest, vide Findlay Shirras on 'Science of Public Finance', Vol I, page 202. Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives. As Seligman says, it is the special benefit accruing to the individual which is the reason for payment in the case of fees; in the case of a tax, the particular advantage if it exists at all is an incidental result of State action."

Later, in paragraphs 46 and 47, it was observed that there is really no generic difference between the tax and fees and as said by Seligman, the taxing power of a State may manifest itself in three different forms known respectively as special assessments, fees and taxes. Since a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that a levy of fee should, on the face of the legislative provision, be correlated to the expenses incurred by Government in rendering the services. If the money thus paid is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues for the benefit of the general public, it could be counted as fees and not a tax.

9. After independence of the country the Governmental functions increased manifold and various legislations were enacted and schemes were introduced for upliftment of the society. Many measures were introduced which contained provisions for imposing compensatory and regulatory fees. It was realized that the indicia of fee indicated in Shirur Mutt case was too technical and rigid and was not in tune with the requirement of the prevailing social conditions. The characteristics of tax and fee were then examined in considerable detail by a three Judge Bench in Sreenivasa General Traders. vs. State of Andhra Pradesh AIR 1983 SC 1246 and in paragraphs 30 and 31 of the judgment, the Court held as under:

> "The traditional view that there must be actual quid pro quo for a fee has undergone a sea of change subsequent to decision in AIR 1980 SC 1008. Correlationship 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 a "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 are compulsory exactions 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 present in 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 who obtains the benefit of the service. It is now increasingly realized that merely because the collections for the services 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 realized that the element of quid pro quo in the strict sense is not a sine quo non for a fee."

It is necessary to mention here that the observation made in para 47 of the judgment in the Shirur Mutt case that "If the money thus paid is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues for the benefit of the general public, it could be counted as fee and not a tax" may not be very accurate at least where the fee is being realized by the Government, Central or State, in view of a constitutional provision. Article 266 of the Constitution provides that all revenues received by Government of India, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys

received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of India", and all revenues received by the Government of a State, all loans raised by that Government by the issue of treasury bills, loans or ways and means advances and all moneys received by that Government in repayment of loans shall form one consolidated fund to be entitled "the Consolidated Fund of the State". In view of this specific provision any amount realized by way of fee by the Central Government or State Government has to be credited to Consolidated Fund of India or of the concerned State, as the case may be, and will thus necessarily get merged in the public revenues and cannot be set apart.

10. In Sreeniwasa General Traders (supra) the Court took note of the fact that presumably the attention of the Bench hearing Shirur Mutt case was not drawn to Article 266 of the Constitution. It was further observed therein that the Constitution nowhere contemplates it to be an essential element of fee that it should be credited to a separate fund and not to a consolidated fund.

11. In Municipal Corporation of Delhi and others vs. Mohd. Yasin AIR 1983 SC 617, it was held that compulsion is not the hallmark of the distinction between a tax and a fee. That the money collected does not go into a separate fund but goes into the consolidated fund does not also necessarily make a levy a tax. Though a fee must have relation to the services rendered, or the advantages conferred, such relation need not be direct; a mere casual relation may be enough. It was further held that it is neither necessary nor expedient to weigh too meticulously the cost of the services rendered etc., against the amount of fees collected so as to evenly balance the two. A broad correlationship is all that is necessary. Quid pro quo in the strict sense is not the one and only true index of a fee; nor is it necessarily absent in a tax.

12. The same question was again examined in considerable detail in Krishi Upaj Mandi Samiti and others vs. Orient Paper & Industries Ltd. 1995 (1) SCC 655. Here, it was held that it is not always possible to workout in mathematical precision the amount of fee required for the services to be rendered each year and to collect just that amount which was sufficient for meeting the expenditure in that year. Every correlationship between the levy and the services rendered is one of general character and not a mathematical exactitude. All that is necessary is that there should be a reasonable relationship between the levy of fee and the services rendered. There is no postulate of a fee that it must have a direct relation to the actual services rendered by the authority to each individual to obtain the benefit of a service. It was further observed that it is now increasingly realized that merely because the collections for the services rendered or for grant of a privilege or 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 of the nature of the levy whether it is a fee or a tax.

13. Secretary to Government of Madras and another vs. P.R. Sriramulu and another 1996 (1) SCC 345 is a decision rendered by a Bench of three learned Judges and the appeal was directed against the judgment of the High Court of Madras wherein Schedule (1) to the Tamil Nadu Court Fees and Suits Valuation Act, 1955 and sub-rule (1) of Rule 1 of Order II of the High Court Fees Rules, 1956 based on Article (1) of Schedule (1) of Madras Act No. XIV of 1955 were held to be invalid in so far as they related to the levy of court fees on ad valorem scale. The Court observed that the administration

of justice is one of the main functions of the State. It is also a fact that the function of the State in the modern time has become too expensive in encompassing a large area of activity. The State has not only to maintain a system of administration of justice, but also the maintenance of law and order. It has also to provide a system to enable its citizen to canvass their rights against the wrong done to them as well as to the State itself. It is for these reasons that the State came forward to levy fee by legislative amendments in order to cover up the expenses towards pay, allowances and pensions of judicial officers and establishment staff, their residential accommodations, court buildings, repairs and maintenance as well as other expenses under various heads mainly engaged and employed for the administration of justice. After taking note of the observation in Om Prakash Agarwal vs. Giri Raj Kishori 1986 (1) SCC 722, that in determining a levy as fee the true test must be whether its primary and essential purpose is the rendering of specific services to a specified area or class, it being of no consequence that the State may ultimately and indirectly be benefited by it, it was held that if a broad and general correlation between the totality of the fee on the one hand and the totality of the expenses of the services on the other is established, the levy will not fail in its essential character of a fee on the ground alone that the measure of its distribution on the persons or incidence is disproportionate to the actual services obtainable by them. The test of the correlationship is not in the context of the individual contributors, the test is on the comprehensive level of the value of the totality of the services, set off against the totality of the receipts. Accordingly, it was held that the test of correlation is to be reckoned at the aggregate level and not at the individual level. On these principles the appeal was allowed and the judgment of the High Court was set aside.

