(1984) 09 OHC CK 0014

In the Orissa High Court

Case No : O.J.3C. No''s. 1946 to 1951, 2149, 2150, 2629, 2630,1701, 1702, and 1704 of 1983, 323, 324, 325, 546, 560 to 564, 643, 644, 719, 720, 775, 779 to 784, 808, 809, 810, 945, 947 and 1001 of 1984

C.D. Kamdar and Others — APPELLANT

Vs

State of Orissa and Others — RESPONDENT

Date of Decision : 11-09-1984

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 12, 2, 38, 90(7)
Boards Excise (Fixation of Fees on Mohua Flowers) Rules, 1976 — Rule 5
Constitution of India, 1950 — Article 110, 19, 199
Forest Act, 1927 — Section 2(4), 41
Orissa Excise (Mohua Flowers) Rules, 1976 — Rule 10, 9

Citation : (1985) 1 OLR 291

Hon'ble Judges : D. Pathak, C.J;S.C. Mohapatra, J

Bench : Division Bench

Advocate : Ranjit Mahanty and Sanjit Mohanty in Sls. 1 to 10, S.C. Ghose, in Sls. 11 to 26, M. Jain, in Sls. 2 and 29, B. Agarwal, in Sls. 28 and 29, A.C. Mohanty, in Sls. 30 to 32, Sanjit Mohanty, in Sls. 33 and A.K. Misra, in Sls. 33 to 39, for the Appellant; Advocate General and S.K. Das, A.S.C., for the Respondent

Final Decision : Dismissed

Judgement

S.C. Mohapatra, J.—All the petitioners, thirty-nine in number, carry on the business of purchase of Mohua flowers in the State of Orissa and export of the same outside the State. They have assailed the legality and validity of the Board''s Excise (Fixation of Fees on Mohua Flowers) Rules 1976, and, in particular, notification No. 454-XIV. 3/82-EX. dated the 5th February, 1982, enhencing the rate of fee for issue of pass to export Mohua flower. As all the writ applications involve common question of law, they are heard together and shall be disposed of by this Judgment.

2. Mohua flower is the matured sugary flower of Mohua tree the botanical name of which is Bassia Latifolia or Bassia Longifolia. These trees grow in abundance in

the forests of Orissa and also in some private lands. A reference to the commercial Products of India by Sir George Watt, published in the year 1908 at Page-118 and the Silviculture of India. Trees, Volume 11 by Mr. R. S. Troup, published in 1921 at page-(41 botl under the authority of His Majesty''s, Secretary of State for India it Council, reveals that the flowers of Mohua tree appear as great cluster near the ends of the thick branchlets early in February and the flower open from the end of February to April each year. The cream-coloured corolls fleshy, and sweet fall in showers to the ground soon after opening every morning just after sunrise. Fall from a single tree is completed within 7 to 10 days. Yeild of each tree ranges from 5 to 8 maunds (1 maund 37-3242 Kgs.). The chief purchasers of the flowers are the distillers. In past, it was exported to Europe to be used for distillation.

Mohua flower was a forest produce under the Indian Forest Act, 1927 (Act 16 of 1927) and is also a forest produce under the Orissa Forest Act, 1972, (Orissa Act 14 of 1972) whether found in or brought from forest or not. Thus, Government has regulatory power on the. movement of Mohua flower under the forest legislations-See 29 (1.963) C. L. T. 150 (Kasi Prasad Sahu v. State of Orissa and Anr..) There was however, no law empowering the State Government to impose restriction on sale, possession and import and export of Mohua flower. In order to ensure adequate supply of Mohua flower to the "distilleries, it was felt necessary to impose such restrictions. Accordingly, taking into consideration the charactristics and use of Mohua flower, it was included as an intoxicant by amending the Bihar and Orissa Excise Act, 1915 (B. and O. Act 2 of 1915) (here in after referred to as the ''Act''), in Orissa Act 36 of 1975. Since there after, the provisions of the Act also govern Mohua flower. To carry out the purposes of the Act in connection with Mohua flower, the State Government is in exercise of the powers u/s 89 of the Act made a set of rules called the Orissa Excise (Mohua flower) Rules 1976 (here in after referred to as the ''State Rules''). The Board of Revenue, Orissa (here in after referred to as the ''Board'') in exercise of the powers u/s 90(7) of the Act has also made a set of Rules for prescribing the scale of fee etc. which are called Board''s Excise (Fixation of fees on Mohua flower) Rules, 1976 (here in after called the ''Board Rules). Both the sets of Rules came into force on 1. 4. 1976.

