

(1972) 04 OHC CK 0021
In the Orissa High Court
Case No : O.J.S. No. 123 of 1970

Girija Prasad Bose and Another

APPELLANT

Vs

Executive Officer, Jajpur Municipality and Others

RESPONDENT

Date of Decision : 25-04-1972

Acts Referred:

Orissa Municipal Act, 1950 — Section 117, 297, 298

Citation : AIR 1973 Ori 8 : (1972) 38 CLT 695

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

Bench : Division Bench

Advocate : R. Mohanty, for the Appellant; S. Mohanty and Additional Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

R. N. Misra, J.—The petitioners along with the opposite parties 4 to 10 jointly owned a private market known as Giraja Hat alias Agneswar Hat located within the limits of the Jajpur Municipality. It is a private market within the meaning of Section 297 of the Orissa Municipal Act, 1950 (hereinafter referred to as the Act) and is alleged to be running for more than 65 years. A fee being demanded for grant of the licence u/s 298 of the Act. On 6-1-70, an application was made to the Municipality for renewal of the licence for the year 1970-71. On 4-2-70, the Municipal Council resolved that a licence be issued in respect of the market upon payment of fee at 8 per cent of the gross income of the owners from the market for the year 1964-65 for which particulars were available with the Municipal Council. Accordingly the licence fee was fixed at Rs. 1826/- and the applicants were called upon to deposit the amount by 12-2-70 so that the licence shall be renewed and failing the compliance the application for renewal of the licence shall be deemed to have been rejected. On 7-2-70, the petitioners had applied before the Municipal Council that the demand of such a heavy fee was illegal particularly because no service was being rendered by the Municipality in respect of the market. The petitioners moved this application before this court on

11-2-70 and obtained an order of injunction. It has been alleged by the petitioners that by the demand raised by the Municipal Council a restraint has been put on the owners of the market in the matter of running their business and under the colourable pretence of raising fee, a tax had in fact been demanded though the Municipal Council has no power to levy a tax in respect of a private market. The petitioners have, therefore, asked for a writ of mandamus from this court requiring the Municipal Council not to enforce its demand and to renew the licence in respect of the market.

2. The Executive Officer of the Municipal Council has filed an affidavit before this Court wherein it has been stated that the petitioners failed to deposit the licence fee demanded from them by 12-2-70 and as such in terms of the resolution of the Municipal Council the application for renewal has been rejected. It is said that such an order was subject to appeal u/s 305 of the Act and the petitioners have not availed of the statutory remedy before approaching this Court. The Executive Officer has also tried to justify the demand being a "Fee" and not a "tax".

3. Section 297 (1) of the Act provides,

"No person shall open a new private market or continue to keep open a private market unless he obtains from the Municipal Council a licence to do so."

Sub-section (3) of Section 297 further provides,

"The Municipal Council shall, as regards private markets already lawfully established, and may at its discretion, as regards new private markets grant the licence applied for, subject to such rules as to supervision and inspection and to such conditions as to sanitation, drainage, water-supply, width of paths and ways, weights and measures to be used and rents and fees to be charged in such market as the Municipal Council may think proper, or the Council may refuse to grant any such licence for any new market. The Municipal Council, may, however, at any time, for breach of the conditions thereof, suspend or cancel any licence which has been granted under this section. The Municipal Council may also modify the conditions of the licence to take effect from a specified date."

Section 298 of the Act provides for the fees for licence and runs thus:--

"When a licence granted u/s 297 does not permit the levy of any fees, it shall be granted free of charge, but when such permission is given a fee not exceeding twenty per centum of the gross-income of the owner from the market in the preceding year shall be charged by the Municipal Council for such licence."

It is not disputed that the market in question comes under the second category, that is, the owners have been permitted to levy fees and as such the Municipal Council while granting a licence is also entitled to charge a fee not exceeding 20 per centum of the gross income of the owners from the market.

