

IN THE HIGH COURT OF SINDH, KARACHI

Constitution Petition No. D – 3172 of 2016

PRESENT:

MR. JUSTICE AQEEL AHMED ABBASI
JUSTICE MRS. KAUSAR SULTANA HUSSAIN

Mr. Cyrus Cowasjee and 2 others.....Petitioners

Vs.

Karachi Metropolitan Corporation.....Respondent

Petitioners: through Mr. M. Abdur Rahman, Advocate

Respondent: through Mr. Iqbal M. Khurram, Advocate
and Mr. Jawwad Dero, Addl. A.G. Sindh.

Date of Hearing: 12.10.2021.

Date of Short Order: 12.10.2021.

JUDGMENT

1. Through instant petition, petitioners have expressed their grievance against the respondent i.e. Karachi Metropolitan Corporation (KMC) for charging “mutation charges” from the petitioners in respect of an inherited property, whereas, following relief has been sought:-

A. DECLARE

- (i) That the impugned Challan is ultra vires and void.
- (ii) That the respondent has no authority to demand charges to be paid in respect of “Mutation Charges” where a person has inherited property through operation of law.

B. DIRECT

- (i) The respondent to reimburse the Petitioner in respect of Ground rent for the period prior to 1 July 2010.
- (ii) The respondent to reimburse the petitioners in respect of Mutation fees.

C. GRANT

- (i) Costs.
- (ii) Such other relief as this Honourable Court deems just and proper in the circumstances.

2. Briefly the facts as stated in the memo of petition are that the petitioners are the joint owners of immovable property comprising of Survey No.19, Civil Line Quarter No.8, Civil Line, Karachi, admeasuring 3927 square yard, which was owned by petitioners' father and paternal grant father (late) Rustom Fakirjee Cowasjee leaving behind a will by which he bequeathed his entire estate to his three sons with the following shares:-

S.No.	N a m e	Percentage
1.	Ardeshir Cowasjee	34%
2.	Cowasjee R.F. Cowasjee	33%
3.	Cyrus	33%

That probate was granted on the will in SMA No.105 of 2007 and subsequently the properties were recorded as being owned by the legal heirs of the (late) Mr. Rustom Fakirjee Cowasjee. However, at the time of recording the names of legal heirs of (late) Rustom Fakirjee Cowasjee, the respondent did not charge any fee, duty whatsoever from the legal heirs under the Sindh Local Government Act, 2001, the petitioners No.2 & 3's father Ardeshir Cowasjee passed away on 24.11.2012, leaving behind a will by which he bequeathed his entire estate to his two children, petitioner No.2 & 3. That a Letter for Probate bearing Succession Miscellaneous Application No.163/2013 was filed before the High Court of Sindh at Karachi in respect of estate of (late) Ardeshir Cowasjee, which was granted jointly in favour of petitioners No.2 & 3 vide order dated 17.12.2013, according to which, each of them were to inherit

equally as to the estate of the (late) Ardeshir Cowasjee in the following percentage:-

S.No.	Name	Percentage
1.	Ava Ardeshir Cowasjee	50%
2.	Rostom Ardeshir Cowasjee	50%

That as such and at the time of filing instant petition the legal heirs of the (late) Ardeshir Cowasjee held the following undivided shares in the subject property:-

S.No.	Name	Percentage
1.	Ava Ardeshir Cowasjee	17%
2.	Rustom Ardeshir Cowasjee	17%

The petitioners after demise of their father, (late) Ardeshir Cowasjee applied for their names to be recorded as the owners of the subject property in the record maintained by the erstwhile City District Government Karachi i.e. the predecessor in interests of the respondent. However, petitioners were confronted by a bank deposit challan dated 14.04.2015 issued by the respondent for a sum of Rs.1,299,452/- (Rupees One Million Two Hundred and Ninety Nine Thousand Four Hundred and Fifty Two) to be paid by the petitioners for the purposes of affecting the mutation of the names. Petitioners raised objection in writing through their Advocate against the impugned challan, particularly, the imposition of mutation fee amounting to Rs.1,299,452/- (Rupees One Million Two Hundred and Ninety Nine Thousand Four Hundred and Fifty Two) for being illegal, ultra-vires to the Constitution of Islamic Republic of Pakistan, 1973 and law, which according to the petitioners, was inherited to the petitioners through will, however,

the respondent did not submit any response to such representation and the petitioners were posed towards payment of the aforesaid amount, however, under objection and were constrained to file instant petition seeking declaration to the effect that respondent i.e. K.M.C. has no authority to demand mutation charges/fee in respect of subject property inherited through operation of law.