3. The validity or legislative competence of the amendment of the Act including Mohua flower as an intoxicant or the State Rules have not been challenged at any time and in these writ applications also they are not challenged. The Board''s Rules which prescribed the rates of fees u/s 90(7) were not challenged before the amendment of rule 5 therein enhancing the rate of fee to issue pass for export of Mohua flower from Rs. 5/- to Rs. 25/- to be effective from 1. 4. 1982. Thus, the main and the real focus of controversy is the power of Government to levy and realise large fees for pass to export Mohua flower as per the scales fixed under the Board''s Rules.

4. From the allegations in the petitions and the replies there to the following

facts are revealed :

(a) Total Fees collected under the Board''s Rules : 1976-77 ... Rs. 11, 57, 000 1977-78 ... Rs. 11,52,000 1978-79 ... Rs. 14,99,000 1979-80 ... Rs. 12,00,000 1980-81 ... Rs. 13,28,780 1981-82 ... Rs. 18,86,904 1982-83 ... Rs. 49,22,425 1983-84 ... Rs. 65,74,300

(b) Fees in respect of a pass for export under Board''s Rules 1976-77 ... Nil. 1977-78 ... Nil. 1978-79 ... Rs. 6,43,884 1979-80 ... Rs. 4,96,303 1980-81 ... Rs. 9,91,817 1981-82 ... Rs. 10,69,820 1982-83 ... Rs. 8,42,735 1983-84 ... Rs. 31,09,000 (c) Yearwise expenditure towards pay and allowances as of the staff sanctioned by the Government ... Rs. 5,05,500 (d) Yearwise expenditure on communication (Roadways) under State Plain of Forest Department : 1980-81 ... Rs. 1,86,300 1981-82 ... Rs. 1,94,000 1982-83 ... Rs. 2,00,000 5. On the premises as stated above, Mr. Ranjit Mohanty, the learned counsel for the petitioners in some of the writ applications urged. the following contentions :

(a) Under the Act and the State Rules the Board of Revenue has no power to make rules fixing the rate of fee for levy of the same which is not strictly a fee for the purpose of export of Mohua-flowers.

(b) The levy for a pass to export Mohua flower bears no relationship with the service rendered to the pass-holder and is not therefore, a fee in the true sense and is a tax for which the legislature has no power under the Act.

(c) Alternatively, the enhancement of fee for a pass to export is in the nature of collection of revenue for the general purpose and is, thus a tax and not fee in the strict sense.

Mr. R. Agarwalla, the learned counsel for some of the petitioners while adopting the argument of Mr. R. Mohanty, took us through the various provisions of the Act and other Rules thereunder to indicate that the levy does not fit into the scheme of the Act.

6. The learned Advocate General justified the levy as a licence fee and contended that the same is levied for the privilege of the State Government being parted with in favour of the petitioner as consideration and in such cases, question of quid pro quo is not to be insisted upon. Altimately, it is urged in support of the Levy that there is covrelationship between the levy and the service rendered.

7. Mr. R. Mohanty, the learned counsel for some of the petitioners submitted that the power of the Board u/s 90(7) of the Act is to levy fees simpliciter. He cited the case reported in 34(1968) C.L.T. 122 (S.C.) (Laxmikant Sahu v. Supdt. of Excise, Berhampur and Ors.) in support of the contention. Pending the entire judgment the contention as raised by Mr. Mohanty, is not speltout. A decision is an authority only for what it actually decided and not for what may logically follow from it. Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions, which may be found there, are not intended to be . expositions of the whole law but

governed or qualified by particular facts of the case in which such expressions are to be found See Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others, The case of Laxmikanta Sahu (supra) was considered by the Supreme Court in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, In para-61 at page-1134 it has been observed that in that case it was expressly conceded on behalf of the State of Orissa that the levy was a tax and not a fee. The decision being based on a concession did not involve the determination of the point whether the fee levied u/s 90(7) of the Act is a fee simpliciter.

