(1975) 01 OHC CK 0004

In the Orissa High Court

Case No : O.J.C. No. 447 of 1974

A. Raja Rao Dora APPELLANT

Vs

Dhenkanal Municipal Council and Others RESPONDENT

Date of Decision : 29-01-1975

Acts Referred:

Orissa Municipal Act, 1950 — Section 11, 295, 295(2), 298, 548
Orissa Municipal Rules, 1953 — Rule 28(3)

Citation : (1975) 41 CLT 415

Hon'ble Judges : R.N. Misra, J;K.B. Panda, J

Bench : Division Bench

Advocate : R. Mohanty, for the Appellant; S.C. Mohapat and D.K. Mohapatra and A.G.A., for the Respondent

Judgement

R.N. Misra, J.—Within the jurisdiction of the Dhenkanal Municipal Council (opposite party No. 1) is located a market known as the ''Darbar Hat'' which meets on Sundays only. Lot of people congregate there for the sale of various articles like cattle, food stuffs, grocery and the like. Petitioner carries on business in photograph and goes to the said market for such)purpose. During the financial year 1973-74, the said market along with the right to collect the fee had been farmed out to one Manju Khan for a sum of Rs. 36,000/-. For the year 1974-75, the light to collect the rates from the market was given to opposite party No. 3 for a sum of Rs. 47,600/-.

According to Petitioner''s allegations, the market is located on an uneven land and is absolutely open. There were three tin sheds of the size of 10 feet x 20 feet which had been constructed :many years back and now exist in a dilapidated condition. No amenities have been provided in the area and the traders are forced to look to their own conservancy and convenience. There is no lighting arrangement; the money realised from the person to whom the right of collecting the prescribed fees from the market is farmed out is put into the general funds (''If the municipality and no investment is made for the improvement thereof.

The settlee of the market for the year collects fees from traders who come into the area for business of buying and selling. According to ''Petitioner, u/s 295(2) of the Orissa Municipal Act, a fee is realisable in such circumstances and quantified sum has been received from opposite party No. 3. in lieu of such fee and the right to collect the fee has been made over to him. Whether it is collected by the Municipality directly or by opposite party No. 3, it does not lose the character of ''fee'' and in the absence of quid pro quo, the collection of fee is unauthorized and liable to be struck down.

2. In the first counter affidavit of the Executive Officer of the Municipal Council filed on 17th of June, 1974, it was pleaded that the Darbar Hat also known as ''Alasua Hat'' was in from the time of the ex-state of Dhenkanal and the Ruler had then authorised the Municipal authorities to collect fees from the said public market. Section x 295 of the Municipal Act of 1950 authorised the Council to levy and collect various fees and authorised the Municipal Council also to farm out such fee for any period not exceeding three years at a time. The arrangement entered into with opposite party No. 3 was in exercise of the said power. It was also contended that the Municipal Council was so farming out the right to collect fee from the market from before. The position is accepted that the right to collect the fee under the said section has been farmed out to opposite party No. 3 for the year for a sum of Rs. 47,600/-. The following allegations were made with reference to the claim of Petitioner of want of quid pro quo:

40 That the weekly market is regularly claimed and the public health of the municipality which is affected by the daily market is protected and also the approach roads to the market are also repaired and maintained in good condition by the municipality for the facility of the traders and the purchasers of the public market from the fund of the municipality which is intended to render service.

41. That a well for the purpose of supply of water to the market population is maintained by the municipality and periodical necessary expenses are made for maintaining the purity of the well in order to avoid any diseases.

42. That assuming the fees are in the nature of tax, it is authorised by the Legislature and accordingly a quid pro quo is not necessary element of the fees levied.

Petitioner thereafter filed a rejoinder wherein he alleged that the fee in question could not be treated as a tax. In paragraphs 6 to 11 of the rejoinder, in relation to the plea of quid pro quo, he asserted:

6. That in reply to paragraphs 39 and 40 of the Counter Affidavit, the deponent states that the fees collected are not at all utilised for the purpose for which it is collected.