14. In a recent judgment rendered in Bombay Stock Exchange Brokers' Forum vs. Securities and Exchange Board of India 2001 (3) SCC 482 by a Bench of three learned Judges, the challenge levelled against the registration fee levied by the Securities and Exchange Board of India on Stock Brokers came up for consideration. The Bench after review of a number of earlier decisions, including Constitution Bench decision in Shirur Mutt case (supra), took note of the fact that in determining whether a levy is a fee or not, emphasis must be on whether its primary and essential purpose is to render specific services to a specified area or a class and if in that process it is found that the State ultimately stood to benefit indirectly from such levy, the same is of no consequence. After examination of the relevant Act and the Regulations, the Court held that since the amount collected under the levy account in the said case was being spent by the Board on various activities of the Stock and Securities market with which the petitioners are directly connected, the fact that the entire benefit of the levy does not accrue to the contributors i.e. the petitioners, would not make the levy invalid.

15. It will be thus seen that the statement of law made in Shirur Mutt case (supra) regarding the attributes of fee has undergone a sea change. The consistent view now is that there is no generic difference between a tax and a fee which are both compulsory exaction of money by public authorities. The correlationship between the levy and the services rendered should be one of general character and not of mathematical exactitude. Further, the broad and general correlationship between the totality of the fee on the one hand and the totality of the expenses of the services on the other, will be sufficient to justify the levy. The levy will not fail only on the ground that the measure of its distribution on the persons or incidence is disproportionate to the actual services rendered by

them. The true test being the comprehensive level of the value of the totality of the services set off against the totality of the receipts. The character of the fee is thus established. The vagaries in its distribution amongst the class do not detract from the concept of a fee as such.

16. The subject matter of challenge in the present case is registration fee which has been fixed by the State Government in exercise of power conferred by Section 78 of the Registration Act. The said provision reads as under:

> "78. Fees to be fixed by State Government. The State Government shall prepare a table of fees payable --
>
> (a) for the registration of documents;
>
> (b) for searching the registers;
>
> (c) for making or granting copies of reasons, entries or documents, before, on or after registration;
>
> and of extra or additional fees payable --
>
> (d) for every registration under section 30;
>
> (e) for the issue of commissions;
>
> (f) for filing translations;
>
> (g) for attending at private residences;
>
> (h) for the safe custody and return of documents; and
>
> (i) for such other matters as appear to the State Government necessary to effect the purposes of this Act".
>
> 17. The fixation of registration fee under Sub-section (a) on a graduated scale depending upon the value or consideration for which the instrument has been executed may be on the higher side. However, the fee for various other items enumerated in sub-sections (b) to (i) is very small, though the State has to incur a considerable amount of expenditure for the same. The high value transactions are generally in big cities where the value of the property is high and not in small towns or in rural areas. Nevertheless, the State Governments have to maintain offices of Sub-Registrars in small sub-

divisional towns and post staff which has to be paid salaries. Rules have been framed by various State Governments which lay down elaborate procedure for maintenance of Books and Registers

wherein copies of registered documents have to be kept. This necessarily requires trained manpower entailing expenditure in payment of their salary.

18. There is no material on record to show that the overall amount received by the Government by way of fee from the Registration department far exceeds the overall expenditure incurred in maintaining the said department. The High Court and also the District Court merely took into consideration the registration fee paid by the plaintiffs and did not at all examine whether there was any substantial discrepancy between the total amount of fee realized by the registration department and the total amount of expenditure incurred by the government in the maintenance and functioning of the department. The notification issued by the State Government could not be struck down merely by taking into consideration the registration fee paid by the plaintiffs and quantification of the value of services rendered to them.

19. Learned counsel for the respondents has placed reliance upon The Delhi Cloth and General Mills Co. Ltd. and others vs. the Chief Commissioner, Delhi and another AIR 1964 Punjab 492, State of Uttar Pradesh vs. The District Registrar, Meerut and another AIR 1971 Allahabad 390 and The Chief Commissioner, Delhi and another vs. The Delhi Cloth and General Mills Co. Ltd. and others AIR 1978 SC 1181 (which is a decision by a bench of two learned Judges in appeal preferred against the judgment reported in AIR 1964 Punjab 442) in support of his contention that the notification issued by the State Government prescribing the registration fee in tabulated form is illegal. It is not necessary to examine these cases in detail as in all these cases reliance has been placed upon Shirur Mutt case (supra) for holding that there must be an element of quid pro quo and that the fee realized must be correlated and must be spent for the purposes of imposition. As discussed above, the view taken in Shirur Mutt case (supra) has undergone a considerable change by subsequent decisions of this Court. Moreover, having regard to the express language used in Article 266 of the Constitution, it is not possible for the State Government to keep the fee realized in a separate fund other than the Consolidated Fund of the State. In view of the subsequent decisions of this Court, the view taken in the decisions relied upon by learned counsel for the plaintiff-respondents cannot be considered to be good law and they are hereby overruled.

20. For the reasons discussed above, the appeal is allowed with costs. The judgment and decree passed by the High Court and also by the District Judge and Senior Sub-Judge, Solan, are set aside and the suit filed by the plaintiff-respondents is dismissed.