3. Learned counsel for the petitioners has vehemently argued that respondent i.e. K.M.C. has no authority to charge or collect mutation fee in respect of inherited property under the Sindh Local Government Act, 2013, as according to learned counsel, in the event of inheritance through will in terms of Section 213 of the Succession Act, 1925, the property stands evolved in the legal heirs of the deceased according to their share through transmission, whereas, it does not involve the application of the provisions of Section 5 of Transfer of Property Act, 1882, which according to learned counsel for the petitioners, relates to transfer of property between living persons only. Per learned counsel, petitioners are not the transferees of the subject property, which has been inherited through will, therefore, by operation of law in terms of Section 213 of Succession Act, 1925, the property of a deceased person stands evolved among the legal heirs as per their shares, which merely requires the recording of their names in the record of respondents, however, without charging any mutation fee. Learned counsel for the petitioners has also referred to provisions of Section 92 and 103 of the Sindh Local Government Act, 2013, read with entry at Sr. No.12, Part 1 of Schedule V of the Act, and submits that the respondents/KMC has the authority to impose tax on **transfer of immoveable property only**, whereas, there is no authority vested in the respondent/KMC to charge mutation fee. It

has been further contended by the learned counsel that in the case of inheritance, the property automatically stands evolved in the name of legal heirs by operation of law, therefore, does not involve any element of transfer in terms of Transfer of Property Act, 1882, nor it does authorize the respondents under the Sindh Local Government Act, 2013 read with Sindh Local Government Ordinance, 1972 (repeal) and Sind People's Local Government Ordinance, 1972, to charge or collect mutation charges/fee. While concluding his argument, learned counsel for the petitioners submitted that the term transmission is different from the term transfer and has referred to the definition of transmission as given in the Black's Law Dictionary Eleventh Edition and also defined by the Hon'ble Supreme Court in the case of ***Ghulam Ali v. Ghulam Sarwar Naqvi (PLD 1990 SC 1)***. Learned counsel for the petitioners has also referred to the following judgments, wherein, according to learned counsel for petitioners, no fee or tax can be charged in case of inheritance:-

1. *Government of North-West Frontier Province through Secretary Agriculture and others v. Rahimullah and others (1992 SCMR 750)*
2. *Federation of Pakistan through Secretary, Ministry of Petroleum and Natural Resources and another (2014 SCMR 1630)*
3. *Workers' Welfare Funds, Ministry of Human Resources Development, Islamabad through Secretary and others (PLD 2017 SC 28)*
4. *Continental Biscuits Ltd. v. Federation of Pakistan through Secretary Defence, Ministry of Defence, Islamabad and 3 others (2017 PTD 1803)*

4. Conversely, learned counsel for the respondent has argued that respondent/KMC has the authority to charge and collect the mutation charges at the time of mutation of names in their record in terms of Section 96 and 103 of the Sindh Local Government Act,

2013. It has been further contended by the learned counsel for respondent that in terms of Rule 36 and 27 of Sindh Peoples Local Council (Land) Rules 1975, read with West Pakistan Land Revenue Act, 1967 (West Pakistan Act XVII of 1967), the mutation fee can be charged by the council at the time of mutation of names from lessee, transferee or any other person, who may acquire any land or plot under these Rules. It has been further contended by learned counsel for the respondent that in terms of Section 46 of the Sindh Land Revenue Act, 1967, mutation fee is payable by the person in whose favour entry is made in any record or register of Board of Revenue, whereas, there is no requirement of law that such entry can be given effect only pursuant to transfer of property as argued by the learned counsel for petitioners. It has been prayed by the learned counsel for respondent that instant petition is misconceived, which may be dismissed.