Section 300 of the Act authorises the Executive Officer to require the owners of a private market to-

- (a) construct approaches, entrances, passages, gates, drains and cesspits for such market and provide latrines;
- (b) roof and pave the whole or any portion of it;
- (c) ventilate the market properly and provide with supply of water;
- (d) provide passages of sufficient width between the stalls and make such alterations in the stalls, passages, shops, doors and other parts of the market as may be considered necessary;
- (e) keep the market in a clean and proper state and make such other sanitary arrangement as may be thought necessary. Section 301 of the Act authorises suspension of licence upon failure to comply with the requirements provided u/s 300. Section 303 authorises the Municipal Council to close private markets and Section 305 provides for an appeal against orders passed under Sub-section (3) of Section 297 of the Act.

4. Section 298 of the Act thus authorises levy of a fee for grant of the licence u/s 297 of the Act. The concept of fee as different from tax is well known. In the celebrated decision in *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, their Lordships have said,

"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, vide Seligman's Essays on Taxation, p. 408.

If as we would hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should on the face of the legislative provision, be correlated to the expenses incurred by Government in rendering the services. As indicated in Article 110 of the Constitution, ordinarily there are two classes of cases where Government imposes "fees" upon persons. In the first class of cases, 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 either heavy or moderate from that person in return for the privilege that is conferred.

..... 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. 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.

Our Constitution has, for legislative purposes, made a distinction between a tax and a fee and while there are various entries in the legislative lists with regard to various forms of taxes, there is an entry at the end of each one of the three lists as regards fees which could be levied in respect of any of the matters that is included in it. The implication seems to be that fees have special reference to Governmental action undertaken in respect to any of these matters."

In *Corporation of Calcutta and Another Vs. Liberty Cinema*, , the question came up for examination again with reference to the provisions of Section 548 of the Calcutta Municipal Act, 1951. On an examination of the scheme in the statute and keeping in view the doctrine of *quid pro quo* in the case of a fee their Lordships held that the fee was in fact in the nature of a tax. The majority judgment after analysis concluded:

"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 person 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 correlating the amount of the levy to the costs of any service. The levy is a tax."

In *The Delhi Cloth and General Mills Co. Ltd. Vs. The Chief Commissioner, Delhi and Others*, , the dispute for determination was the imposition of fee for renewal of a licence under the Delhi Factories Rules with reference to the provisions of the Factories Act of 1948. Their Lordships referred to the case of *H.H. Sudhendra Thirtha Swamiar Vs. Commissioner For Hindu Religious and Charitable Endowments, Mysore*, where it had been said thus:--

"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 services rendered by the authority to individual who obtains the benefit of service. If with a view to provide a specific service, levy is imposed by law and expenses for maintaining the service are met out of the amounts collected there being a reasonable relation between the levy and the expenses incurred for rendering the service, the levy would be in the nature of a fee and not in the nature of a tax." In each case where the question arises whether the levy is in the nature of a fee the entire scheme of the statutory provisions, the duties and obligations imposed on the inspecting staff and the nature of work done by them will have to be examined for the purpose of determining the rendering of the services which would make the levy a fee. It is quite apparent that in the *Liberty Cinema* case it was found that no service of any kind was being or could be rendered and for that reason the levy was held to be a tax and not a fee. In our

judgment the present case falls within the other class of cases to which reference has been made in which contributions for the purpose of maintaining an authority and the staff for supervising and controlling public institutions like Maths etc., were held to be fee and not tax."

In *Indian Mica Micanite Industries Vs. The State of Bihar and Others*, , the same question again arose for consideration with reference to the provisions of Rule 111 of the rules framed under the Bihar and Orissa Excise Act, 1915. The relevant rule provided for levy of a fee for grant of a licence to possess denatured spirit. Their Lordships said,

"..... before any levy can be upheld as a fee, it must be shown that the levy has reasonable correlationship with the services rendered by the Government. In other words the levy must be proved to be a quid pro quo for the services rendered. But in these matters it will be impossible to have an exact correlationship. The correlationship expected is one of a general character and not as of arithmetical exactitude.

Dealing with the matter further their Lordships again said.

"On the side of the appellant, it is alleged that the State is collecting huge amount as fees and that it is rendering little or no service in return. The correlation ship between the services rendered and the fee levied is essentially a question of fact. Prima facie, the levy appears to be excessive even if the State can be said to be rendering some service to the licencccs. The State ought to be in possession of the material from which the correlationship between the levy and the services rendered can be established at least in a general way. But the State has not chosen to place those materials before the court. Therefore, the levy under the impugned rule cannot be justified."

