

(1975) 05 MP CK 0001

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 1074 of 1974

Loonkaran Parakh

APPELLANT

Vs

State of Madhya Pradesh and Another

RESPONDENT

Date of Decision : 03-05-1975

Acts Referred:

Constitution of India, 1950 — Article 265

Madhya Pradesh Municipal Corporation Act, 1956 — Section 133, 366(3), 427, 442(1), 45D

Citation : AIR 1975 MP 217 : (1980) ILR (MP) 403 : (1976) JLJ 442 : (1975) 20 MPLJ 515

Hon'ble Judges : G.P. Singh, J;C.P. Sen, J

Bench : Division Bench

Advocate : Anoop Choudhari, for the Appellant; S.K. Dixit, for No. 1 and G.P. Bajpai and A.P. Tare for No. 2, for the Respondent

Final Decision : Dismissed

Judgement

Singh, J.

This petition under Article 226 of the Constitution raises a question as to the validity of the fee imposed by Bye-law 7 of the Building Permission (Fees, Composition Fee) Bye-laws, 1973, of the Municipal Corporation, Raipur.

The petitioner has filed this petition as a guardian of his minor son. An application was made to the Corporation on behalf of the minor for permission to construct a building. As a prerequisite to the grant of permission, the petitioner was required to pay to the Corporation Rs. 225/- as fee payable under the bye-laws. The petitioner contends that the Madhya Pradesh Municipal Corporation Act, 1956, which is the relevant Statute, does not authorise the Corporation to charge any fee for grant of building permission, that the provisions under which the bye-laws purport to have been made do not refer to any fee and that the impost is a tax in the garb of fee. The petitioner prays that the bye-laws be quashed and that a direction be issued to the Corporation to refund the fee

collected from the petitioner. The Corporation in its return has justified the imposition of the fee u/s 366 (3) of the Act. The Corporation denies that the fee is a tax and contends that the fee is correlated to the expenses incurred by the Corporation in discharging its duty of regulation and control of building activity within the Corporation limits. It is submitted that the expenses incurred by the Corporation in discharging the aforesaid duty are approximately equal to the collections made as fee under the impugned Bye-laws.

To appreciate the rival contentions, it is first necessary to notice the relevant provisions of the Act and the Bye-laws. Chapter XI of the Act deals with Taxation. Section 132 in this Chapter authorises the Corporation to impose taxes enumerated therein and Section 133 provides the procedure for imposition of tax, Chapter XXIV which occurs in Part VI of the Act deals with the subject of "Building Control". Section 293 which is the first section in this Chapter prohibits erection or re-erection of any building or making of any material external alteration to any building without the permission of the Commissioner, who is one of the municipal authorities charged with the duty of carrying out the provisions of the Act (Section 6). As required by Section 294, every person intending to erect or re-erect a building has to make two applications: (1) an application for approval of the site together with a site plan and (2) an application for permission to build together with a ground plan, elevation and Section of the building and a specification of the work to be done. The Commissioner may refuse to approve the site on the grounds mentioned in Section 296. The grounds on which permission to erect or re-erect building may be refused are contained in Sections 295 and 297. Speaking generally, a site may be disapproved if erection or re-erection of the proposed building would be in contravention of a town planning scheme or any other provision of the Act or any other enactment; or if the site is in a portion within the limits of the city in which the position and direction of the streets have not been determined and the proposed building will obstruct or interfere with the construction in future of suitable streets or with the drainage, water-supply or ventilation, or if the site has been re-claimed or used as a place for depositing sewage, offensive matter or rubbish or carcasses of dead animals or is otherwise insanitary or dangerous to health; or if the building is likely to interfere with a future town planning scheme. Permission for erection or re-erection cannot be granted by the Commissioner until the site is approved. Even after approval of the site permission to erect a building cannot be granted if the plans and specifications show that the proposed building is not in accordance with a town planning scheme or the provisions of the Act or any rule or bye-law made thereunder or any other enactment; or if the erection of the proposed building would be a nuisance or injurious to the inhabitants of the neighbourhood or to the public. Section 298 provides that the work of the erection of the building shall be executed in such manner under such supervision through such qualified agency and subject to such conditions or restrictions as may be prescribed by the Bye-laws. If the work of erection is not started within one year the sanction lapses but it can be renewed under Section 300. A new