5. Learned Additional Advocate General Sindh present on Court notice issued in terms of Section 27A CPC has supported the arguments of learned counsel for the respondent and submits that petitioners are required to make payment of mutation charges/fee under the Sindh Local Government Act, 2013, read with Rule 26 and 27 of Sindh Peoples Local Council (Land) Rule 1975.

6. We have heard the learned counsel for the parties, perused the record with their assistance and have also examined relevant provisions of law and the Rules as well as the case law as relied upon by the learned counsel for petitioners during course of arguments.

7. The precise controversy involved in the instant petition relates to authority of the KMC to charge mutation charges/fees in respect of inherited immoveable property comprising of Survey

No.19, Civil Line Quarter No.18, Civil Line, Karachi, admeasuring 3927 sq. yards, which was owned by the petitioners' father (late Rustom Fakirjee Cowasjee leaving behind a will by which he bequeathed his entire estate to his three sons, namely, (i) Ardeshir Cowasjee (34%), (ii) Cowasjee R.F. Cowasjee (33%), (iii) Cyrus (33%) respectively. The probate was granted on the will in SMA No.105/2007 and the properties were recorded as being owned by aforesaid legal heirs of (Late) Rustom Fakirjee Cowasjee, however, it is pertinent to note that respondents did not charge any transfer fee or charges from the legal heirs under the Sindh Local Government Act, 2001. Petitioners No.2 & 3's father, namely, Ardeshir Cowasjee, one of the legal heirs co-sharer in the property left behind by (Late) Rustom Fakirjee Cowasjee, passed away on 24.11.2012, leaving behind the will by which he bequeathed his entire estate to his two children, namely, Ms. Ava Ardeshir Cowasjee and Mr. Rustom Ardeshir Cowasjee i.e. petitioners No.2 & 3. A letter for probate bearing SMA No.163/2013 was filed before the High Court of Sindh, at Karachi, in respect of the estate of (Late) Ardeshir Cowasjee, which was granted jointly in favour of petitioners No.2 & 3 by order dated 17.12.2013, according to which, both the legal heirs inherited equal share (50% each) to the estate of (Late) Ardeshir Cowasjee. At the time of filing instant petition, the legal heirs of the (Late) Ardeshir Cowasjee held 17% each undivided share in the subject property, who approached the City District Government Karachi (CDGK) i.e. the predecessor in interest of KMC with the request to record their names as the owners of the subject property. However, petitioners were confronted by a bank challan dated 14.04.2015 for a sum of Rs.12,99,452/- only to be paid by the petitioners for the purpose of affecting the mutation of their names in their record. Being

aggrieved by such imposition of mutation fee/charges amounting to Rs.12,99,452/-, petitioners have filed instant petition wherein petitions have challenged the authority of the KMC to charge or collect any fee/charges towards mutation of names in respect of cases where property is inherited to the legal heirs through will. The case of the petitioners being Parsi is covered under the provisions of Section 213(2)(b) of the Succession Act, which provides that (*“in the case of will made by any Parsi dying after the commencement of the Succession Act, 1925, where such wills are made within the local limits of the Ordinary Civil Jurisdiction of Sindh and Balochistan High Court, and where such wills are made outside those limits, and so far relates to the immoveable properties situated within those limit, a Court of competent jurisdiction of Pakistan can grant probate of the will under which right is claimed.”*)

There seems no dispute with regard to acquiring of the right or title by the petitioners in the subject property through inheritance (will), therefore, this not a case, where the right or title in the immoveable property is acquired pursuant to an agreement covered under Section 5 of the Transfer of Property Act, 1882. The term “transfer of property” has been defined in the Act, to mean ***“an act by which a living person conveys property, in present or in future, to one or more other living persons.”*** In other words, under the Transfer of Property Act, 1882, the transfer of property means any act by which a living person conveys property to any other living person(s), whereas, in the case of inheritance (Will), as in the instant case, the right or interest in the property is acquired by the legal heirs after the death of a person holding right and title in such property, by operation of law. To further elaborate the distinction between acquiring right or title in a property through inheritance, and through an act by which a living person conveys property to