5. In this Court the self same question came up for examination in *Chintamoni Sahu Vs. Cuttack Municipality*, . On an analysis of the scheme of the Orissa Municipal Act it was found that Municipal taxation was different from provisions authorising levy of fee. In that case the levy of fee u/s 290 of the Act was being considered. Panigrahi, C. J., speaking for the court laid down,

"The fee collected is the quid pro quo for the expenses incurred by the council. The fees prescribed, therefore, should reasonably cover the cost of the special services necessitated by the duties and responsibilities imposed on the council in respect of the supervision and regulation of places for which a license is taken. They are intended to be a compensation to the Municipality for the expenses incurred in the issue of licenses and the general regulation of trades which are licensed. It is necessary in the interests of the health of the town that the Municipality should know where a particular trade is being carried on, so that it may control and check its working so as not to cause nuisance or danger to the public generally or to the persons living in the locality. It would follow, therefore, that the council has no power to fix any arbitrary fee it chooses. There is some limit to this power, and the limit is set by the amount required for meeting the

cost of the special services rendered by the Council. This, however, is not to say that the amount collected should be exactly the same as that required to cover the extra burden placed on the council by reason of the extra supervision and inspection..... It would follow, therefore, that the power to charge license fees cannot be used for taxation. In other words, the total fees charged by the council should not be much in excess of what the duties and responsibilities cast upon them and their staff in connection with the licenses cost them. It is open to the council to enhance the fee from time to time if they find that the sums realised are not sufficient to defray the cost of services rendered. But it is clear that it has no power to fix any arbitrary fee. The line of distinction which would make "fee" a "tax" is whether the fees prescribed is reasonable or unreasonable, and this must depend upon the circumstances of each case."

In (1959) 25 CLT 509 (Pravulal Parodia v. State of Orissa), Narasimhan, C. J., examined the same question again and repelled the contention raised on behalf of the State of Orissa that the fee could be justified even though not correlated with the return.

6. The executive Officer in his affidavit has accepted the position that there is no separate fund and the income from various heads of fees is merged into the general revenue of the Municipality. It is true that even if the fees are merged into the general fund, if they are separately treated for the purpose of expenses there can be no objection. But the details given in the counter affidavit do not really establish sufficient quid pro quo between the fee and the rendering of alleged service. The nature of services rendered as indicated in the counter affidavit may now be referred to:--

(a) About Rs. 60,000/- over sanitation including vaccination and inoculations, conservancy and scavenging work within the municipal limits. Only Rs. 15,000/- is expected as income from latrine tax.

(b) It is a bi-weekly Hat and the municipal scavengers are engaged to clear the Hat area on the days following the Hat days.

(c) The approach roads and the roads within the Hat area are also cleaned.

(d) The municipality maintains a well for supply of drinking water for the persons visiting the Hat.

(e) Lights are provided on the approach roads to the Hat.

(f) Money has been sanctioned for providing a higher power lights Inside the Hat itself.

(g) Provision has been made for inoculation to avoid out-break of epidemic due to congregation of about 5000 people on Hat days.

(h) The health staff of the municipality inspects the Hat in order to prevent sale of adulterated food within the Hat.

(i) The municipality also makes adequate provision for checking weights and measures within the Hat area.

It is also contended that a large number of people from the areas outside the municipal limits visit the Hat and use municipal amenities and the municipality is put to extra burden on that account. It is conceded in the affidavit of the Executive Officer that fees realised in respect of different kinds of licences including the licence fee for private market are brought into the municipal fund as provided u/s 114 of the Act and no separate account is maintained in regard to expenses for services rendered in respect of a particular licensee or licensees as a class. On the other hand, it has been said,

"All these amounts along with holding tax and fines realised and other misc. incomes constitute the municipal fund as provided u/s 114 of the Act and can be spent for the purposes as mentioned in Sections 117 and 120 of the Act."