building cannot be occupied or used without first obtaining the permission of the Commissioner u/s 301. The section requires that after completion of the work a notice shall be given to the Commissioner who may refuse permission to occupy or use the building if the erection, construction or re-construction is in contravention of any provisions of the Act, or any rule or bye-law made thereunder or any other enactment for the time being in force. The section requires that all necessary facilities for inspection of the work shall be given to the Commissioner, The Commissioner has power u/s 307 to require removal of any work which has been executed without sanction or in contravention of the terms of sanction. These Sections in Chapter IV dealing with building control do not contain any provision for charging any fee. Section 366 which authorises imposition of a fee for every licence or written permission occurs in Chapter XXXIV (Part VIII) which contains General Provisions for the carrying on of the Municipal Administration. Section 366 which is the first section in this Chapter deals with licences and permissions. Section 366 (1) provides that whenever it is prescribed by or under the Act that the permission of the Commissioner is necessary for the doing of any act, such permission, unless otherwise expressly provided, be in writing. Section 366 (2) requires that every licence and permission shall be signed by the Commissioner and contain the particulars mentioned in the Section. Section 366 (3) which permits imposition of a fee reads :

"366 (3). Except when it is otherwise expressly provided in this Act or in any rule or bye-law made thereunder, a fee for every such licence or written permission may be charged at such rate as may be fixed by the Commissioner and such fee shall be payable by the person to whom the licence is granted."

The subject of Bye-laws is dealt with in Chapter XXXVII (Part X). Section 427 authorises the Corporation to make Bye-laws consistent with the provisions of the Act and the rules made thereunder for carrying out the provisions and intentions of the Act. The section also enumerates various topics under different heads on which Bye-laws can be made. The topics relating to construction of buildings occur in Clause (28), but the topic of fee for obtaining permission to erect a building is not mentioned in this clause or anywhere else. Clause 45-D in the section refers to "conditions, fees and limitations for compounding of offences". So this clause is limited to the subject of compounding of offences: fee chargeable for construction of building does not fall within it. The Bye-laws purport to have been made under Clause (28) read with Clause 45 (B) of Section 427. The relevant notification reads as follows:

"No. 961-XVIII-I.-- In exercise of the powers conferred by Sub-section (1) of Section 430 of the Madhya Pradesh Municipal Corporation Act, 1956 (No. 23 of 1956), the State Government hereby confirms the following bye-laws made by the Administrator, Municipal Corporation, Raipur under Clause (28) read with Clause (45-D) of Section 427 and Clause (c) of Sub-section (1) of Section 442 of the said Act, the same having been previously published as required by Section

429 of the said Act, and they are now published as required by Section 431 thereof namely:"

Bye-law No. 7, which is the impugned bye-law, provides that the Commissioner on being satisfied that the application for grant of building permission is complete in all respects shall issue a notice to the applicant to deposit the fee in the Corporation treasury and produce in evidence the challan of depositing the fee as shown in the Schedule. The fee deposited is refunded under Bye-law 17 if building permission is refused. The Schedule which prescribes the amount of fee chargeable reads as follows:

SCHEDULE

(See Bye-law 7)

Item Type of construction No

Built up area

Fees Chargeable Sq. Meter to Sq. Meter

1

2

3

4

Rs.P.

A building intended to be used for

0

75

50.00

residence

76

125

100.00

128

200

150.00

201

300

225.00

801

400

350.00

401

600

500.00

601

750

750.00

751

1000

1250.00

1001

1250

1500.00

1251

1500

2000.00

A building intended to be used as shop, store house, ware house or for carrying trade or business or any other commercial purpose.

above 2500

4250.00

Fees prescribed as in Item No. 1 plus an additional charge of 5% of such amount of Fees: Provided that for a built up area above 2500 Sq. Mtr. the fees charged shall be Rs. 15000.?

A building intended to be used as administrative block in a factory

Fees prescribed in Item No. 1

A building used for shop cum residence purposes

Fees as prescribed in Item No. 1 plus an additional charge of 25% of such amount of fees.

A building intended to be used as a Cinema or theatre Hall.

0 to 80 seats Capacity and

Rs. 4,000.00

above (80)seats capacity

Rs. 7,500.00

A building intended to be used for any social, charitable, etc. purposes

5% of fees as prescribed in Item No. 1

(e. g. Hospital, Schools, Clubs, Dharmashalas and similar types of buildings)

Addition, alteration with existing builtup area or external addition or alteration which do not add to the built up area such as court-yard compound, alteration in elevation or roofing such as tiles to A. C. Sheet of Flat Surface addition, opening or closing

A flat rate of Rs. 25.00 in respect of building mentioned in Items 1, 3 and 6 and Rs. 100.00 in respect of building in Item Nos. 2, 4 and 5

In case of addition or alteration in the proposed plan

(i) upto 5% Nil (ii) Between 6% Rs. 50.00 to 10% (iii) Above 10% Fresh application according to the Bye-laws.