8. In order to appreciate the rival contentions, it is necessary to keep in mind the scheme of the Act and the Rules. Collection of Mohua flower, possession, sale, import and export there of are parts of the trade in Mohua flower. The Act envisages regulation of trade in Mohua flower. Section 5 of the Act empowers the Board to regulate the maximum or minimum quantity of any intoxicant which may be sold by retail sale. In exercise of this power a notification has been issued on 30. 3. 1976 in respect of the limit of retail sale of Mohua flower in different areas of the State. Section 7(1) provides for the administration of the Excise Department and the collection of Excise Revenue including fees within a district by the Collector who shall be subject to the control of the Excise Commissioner and the Commissioner of the Division as provided in Section 8(1). u/s 18(1) possession of any intoxicant is totally prohibited unless the same has been obtained from a licensed vendor of the said intoxicant. Section 19 liberalises the prohibition in case of persons who are not licensed to manufacture, collect or sell any intoxicant to the limit of the quantity fixed by the Board for retail sale. Rule 3 of the State Rules is to this effect only. For the privilege of storage and possession beyond the limit, a person is required to make application as provided in Rule 4 of the State Rules and on such application the collector or any other Excise Officer authorised by him is to issue a permit on payment of fee by that person. Rule 3 of the Board''s Rules prescribes the rate of fee. The fee so collected is a licence fee for the grant of privilege of storage and possession of Mohua flower. u/s 20 of the Act no intoxicant can be sold except under the authority and subject to the terms and conditions of a licence. Rule 12 of the State Rules provides for giving effect to the restriction on sale of Mohua flower. It provides for sale of Mohua flower beyond the limit of retail sale by licensed vendors to persons possessing permit to possess the same. For that purpose, it provides for application indicating the place and premises wherefrom the sale is made and the quantity of sale during the year for which permit is applied for. Before issue of the licence an enquiry is made regarding the storage and possession. In the Rules, as it originally stood, it was prescribed that a fee shall be paid for obtaining the licence. However, the said provision is now amended and no fee is required to be paid. Consequently, Rule 7 of the Board''s Rules which prescribed the rate of fee for licence to sell, has been deleted. As the matter stands, for grant of the privilege to sell, no licence fee is levied although the restriction is there. Although the Act provides for prohibition or restriction on

transport and Rule 11 of the State Rules provided for the same restrictions as in the case of import, shortly after the State Rules came into force, those restrictions were removed and now Rule 11 of the State Rules provides that there shall be no restriction for transport of Mohua flower inside the State. Section 9 of the Act provides for prohibition of import of an intoxicant. Under Rule 8 of the State Rules only the parsons possessing licence to score and possess Mohua flower were to be permitted to import after obtaining a proforma permit. For obtaining a permit, application is to be made as provided in Rule 7 of the State Rules. An enquiry is to be made by the Collector and on the basis of his satisfaction, the Superintendent is to issue a permit granting the privilege to import for which a fee is to be paid. Rule 4 of Board''s Rules prescribes the fee for that purpose. Section 10 of the Act imposes restriction on export and transport. So far as transport, it has already been indicated that the same has been made free. Section 12 also prohibits export of an intoxicant without pass. Rule 9 of the State Rules prescribes that only persons possessing a permit for storage and possession and licence for sale of Mohua flower can export Mohua flower under authorisation by the Excise ommissioner. Rule 10 of the State Rules prescribes that an application is to be made by such persons intending to export. The Excise Commissioner being satisfied is to authorise the collector to issue a pass in the proforma on payment of fee by the person. Originally, Rule 6 of, the Board''s Rules prescribed the rate of fees. It was deleted by notification dated the 2nd June, 1976 and since then no fee was levied for . obtaining a pass to export Mohua flower. By Board''s notification dated 26. 10. 1978 fee for export pass was again levied by inserting the same as Rule 5. The rate was Rs. 5/- per quintal. Thus, for the privilege granted to specified persons to export Mohua flower, a licence-fee was levied. There was no objection to this levy. On 5. 2.1982, the Board amended the rate by notification enhancing it from Rs. 5/- to Rs. 25/-This enhancement has given rise to the present writ applications. While staying operation of the impugned notification as an interim arrangement, this Court directed that petitioners shall pay the fee at the rate of Rs. 10/- per quintal which is continuing.

