(1993) 06 MP CK 0022

In the Madhya Pradesh High Court

Case No : M.P. No. 890/92

Ibadatali APPELLANT

Vs

Municipal Council, Khargone and Others RESPONDENT

Date of Decision : 22-06-1993

Acts Referred:

Madhya Pradesh Municipalities Act, 1961 — Section 105, 160, 3(37)
Madhya Pradesh Municipalities Terminal Tax on Passengers (Regulation of Assessment and Collection) Rules, 1988 — Rule 12, 13

Citation : AIR 1994 MP 58 : (1993) ILR (MP) 137 : (1993) 38 MPLJ 640 : (1993) MPLJ 640

Hon'ble Judges : V.S. Kokje, J;R.D. Shukla, J

Bench : Division Bench

Advocate : S. Samwatsar, for the Appellant; T.N. Singh, for the Respondent

Final Decision : Allowed

Judgement

V.S. Kokje, J.

This order shall govern the disposal of Misc. Petitions Nos. 1078/92, 1337/92, 907/92, 1027/92, 780/92, 846/92 and 1183/92. This bunch of cases was heard along with Misc. Petition No. 111/92 as the point involved in these cases was the same as was involved in that case with the only difference that that was a case under the M.P. Municipal Corporations Act, 1956 (hereinafter called as the "Corporation Act") and these are the cases under the M.P. Municipalities Act, 1961 (hereinafter called as the "Municipalities Act"). In our order prononuced in M.P. No. 111/92 declared today, we have taken the view that function of recovery of a Municipal Tax cannot be transferred by way of auction or othewise by Municipal Corporations to any other agency. The reasons stated in our decision in M.P. No. 111/92 to a great extent apply to these cases under the Municipalities Act also. However, certain features peculiar to the Municipalities Act compel us to write this separate judgment giving reasons for coming to the same conclusion as in reached in M.P. No. 111/92 in support of cases of Municipalities also.

The point involved in all these cases is whether a Municipal Council is empowered to transfer the right to recover a Municipal Tax to any other person by auction or otherwise ? It was contended on behalf of the petitioners that in view of Sections 104 and 105 of the Municipalities Act all tbe moneys raised by a tax levied for the purposes of this Act have to be credited to the Municipal Fund formed u/s 104 of the Municipalities Act. So far as this contention is concerned view taken by us in our decision in M.P. No. 111/92 on the basis of Sections 86 and 87 of the Corporations Act holds good in respect of Municipalities Act also. A comparison of Section 104 of the Municipalities Act with Section 86 of the Corporations Act and of Section 105 of the Municipalities Act with Section 87 of the Corporations Act would show that the provisions are pari-materia. We are therefore of the view that for the reasons stated in our decision in M.P. No. 111/92 it is not permissible for a Municipal Council to transfer a right to recover a Municipal Tax to any other person or body in a manner which would infringe the mandate of Section 105 of the Municipalities Act.

The peculiar feature of the Municipalities Act is, however, Section 160 of the Act on which great emphasis has been laid by the learned Counsel appearing for various Municipal Councils. It would be useful to quote Section 160 of the Municipalities Act hereunder for ready reference.:--

"160. Lease of Levy of tolls, market dues and fees...... (1) The council may, by public auction or private contract, lease the levy of tolls, market dues and fees which may be imposed under this Act :

Provided that the lease shall give security for the due fulfilment of the conditions of the lease. (2) When lease have been given under Sub-section (1) the lessee and any person employed by him to collect any tolls, market dues and fees shall, subject to the conditions of the lease, have the power referred to in Sub-sections (8) and (5) of Section 157."