The weekly market is never cleaned, the Hat which meets once a week on Sundays and conceding for the sake of argument that cleansing is done as alleged, the same is part of the general duty of the Municipality enjoyed under law common to all the inhabitants in the Municipal area and not a special service rendered to the traders and purchasers within the Hat from whom fees are collected. Fees are collected both from purchasers and sellers as indicated in the rate chart annexed here to as Annexure-5.

7. The allegations that public health affected by daily market is protected, is totally false. The Darbar Hat sits on every Sunday and no trading activities are carried on any other day, nor are there any permanent stalls nor are there any stalls on Hat days.. Traders go to sell their goods in the open. Some traders to get protection from sun and rain, put tarpaulin which they dismantle in the evening and carry away. The Municipality also puts up a temporary tarpaulin shed on each Hat day and dismantles the same in the evening....

8. The assertion made in paragraph 40 that the approach roads are maintained is equally false. There is only one road leading to the Hat and the same is situated on rocky terain and does not need any maintenance. Alternatively, it is submitted that the protection of health and maintenance of roads is the duty cast upon the Municipality statutorily for all the inhabitants of Municipal area and no special service whatsoever rendered to the persons from whom the fees is levied.

9. In reply to paragraph 41 it is submitted that the went in question was dug some time in 1952 and is in a hopeless condition of disrepair. The said well not only caters to the needs of the traders and purchasers but also to the nearby inhabitants and the cost of maintenance of the well is not more than Rs. 25/- per year.

10. It is submitted that conceding for the sake of argument that the services rendered by the Municipality as stated in paragraphs 39, 40 and 41 of the counter affidavit are special services, meant for the people who pay the fees, there is absolutely no co-relation between the quantum of fees levied and the services rendered and the total fees realised will be about Rs. 49,000/- per annum; the expenditure on the aforesaid heads cannot exceed Rs. 1,000/- per annum, and as such the same is a tax, not authorised by law in the absence of any co-relation.

11. That no scavengers are engaged to dean the Hat even on the days following the Hat day. On 8th of August, 1974, the Executive Officer of the Municipal Council filed another affidavit wherein he asserted that the Municipal Council had resolved to spend a sum of Rs. 30,000/- for improvement of the market area. In paragraph 9, it was stated:

...This development of the market area would attract more traders into it and that would be for the benefit of the tax-payers of the Municipality.

Therein, it was further pleaded that a sum of Rs. 5,000/- was proposed to be spent for extending the road leading to the Hat. This would facilitate transport of the goods meant for sale. In paragraph 11, it was stated that ''the Municipality had proposed to level the market area by expending a sum of Rs. 15,000/-.

Some sheds which had remained half constructed were to be completed by spending more money so that traders could seek protection from the sun as also during rain. It is conceded that the market area is in an open field, in paragraph 13 of this affidavit, but it was claimed that trees would be planted to provide shade to animals as also the population coming within the market area for business purpose. It is contended that these proposed expenditures on different heads should be taken as quid pro quo.

3. Section 295 of the Municipal Act provides:

(1) The Municipal Council may provide places for use as public markets.

(2) Subject to such control as may be prescribed, the Municipal Council may in any public markets levy anyone or more of the following fees at such rates as may appear to it proper or may farm out such fees for any period not exceeding three years at a time on such terms and subject to such conditions as it maydeem fit

(a) fees for the use of, or for the right to expose goods for sale in such markets

(b) fees for the use of shops, pens or stands in such markets;

(c) fees on vehicles, carts, carriages or pack-animals carrying or on persons bringing goods for sale in such markets;

(d) fees on animals brought for sale into, or sold in such markets; and

(e) licence fees on brokers, commission agents, weigh men and measurers practising their calling in such markets.

(3) ... ...