9. Section 38 of the Act provides that every licence, permit or pass under the Act :

(a) shall be granted.

(i) on payment of such fees, if any,

(ii) Subject to such restrictions and on such conditions;

and

(b) Shall be in such form and contein such particulars as the Board may direct.

Section 42 empowers the authority to cancel or suspend the permit, pass or licence under conditions stated therein. Section 37 provides for exemption in certain cases. 10. With similar provisions in the Punjab Excise Act (1 of 1914)

Supreme Court in Har Shankar''s case (supra) held in paragraph 38 of page-1129 that they are in conformity with the hoary rights which the Government in all countries have exercised in matters concerning intoxicants. In paragraph 53 at page-1132 it was held that there is no fundamental right to do trade or business in intoxicants. It held;

"...The State, under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxi-cants-its manufactures, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no affective regulation of various forms of activities in relation to intoxicants ..."

In paragraph 55 at page-1133, it has been held :

" Since rights in regard to intoxicants belong to the State, it is open to the Government to part with those rights for a consideration......The power of the Government to charge a price for parting with its rights and not the mode of fixing that price is what constitutes the essence of the matter. Nor indeed does the label affixed to the price determine either the true nature of the charge levied by the Government or its right to levy the same."

11. We are, therefore, of the clear view that the wider right to prohibit absolutely trade in intoxicants in any form includes the narrower tight to permit dealing in intoxicants in such terms of general application as the State deems expedient. Since rights in regard to intoxicants belong to the State, it is open to the Government to part with these rights for a consideration. Accordingly, the levy called fee in the Act and Rules, challenged in these writ applications, is a consideration to part with the right of the State Government and is not questionable on the ground that there is no service rendered or the service rendered is insignificant having no reasonable co-relationship with the fee collected.

12. Mr. R. Mohanly has cited catena of decisions of the Supreme Court in support of his contention that there is no quid pro quo for the fee levied. We have considered, in short, the decisions relied upon by the learned counsel for the petitioners. At the thereshold it may be said that those decisions can he distinguished on the short ground that there was no dispute in those cases that the levy was a fee requiring co-relationship with the service rendered. The extent of co-relationship was examined for the justification of the levy. In those cases the question whether the levy was a fee or a consideration for parting with the right of the State Government was not examined.

(i) The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., relates to fee u/s 76 of the Madras Hindu Religious and Charitable Endowments Act which provision itself specifically provides for the contribution to be levied for service rendered.

(ii) The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and

Others, relates to levy for development of the Mining Areas which is a levy for service rendered.

(iii) Corporation of Calcutta and Another Vs. Liberty Cinema, relates to a licence fee imposed by a local body.

(iv) Nagar Mahapalika Varanasi Vs. Durga Das Bhattacharya and Others, also relates to a licence fee by a Municipality.

(v) A. I. R. 1983 S. G. 617 (Municipal Corporation of Delhi and Ors. v. Mohd. Yasin) is a levy by local body regulating slaughter of animals.

(vi) The State of Maharashtra and Others Vs. The Salvation Army, Western India Territory, relates to contribution for regulating public trusts. It was held that a fee for regulating the trust with a view to preserve it, is a special service rendered for benefit of the trust.