Section 117 provides the various purposes to which the municipal fund is applicable and Section 120 provides for restriction on the application of moneys received for certain purposes. This concession of the municipality goes a long way in establishing the contention of the petitioners that in demand-ting the fees for licence u/s 298 of the Act the Municipal Council does not keep the quid pro quo element in view. Most of the heads of expenses authorised u/s 117 of the Act are foreign to the concept of quid pro quo. It is not open to the Municipal Council to divert fees collected under the various provisions of the Municipal Act including the one in question to such general purposes where there is no element of return by way of performing service.

7. It is true that the concept of quid pro quo 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. In 58 I.A 313 (Qazundaung Bazar Co. v. City of Rangoon) the dispute was of the type raised in the present case. The procedure adopted by the corporation of Rangoon has been described by their Lordships thus:--

"The only question which remains is the question whether the corporation in acting as hereinbefore described has, as required by Section 178, Sub-section (3), charged a fee for each private market at a rate fixed by the Corporation- In form what the Corporation (by adopting the report of the Finance Committee) did was to arrive at the total amount of the cost which was to be covered by the sums payable by all the private markets. This total sum (described by the committee as "a total licence fee") they divided among all the private markets in proportion to their respective assessable values. The sums so arrived at were, in the case of each private market, a percentage, and, in each case, the same

percentage of its assessable value. A sum which represented that percentage was then charged to each private market as its licence fee for the right to keep it open for a year."

This scheme was upheld by their Lordships of the Privy Council and we are of the view that due compliance with the provisions of Section 298 can really be made by following a scheme akin to the process referred to by their Lordships of the Privy Council. We may not be taken to have said that that is the only process, but certainly it is a guide- line for due compliance with the provisions of the statute.

8. Mr. R. Mohanty for the petitioners placed two Full Bench decisions before us in *City Corporation of Calicut Vs. Thachambalath Sadasivan and Others*, and *Commissioner, Municipal Council, Tellicherry and Another Vs. Ramesh S.M. Prabhu and Another*, . In both these cases it has been laid down,--

"Without a special benefit accruing to the payer in return, the levy cannot be justified. The fee collected must have correlation to the expenses incurred in issuing the same. If more than what is required to issue the licence is levied, the tax element will predominate since the excess collected will go to the general fund to be utilised for matters of general public utility and in such cases the levy would assume the character of a tax and not fee. The corporation cannot impose a tax in the guise of a fee."

It was further indicated,

"No fee can be imposed in return for the corporation discharging its statutory duties as a corporation. By the provision, control and regulation of the activity the payer of the fee cannot be said to be benefited. The object behind such measures is to detect lapses from or violation of the rules by the licensees and that in effect is the exercise of the "police power" vested in the Corporation. No cess or fee can justifiably be imposed on the licensees for such measures which the corporation is bound under the statute to adopt or undertake."

It has been contended by Mr. Mohanty that most of the services referred to in the counter-affidavit are of general nature and should be treated by us as discharge of "police power" vested in the Municipal Council. There is some force in his contention, but to the extent the municipality renders direct services to the owners of the market qua market owners cannot be ruled out from the principle of quid pro quo.

9. In view of what we have indicated already the irresistible conclusion to reach is that the demand raised by the municipal council by its resolution dated 4-2-70 and conveyed under the order of the Executive Officer dated 6-2-70 cannot be sustained. It is true that the 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 was supportable the limit of the fee could go upto 20 per centum of the gross income. Here the demand is 8 per cent. While it is within the statutory limit

indicated u/s 298 of the Act, yet it is bad because it has ceased to be a fee in the absence of quid pro quo. We would accordingly allow the writ petition, quash the resolution of the Municipal Council and issue a writ of mandamus requiring the opposite parties 1, 2 and 3 to desist from giving effect to the same. We would, however, make it clear that it is open to the Municipal Council to raise a proper licence fee keeping in view the principles we have indicated, and if the petitioners have really run the market for the year in question they shall certainly be liable to pay such fee. The Municipal Council would do well to fix a proper fee in respect of the licence in years to come so that such a dispute may not recur and the Municipality may not be drawn into litigation again. We leave the parties to bear their own costs.

B.K. Ray, J.

10. I agree.