another living person, it can be said that by virtue of law of inheritance, the property automatically stands devolved and transmitted amongst the legal heirs of a deceased person, including immovable property, as per their determined shares, however, without any act by which a living person conveys property to one or more other living person(s). Whereas, in the case of acquiring right or title in the immoveable property, other than through inheritance (Will), provisions of Transfer of Property Act, 1882, are attracted according to which, there has to be an act of transferring the right, title or interest in the immoveable property by a living person to other living person(s). The term “transmission” though, not defined under the Transfer of Property Act, 1882, however, has been recognized as different and distinct from the term “transfer”. Reference in this regard can be made to the definition of term “transmission” under the Black’s Law Dictionary XIth Edition, according to which, transmission means ***“The passing of an inheritance to an heir”***. The Hon’ble Supreme Court in the case of **GHULAM ALI V. MST. GHULAM SARWAR (PLD 1999 SC 1)** has been pleased to elaborate the term “transmission” in the following terms:

“The main point, of the controversy in this behalf get resolved on the touchstone- of Islamic law of inheritance. As soon as an owner dies, succession to his, property opens. There is no State intervention or clergy’s intervention needed for the passing of the title immediately, to the heirs. Thus it is obvious that a Muslim’s estates legally and juridically vests immediately on his death in his or her heirs and their rights respectively come into separate existence forthwith. The theory of representation of the estate by an intermediary is unknown to Islamic Law of inheritance as compared to other systems. Thus there being no vesting of the estate of the deceased for an interregnum in any one like an

executor or administrator, it devolves on the heirs automatically, and immediately in definite shares and fraction. It is so notwithstanding whether they (the heirs) like it, want it, abhor it, or shun it. It is the public policy of Islamic law. It is only when the property has thus vested in the heir after the succession opens, that he or she can alienate it in a lawful manner. There is enough comment and case-law on this point which stands accepted.”

8. Having examined the nature of petitioners’ right and title acquired in the subject immoveable property through inheritance (will) in the light of above provisions of Transfer of Property Act, 1882, and Succession Act, 1925 as well as the judgment of the Hon’ble Supreme Court (supra), we are of the opinion that in the case of petitioners the subject immoveable property (as per respective share of petitioners), stood evolved/transmitted by operation of law of inheritance (will) and does not involve any act of transfer as defined in Section 5 of the Transfer of Property Act, 1882.

9. We may now examine the relevant provisions of Sindh Local Government Act, 2013 and also the provisions of Peoples Local Council (Land) Rules, 1975, under which, the respondent (KMC) issued the impugned challan to the petitioners in the sum of Rs.12,99,452/- towards mutation charges in respect of subject immoveable property. Since, in the impugned challan issued by the respondents to the petitioners demanding charges, there has been no reference to any provision of law, under which such demand was created. However, when the learned counsel for the respondents was confronted to refer to the relevant provisions of Sindh Local Government Act, 2013, whereby, authority to collect mutation fee/charges is vested in the respondents, learned counsel, in

response to such query, referred to the provisions of Section 96 and 103 of the Sindh Local Government Act, 2013. Perusal of the provision of Section 96 of the Sindh Local Government Act, 2013, shows that, it gives an authority to the council to levy taxes, rent, tolls and fee mentioned in Schedule 5 of the Act, 2013, whereas, in terms of Item No.12, Part 1 of Schedule 5 of Sindh Local Government Act, 2013, KMC has the authority to impose tax on transfer of immovable property. However, there is no authority vested in the KMC in terms of Section 96 read with Schedule 5 of the Sindh Local Govt. Act, 2013, to charge or collect mutation fee/charges. Similarly, Section 103 provides for framing the Rules under the Act, according to which, all taxes, rent, toll, fee and other charges levied by council shall be imposed, assessed, leased compounded, administered and regulated in such manner and such period may be prescribed. It further provides that Rules be framed under this Section for the purposes of assessment of collection of taxes. Learned counsel for the respondent referred to Peoples Local Council (Land) Rules, 1975, which according to learned counsel, are still applicable for the purposes of Sindh Local Govt. Act, 2013, and placed reliance on Rule 26 and 27 and argued that in terms of Rule 26 of Peoples Local Council (Land) Rules, 1975, the council is required to keep land register, showing the name of lessee, transferees or other persons, who may acquire any right over the land or applied under these rules, whereas, in terms of Rule 27, according to learned counsel, while registering names of transferees in such register, the council shall, as far as possible adopt the procedure laid down in the West Pakistan Act XVII of