Renewal of the building permission.

5% of the amount of fees charged originally in respect of the building concerned."

It is true, as argued by the learned counsel for the petitioner, that there is no separate provision in the Act authorising the Corporation to charge any fee for grant of building permission, but the general provision made in Section 366 (3) is sufficiently wide to cover such an authority. Permission of the Commissioner is needed for erection or re-erection of any building or for making any material alteration to any building u/s 294: As provided in Section 366 (1) such a permission has to be in writing. Section 366 (3) authorises charging of a fee for every written permission at such rate as may be fixed by the Commissioner. Thus the Act authorises the Commissioner to fix rates of fee for grant of building permission required u/s 294. The petitioner is, therefore, not right in his contention that no fee can at all be charged by the Corporation for grant of building permission.

We will now take up the next argument that the impugned Bye-laws have not been made u/s 366 (3) and, therefore, it cannot be said that the rate of fee has been validly fixed. We have already stated that the Bye-laws can be made u/s 427 on topics mentioned in that Section. We have also said that the topics enumerated do not cover the topic of fixation of rate of fees chargeable u/s 366 (3). Section 366 (3) in terms confers power on the Commissioner to fix the rate

of fees chargeable under that section. That section does not require that Bye-laws have to be made for the fixation of rate. An order of the Commissioner is enough for fixation of rate of fees. Rate of fees is, therefore, not a subject which can be dealt with by the Bye-laws. The question then is whether the impugned Bye-law can be read as an order fixing the rate of fee u/s 366 (3). We were informed at the time of hearing of this petition that the Corporation stands superseded since long and the powers of the Corporation are exercised by the Administrator appointed by the Government u/s 423. We were further informed that the Administrator is also the Commissioner appointed u/s 54 of the Act. The Bye-law fixing the rate of fees was made by the Administrator who is also the Commissioner after previous publication and was confirmed by the Government. The Bye-law although ineffective as a Bye-law can be given effect to an order of the Commissioner fixing the rate of fee u/s 366 (3) for grant of building permission. To such a course, we do not find any valid objection. The requirement of previous publication and confirmation by the Government are not the formalities required for fixation of fees by an order of the Commissioner u/s 366 (3). These formalities were, therefore, unnecessarily taken; but that by itself will not lead to the invalidity of the fee rather it will show that not only the Commissioner, but the Government also thought that the rates fixed were reasonable. It is well settled that if while passing an order a wrong provision is quoted, that by itself will not invalidate the order and the exercise of the power will be referable to a jurisdiction which confers validity upon it. *Ut res magis valeat quam pereat*, which means that it is better for a thing to have effect than to be made void, is a salutary rule of construction. In our opinion, this principle should be applied in the present case and Bye-law No. 7 read with the Schedule should be given effect to as an order made by the Commissioner u/s 366 (3) and the unnecessary formality taken by the Administrator in obtaining the confirmation by the Government can be ignored.

We then come to the main question raised by the petitioner that the fee charged under the impugned Bye-law has no correlation to any service rendered by the Corporation and that the charge is really a tax in the garb of fee. The distinction between a tax and a fee has been settled by the Supreme Court in a series of cases. The last case now in the series to our knowledge is *The State of Maharashtra and Others Vs. The Salvation Army, Western India Territory*, . The basic distinction between a tax and a fee is that the levy of tax is for the purposes of general revenue whereas a fee in the strict sense is payable as a sort of return or consideration for services rendered and the collections made from imposition of fee are correlated to the expenses incurred in rendering the services. The use of the word "fee" in an Act is not decisive of the question whether the legislature intended to confer a power to levy a fee in the strict sense and not a tax although prima facie the use of the word "fee" will show that the power to levy tax was not intended to be conferred. We have already seen that the subject of taxation in the Act is dealt with in Chapter XI. Section 132 authorises the Corporation to levy the taxes mentioned therein and Section 133