(vii) The Delhi Cloth and General Mills Co. Ltd. Vs. The Chief Commissioner, Delhi and Others, relates to a fee under the Delhi Factories Rules. One of the objects of the fees levied in that case was that in course of discharge of their duties and obligations the Inspectors are expected to give proper advice and guidance so that there may be due compliance with the provisions of the Act which is a service rendered.

(viii) Kewal Krishan Puri and Others Vs. State of Punjab and Another, relates to the levy under the Punjab Agricultural Produce Markets Act. The object of the Act is to regulate markets to eliminate middleman and bring the producer direct to the purchaser. In that case, no right of the State is parted with. Moreover as has been held in Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others, the rate in that case was increased to compensate the market committees for having contributed one crore rupees to the Medical College at Faridkote. It was not one of the intents and purpose of the levy within the provisions of the Statute.

(ix) Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others, is a decision on regulation of markets under the Andhra Pradesh (Agricultural Produce and Live stock) Markets Act.

(x) Indian Mica Micanite Industries Vs. The State of Bihar and Others, relates to levy for possession of denatured sprit under the Bihar and Orissa Excise Act. The finding of the High Court that the levy was a fee was not challenged in the Supreme Court and on that basis the decision was rendered.

(xi) Southern Pharmaceuticals and Chemicals, Trichur and Others Vs. State of Kerala and Others, is a decision on the Kerala-Excise Act. It relates to levy of Supervisory charges on rectified spirit. Accepting the levy as a fee, the matter was examined if there was co-relationship.

13. Let us examine the matter treating the levy to be a fee.

Our constitution for legislative purposes made a distinction between a tax and a fere. In Articles 110 and 199 of the Constitution, two categories of fees have been mentioned. They are : fees for licences and fees for services rendered. As has been observed in A. I R. 1954 S. C. 282 (supra) in the first class of cases i.e., fees for licences, Government simply grants a permission or privilege to a person to do something which otherwise that person would not be competent to do, and extracts fees heavy or moderate from that person in return for the privilege that is conferred. Illustrating the licence fees for Motor Vehicles it. was held that the costs incurred by Government in maintaining an office or bureau for the granting of licences may be very small and the amount of imposition that is levied is based really not upon the costs incurred by the Government but upon the benefit that person receives. The tax element is predominant in such cases. If the money paid by licence holders goes for up keep of roads and other matters of general public utility the licence fee cannot but be regarded as a tax. In other class of cases, i.e., fee for services rendered Government does some positive work for the benefit of persons and the money is taken for the return for the work done or services rendered.

14. While the petitioners claim that there is no service rendered to them in return for the money taken from them, the State Government claims that forest roads are constructed which is a service rendered. Mr. Mohonty, rightly submitted that construction of roads is a matter of general utility and not a service rendered to the petitioners. As we shall find shortly after, the entire money is not spent for general public utility. Nor is it the intention of the Act and Rules that the fees would be collected for matters of general public utility. '' As has been held in The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others, where the specific service is indistinguishable from public service, enquiry is to be made as to the primary object of the levy and the essential purpose intended to be achieved.

"Tax" and "Fee" belong to the world of Public Finance. Even in The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., assistance of the treatises on public finence was taken to find out the distinction between the tax and the fee.

It has been well expressed by Chinnappa Reddy, J in Municipal Corporation of Delhi and Others Vs. Mohd. Yasin, ;

"Words and phreses take colour and character from the context and the times and speak differently in different contexts and times."