1967 for mutation of names in respect of plots leased out by the Government and any entry made in such register shall be rectified by the council on furnishing of such proof and a mutation fee of 2% of the initial sale price. Reference by the learned counsel for respondent to aforesaid Rules in the instant case seems irrelevant, for the reason that in the case in hand, there is no act of transfer of immovable property under Transfer of Property Act, 1882, by a living person to another living person(s), nor there is any sale price of the subject property, upon which 2% of mutation fee could be charged, whereas, admittedly the subject immovable property stands devolved in the petitioners by operation of law through inheritance (Will). Moreover, aforesaid Rules do not over-ride the provisions of the Sindh Local Government Act, 2013, nor can enlarge the scope of the charging provisions and the authority as vested in KMC for the purposes of charging or creating any tax, fee, rent or other charges etc. as provided under the Sindh Local Government Act, 2013.

10. It is well settled legal position in law that in fiscal statutes, charging provisions are to be strictly construed. No tax, fee, charge or levy etc. can be imposed unless such authority is available under the constitution and the relevant statute in terms of clear and unambiguous language. No government or Authority can compulsorily extract money from any person or class of person either in the form of tax, fee, charge or levy, unless specifically authorized under the law. It is also settled legal position that there is no room for any intendment or presumption in a fiscal statute, whereas, burden lies upon the Government, or the authority to establish that there is a provision of the statute, whereby, charge has been created for the purpose of collecting tax, fee, levy or any other charges from any person or class of person(s) in unequivocal

and clear terms, whereas, in case of any ambiguity, the benefit is to be extended to the person or class of person(s) upon whom such incidence or charge is created. Reliance in this regard can be placed in the following cases:

- (i) ***Commissioner of Income Tax, Companies-II, Karachi v. Messrs Muhammad Usman Hajrabai Trust Imperial Courts, Karachi (2003 PTD 1803)***
- (ii) ***Province of the Punjab through Secretary, Govt. of Punjab, Excise & Taxation Deptt. and others v. Muhammad Aslam and others (2004 SCMR 1649)***
- (iii) ***Collector of Sales Tax and Federal Excise v. Messrs Abbot Laboratories (Pakistan) Ltd., Karachi (2010 PTD 592)***
- (iv) ***Continental Biscuits Ltd. v. Federation of Pakistan through Secretary Defence, Ministry of Defence, Islamabad and 3 others (2017 PTD 1803)***

11. In view of hereinabove facts and circumstances of the case and in the light of the aforecited judgments, we are of the considered opinion that the case of the petitioner, whereby, immovable property is admittedly acquired from the estate left behind by the deceased father of the petitioners through inheritance (Will), therefore, the right and title in the subject inherited immovable property stood devolved automatically in the petitioners as per their respective share by operation of law. Accordingly, there is no element of transfer of property as defined under Section 5 of the Transfer of Property Act, 1882 is involved in such eventuality. It is further held that under the Sindh Local Government Act, 2013, Karachi Metropolitan Corporation (KMC) has no authority to charge or collect mutation charges/fee in respect of immovable property, wherein, the right and title is acquired by way of inheritance, through (Will) in the instant case, as it does not involve any act by which a living person conveys

property to one or more other living person(s), therefore, not covered under the definition of transfer as defined under Section 5 of the Transfer of Property Act, 1882. Moreover, since there is no agreement of sale, therefore, no amount can be charged on mutation as there is no sale consideration in the case of inheritance or transfer of property by way of gift without consideration. Consequently, the impugned challan issued by the respondent to the petitioners towards charging mutation charges/fee in the sum of Rs.12,99,452/- (Rupees Twelve Lac Ninety Nine Thousand Four Hundred Fifty Two Only) in respect of subject inherited immoveable property was without lawful authority which is hereby declared to be illegal for having been issued without lawful authority. The aforesaid amount collected by the respondent/KMC in this regard may be refunded to the petitioners within a period of four week from the date of recording reasons in the instant judgment. Instant petition was allowed vide our short order dated 12.10.2021 and above are the reasons for such short order.

JUDGE

JUDGE