A bare reading of the provision would make it clear that the term "Tax" is not included in the Section. What is permitted under the Section is leasing of the levy of tolls, market dues and fees. So far as recovery of tax is concerned the Section does not provide for leasing by auction or otherwise. When this was pointed out to the learned counsel appearing for various Municipal Councils they fell back on the definition of "Tax" in Sub-section (37) of Section 3 of the Munici-palities Act. We reproduce the provision hereunder:--

"3. Definitions. -- In this Act unless the context otherwise requires,

(37) "Tax" includes any toll, rate, cess, fee or other impost leviable or levied under this Act."

It was contended on behalf of the Municipal Councils that because of the wide definition of the terms "Tax", tolls, market dues and fees are included in the term "Tax" and, therefore, by permitting levying of tolls, market dues and fees the legislature should be deemed to have permitted leasing of the levy of a tax also.

The argument deserves out- right rejection. What the Act has defined is the term "Tax" and not the terms "tolls", "Market dues" and "fees". In view of the definition it is correct to say that wherever the word tax is used in the Municipalities Act, unless the context otherwise requires, it shall be deemed to include tolls, rate, market dues, fees etc, but not the vice versa. When specific terms like "tolls", "market dues" and "fees" are used in the Act they have a specific meaning. Otherwise, instead of using these terms at some places, everywhere the term "Tax" could have been used by the Legislature.

Section 127 of the Municipalities Act, the charging section, itself uses the word "Tax" in contradistinction with the words fees, rate and toll, Clauses (i), (ii), (iii), (iv), (ix), (x) (xi), (xii), (xiv), (xv), (xvi), (xvii), (xviii), (xix), (xx), (xxi), and (xxiii), of Sub-section (1) of Section 127 use the word Tax. In Clause (vi) of Sub-section (1) of Section 127 of the Municipalities Act the words "a sum payable" has been used. Similarly in Clauses (vii) and (viii) of Sub-section (1) of the said Section 127 the term "fees" is used. In Clause (xii) of Sub-section (1) of Section 127 the term "rate" is used and in Clause (xxii) of the same provision the term "toll" is used. If all these terms had the same meaning, there was no necessity for using these different terms. It is therefore clear that the terms, "a sum payable", "fees", "rate" and "toll" are used in Section 127 itself in contradistinction with the term "Tax" in order to specifically differentiate them from the term "Tax". It is therefore futile to say that Section 160 of the Municipalities Act specifically permits auctioning of a right to recover terminal tax on passengers and other Municipal Taxes.

It has also been pointed out that Rules have been framed by the State Government permitting leasing out of assessment and recovery of terminal tax on passengers and so long as these Rules stand, it cannot be said that auctioning of the right to recover terminal tax is unauthorised or illegal. Great emphasis was laid on these Rules by the learned counsel appearing for the Municipal councils keeping in view jurisdictional handicap in the way of this Bench declaring the Rules ultra vires. It is not for us in this case to consider the constitutional validity of the notification of the Hon''ble Chief Justice excluding the cases challenging the vires of any Act, Notification or Rules from consideration of the Bench at Indore. As Section 160 of the Municipalities Act or the M.P. Municipalities Terminal Tax on Passengers (Regulation of Assessment and Collection) Rules, 1988 (hereinafter called as the "Rules") has not been challenged before us by any of the petitioners in these petitions, we have to decide these cases on the footing that the sections and the Rules are not ultra vires the Constitution much against our will as un-constitutionality of Section 160 and Rule 12 of the aforesaid Rules stares us in the face.

Rules 12 and 13 of the Rules referred to above read as under :--

"12. The Counsel may with the previous sanction of the State Government, by public auction or private contract, lease the assessment and collection of the said tax :

Provided that the State Government shall have power to determine the conditions of lease.

Where lease has been given under rule 12 the lessee and any person employed by him to collect the said tax shall, subject to the conditions of the lease, have the power referred to in these rules".

There is absolutely no provision in the Municipalities Act permitting grant of lease of assessment and collection of any tax. As already pointed out Section 160 permits lease of levy of tolls, market dues and fees. It does not talk of a tax at all. Moreover, even Section 160 permits lease of only levy of tolls etc. It does not talk of ''assessment'' and ''collection'' which are the words used in Rule 12 of the Rules.

In Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd., in para 20 of their judgment their Lordships of the Supreme Court have observed that the term "levy" is wider in its import than the term "assessment". It may include both imposition of a tax as well as assessment. It was further observed that although the connotation of he term "levy" seems wider than that of "assessment" which it includes, yet it did not seem to extend to "collection". The Supreme Court relied on observations made in N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., to the effect that the expression levy has not been used in the Central Excises and Salt Act, 1944 or the Rules made thereunder to mean actual collection. It is therefore, clear that Section 160 of the Municipalities Act could not have been the source of statutory power to enact Rule 12. Rule 13 of the Rules further provides that when lease has been given under Rule 12 the lessee and the person employed by him to collect the tax shall, subject to the conditions of the lease, have the powers referred to in these Rules. This is clearly Sub-delegation of a delegated power. How can the servants and agents of a contractor become municipal servants and exercise statutory powers conferred by the Municipalities Act on Municipal servants. However, as we are precluded from going into the question of constitutional validity of Section 160 or Rules 12 and 13, we would not use these arguments in support of our order. We are constrained to make even the aforesaid observation only to highlight our predicament and embarrassment. We can see the unconstitutionality writ large on the statute book but cannot declare it to be so, we cannot even refuse to hear these petitions because the petitions as they stand are not hit by the bar created by the Notification of the Hon''ble Chief Justice as they do not challenge the validity of Section 160 of the Municipalities Act or the Rules and do not pray for these provisions being declared ultra vires the constitution of the Municipalities Act.

Let us now deal with the argument that so long as the Rule are not set aside this court cannot preclude the Municipal Councils from leasing the right to collect the terminal tax on passengers. The Rules will have to be read together with the provisions of the Act. As already stated Section 105 of the Municipalities Act requires all the money raised by a tax to go into the ''Municipal Fund''. The Rules cannot override this provision and, therefore, Section 105 and Rule 12 read together would mean that even if the Municipal Council could lease the assessment and collection of terminal tax on passengers, it could not do so violating the mandate of Section 105 of the Municipalities Act. In short, no lease of assessment and collection of terminal tax on passengers can be granted without imposing the condition that the entire money collected as tax shall be deposited in ''Municipal Fund'' and the contractor shall be entitled to only his expenses and perhaps to a reasonable margin of profit. A Municipal Council cannot enter into a contract by accepting a lump sum against the expected recovery towards terminal tax and leave the balance to the contractor. It is not in the scheme of the Act to permit any individual or body of persons to share the money raised as tax with the Municipal Council. In the terms of the contract which have been filed in some of these cases there is no condition imposed that all the amount realised as tax shall be deposited by the contractor in the ''Municipal Fund''. On the contrary, the conditions permit a contractor to keep to himself all the money realised as Municipal Tax on payment of a lump sum amount equivalent to his bid at the auction. This is clearly impermissible u/s 105 of the Municipalities Act.

We are surprised as to how the State Government granted its sanction to Municipal Councils to auction the right to recover Municipal Taxes by accepting a lump sum payment in lieu of the actual recovery of tax. This is nothing short of abdication and surrender of sovereign functions of levying and collecting tax on the part of the Government and the Municipal Councils. We have examined the aspect of sovereign function being delegated or abdicated by the State or the local Authorities in detail in our decisions in M.P. No. 111/92. The same reasoning holds good in these cases also. We would not therefore deal with the point again in details in this order.

For the aforesaid reasons we allow these petitions. The action of the Municipal Councils in graning the right to recover Municipal Tax to third persons by auction is declared illegal and unauthorised and is quashed. The sanction granted by the State Government to various Municipal Councils for auctioning the right to recover Municipal Taxes is clearly without application of mind and arbitrary and illegal. These sanctions are also quashed. There shall however be no order as to costs. Security if any be refundable.