Under Article 266 of the constitution, all revenues received by the Government of a State would form part of the consolidated fund of the State. The amount collected under the Act is excise revenue. It forms part of the consolidated fund. There is no generic difference between a tax and a fee, though broadly a tax is a compulsory exaction as part of a common burden without promise of any special advantages to classes of tax-payers where as a fee is a payment for (i) service rendered (ii) benefit provided, or (iii) privilege conferred as has been elucideted by Chinnappa Reddy, J in A. I. R. 1983 5. C. 617 referred to above. Therefore, each of the three categories has a different concept. Where the fee is levied for a positive service to be rendered there should be reasonable co-relationship between the service rendered in the payer of the fees and the collection from him. The two other categories are the fees for benefit provided and privileges conferred. These two categories come within the meaning of fees for lincence in the language of Article 199 of the Constitution. The levy of fees on intoxicant would also come within the category even if it is held that it does not amount to a consideration for the parting with a privilege of the State. The statutory provisions relating to Mohua flower have already been examined to find that the Act prohibits the carrying on business in intoxicants. There cannot be any doubt that intoxicants of any colour are menance to the society through out the World. Accordingly, no one has a fundamental right to trade in them. It is up to the State to control and regulate the trade in intoxicants. In case, the levy collected has broad or causal relatinship with the object sought to be achieved i.e., regulation in public interest, it is enough.

In Municipal Corporation of Delhi and Others Vs. Mohd. Yasin, the fee in question was for slaughtering animals in the slaughter houses of Municipality. Challenge was made to the increase of the rate of fees by eight times. High Court considered the budget provisions of the Municipality and held that there was no warrant at all for increasing the fee eightfold and accordingly, it was held that it was not a fee but a tax for which there was no legislative mandate. Repelling the findings of the High Court it was held by Chinnappa Reddy, J. for the Court :

"...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-

Further, neither the incidence of the fee nor the service rendered need be uniform. That others besides those paying the fees are also benefited does not detract from the charater of the fees. In fact the special benefit or advantage to the payers of the fees may even be secondary as compared with the primary motive of regulation in the public interest. Nor is the Court to assume the role of a cost accountant. It is neither necessary nor expedient to weigh too maticulously the cost of the services rendered etc. against the amount of fees collected so as to evenly balance the two. A Board co-relationship is all that is necessary..."

Examing the facts, of that case, it was found that the expenses as reflected in the Municipal Budget covered a portion of it which were included directly and exclusviely in connection with slaughter houses. It took note of several other items of expenditure connected with slaughter houses which were not included in the item of the budget relating to slaughter houses. They were maintenance of vehicles and expenditure for transport maintenance of supervisory staff whose duties are connected with slaughter houses, even the cost and depreciation of the buildings and fittings in the slaughter houses, and provisions for expansion and improvement thereof.

15. In the present case, the fee collected is a part of excise revenue. It forms the part of one consolidated fund as required under Article 266 of the Constitution. The regulating machinery beginning from the Revenue Divisional Commissioners, Excise Commissioners, Collectors of the Districts, Superintendents of Excise and other staff are engaged in regulating the trade in Mohua flowers. In the replies the annual expenditure on account of creation of subordinate supervisory staff as in 1977 is only indicated. This is only a part of the direct expenditure which was possible to be indicated. The proportionate expenditures in relation to the higher officers who have substantial role to play in regulating the trade in Mohua flower is said to be not possible to be indicated. In any view, it cannot be said that there is no co-relationship between the levy and the object sought to be achieved. Merely because a part of the collection is used for the public utility, it cannot be said that there is complete absence of co-relationship. From the nature of expenditure involved, it cannot be said to be nominal also. We are satisfied that there is broad relationship between the collection and the expenditure.

16. Another aspect is also to be kept in view. Mohua flower is natural vegetation. There may be years where there would be failure of crop and on that account negligible collection of fee. The expenses incurred for supervisory staff cannot be reduced in such contingencies. The co-relationship cannot be considered by taking the collection of fees of one year or a few years into consideration. Thus, a broad corelationship of the levy with the object sought to be achieved if established, the fee cannot be questioned. The same consideration as in case of a fee for positive service rendered cannot be made as by the very nature of the fees, one is a fee of licence and the other is a fee for service rendered.

17. However, in view of our earlier finding that the levy and collection is a consideration for the parting with a privilege, it is not a fee as is understood in common parlance.

18. Accordingly, the writ applications are dismissed with costs. Hearing fee is assessed at Rs. 350/-. As a result of dismissal of the writ applications, the order of interim stay is automatically vacated.

D. Pathak, C.J.

19. I agree.