It is not disputed at the Bar that in exercise of powers under Sub-section (2) of Section 295 of the Act, the right to collect fees has been farmed out. In fact, the detailed Schedule has been placed before us authorising the rates of different fees.

4. In order that the collection of fees may be valid, quid pro quo has to exist. Reliance is placed by Mr. Mohanty for Petitioner on the observation of Venkata Rama Aiyar, J, speaking for the Division Bench in the case uf P.P. Kutti Keya and Others Vs. The State of Madras and Others, , at page 633, which runs to the following effect:

A fee is what is charged for services rendered by the person who charges it. When the State, for example, introduces licensing, it is entitled to charge for the expenses incurred in maintaining an establishment for licensing and that it is properly termed a fee. The fee prescribed in Rule 28(3) falls under this category and is perfectly legitimate. But the levy u/s 11 is for no services rendered. It is really a tax levied for raising funds for constructing market.

According to Mr. Mohanty, the expenditures on various heads as indicated in the counter affidavit of the Municipal Council, such as raising a wall around the market, laying roads up to the market area or completing the sheds are in the nature of capital investment and cannot be construed as expenditures on services rendered to the fee-payers. We agree with the contention of Mr. Mohanty that these are indeed in the nature of capital investment and would not come within the principle of quid pro quo or as return for the fee paid in the strict sense.

In the case of Girija Prasad Bose and Anr. v. Executive Officer Jajpur Municipality and Ors. AIR 1972 Cutt. 667, a Bench of this Court examined at length a dispute of this type. The observations of the Supreme Court in the case of The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., , were quoted running to the following effect:

...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 as tax. 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 assesments, fees and taxes.

The observations in the majority judgment in the case of Corporation of Calcutta and Another Vs. Liberty Cinema, , were also extracted, where the position of law was indicated thus:

The conclusion to which we then arrive is that the levy u/s 548 is not a fee as the Act does not provide for any services of special kind being rendered resulting in benefits to the persons on whom it is imposed. The work of inspection done by the Corporation which is only to see that the terms of the licence are observed by the licensee is not a service to him. No question here arises of corelating the amount of the levy to the costs of any service....

Examining the matter further, this Court said:

It is true that the concept of quid propos does not require a cent per centum return of service in lieu of fees taken. But as has been indicated in several decisions some of which we have already referred to there must be a general correlation and an attempt must be made to establish the relationship between rendition of service in lieu of the fee. While to each individual licensee paying the fee such return in full may not be possible or practicable, it is always possible to show that to licensees as a class such service has been rendered.

It would thus appear that in order that a fee may be sustained, quid pro quo has to be established, that is the fee must be correlated to the return. In the instant case, we are satisfied that there is abscene of quid pro quo.

5. Mr. Mohapatra for the Municipal Council tried to draw a distinction on the ground that this is not a case of collection of fees as such and we must take note of the fact that the Municipal Council has already farmed out its right in favour of

opposite party No. 3. Such a contention has no foundation at all. Whether the Municipality directly collects the fee or farms out its right as authorised under Sub-section (2) of Section 295 of the Municipal Act, what ultimately is collected does not change its character and continues to be fee which in order to be sustained must answer the requirement of quid pro quo. We would accordingly hold that the fee prescribed by the Municipal Council is not sustainable. It is true that licence fee is within the permissible limit indicated u/s 298 of the Act. If adequate services were rendered and the principle of quid pro quo is supportable, the limit of the fee could go up to twenty per centum of the gross income. While in the instant case it may be within the statutory limit indicated in Section 298 of the Act, yet the demand is bad as it has ceased to be a fee in the absence quid pro qho.

6. We would accordingly allow the writ application, quash the collection of the fees in question and restrain the Municipal Council from enforcing the demands. We, however, make it clear that it is open to the Council to raise a proper licence fee keeping in view the principle indicated in Girija Prasad''s case 2. We make no order as to costs.

K.B. Panda, J.

7. I agree.