prescribes the procedure for imposition of a tax. Having regard to the scheme of the Act, the authority conferred on the Commissioner u/s 366 (3) which occurs in Chapter XXXIV to charge fee for any written permission which he is authorised to give under the Act cannot be construed to be a power to impose any tax. This inference is strengthened from the fact that the fee can be charged under this section simply by an order passed by the Commissioner without even a resolution of the Corporation and the safeguards of the procedure contained in Section 133 for imposition of a tax are not applicable for imposition of a fee under this Section. The learned Deputy Advocate-General, who appeared for the Corporation, conceded that fee chargeable u/s 366 (3) is fee in the strict sense and that the section does not authorise imposition of a tax. It is, however, interesting to notice that an analogous provision in the Calcutta Municipal Act, 1951, was construed to authorise levy of a tax (Corporation of Calcutta and Another Vs. Liberty Cinema,) but a similar provision in the Uttar pradesh Municipalities Act 1916 was construed to authorise lev of a fee in the strict sense; Nagar Mahapalika Varanasi Vs. Durga Das Bhattacharya and Others, . It is not necessary to pursue this matter any further in view of the stand taken by the learned Deputy Advocate-General.

The stand taken by the Corporation in the return (including additional return where more details are given) is that the regulatory provisions relating to building control contained in Chapter XXIV, necessitates the employment of a qualified staff. This staff consists of one Engineer who is also a quali-find architect, 38 ward peons, 13 Sanitary Inspectors, one Building clerk and one Health Officer. The duties imposed on the Corporation by Sections 295, 297, 298, 299 and 301 require inspection of site before its approval, scrutiny of plan before grant of building permission, checking and inspection during construction, inspection after completion of building, issue of completion certificate and permission to use or occupy the building. It is averred in the additional return that the staff mentioned above also looks after the public health and sanitation work of the Corporation but it has to devote 50 per cent of its time for carrying out the aforesaid duties relating to building control. It is also averred that the total expenditure on salary alone of this staff comes to Rs. 1,86,000/-per year out of which at least half i. e. Rs. 93,000/-, can be said to be used for the purposes of carrying out the duties relating to building control. It is further averred that the Corporation has also to spend for expenses on the movement of officers and stationery for carrying out the said duties and the total expenditure roughly comes to Rupees 1,25,000/-, The collections made in the year 1974-75 as fee charged under the impugned Bye-law amount to Rs. 1,34,752,00. On these averments the Corporation submits that correlation to a reasonable degree is established between the quantum of the fee charged and the expenses incurred by the Corporation in providing services to the person who applies for building permission. After the additional return was filed, the learned counsel for the petitioner on our inquiry intimated as that the petitioner did not intend to file any rejoinder. In the circumstances, the facts stated in the additional return must

be accepted and the question of legality of the fee must be judged on the facts stated therein.

The learned counsel for the petitioner has argued that the amount of fee collected by the Corporation under the impugned Bye-law is taken to the Municipal Fund and is not separately appropriated for meeting the expenses of the Corporation for grant of building permission and matters connected thereto. The Municipal Fund is constituted u/s 86 of the Act and Section 87 (1) (e) and (f) require that all moneys raised by any tax levied for the purposes of the Act and all fees payable and levied under the Act or any rules or Bye-laws made thereunder be credited to the Municipal Fund, Thus by the command of Section 87, the fees collected are paid into the Municipal Fund and this fact by itself is not sufficient to hold that the impugned levy is a tax and not fee. It is true that generally speaking the amount collected as fee should be earmarked to meet the expenses of rendering the services and should not be taken to the general revenue of the State; *State of Maharashtra v. Salvation Army* (Supra). But the fact that collections are taken to the consolidated fund of the State and are not separately appropriated towards the expenditure for rendering the services is not by itself decisive. This legal position can be taken to be settled by the decision of the Constitution Bench of the Supreme Court in *The Secretary, Government of Madras, Home Department and Another Vs. Zenith Lamp and Electrical Ltd.*, where while holding that "fees taken in Court" cannot be equated to taxes and that there must be a broad correlation with the fees collected and the cost of administration of civil justice, the Court approved the observations of Dayal, J., in an Allahabad case that the Constitution did not contemplate it to be an essential element of a fee that it should be credited to separate fund and not to a consolidated fund. It was pointed out that under Article 366 of the Constitution all revenues received by the State, whether as tax or as fee, have to go to the consolidated fund. The case of *Govt. of Madras v. Zenith Lamps*. (supra) was followed in *State of Rajasthan v. Sajanlal* AIR 3975 SC 706 at p. 725 and the same point was stressed. We have already stated that under the Act collections made from taxes and fees have all to be credited to the Municipal Fund u/s 87. Therefore, the fact that the fee collected is not credited to a separate fund is not of importance for deciding the question whether the levy in its real nature is a tax or fee.

It is also argued that the impugned fee is not levied at a uniform rate and the rate varies according to the plinth area of the proposed building which goes to show that it is a tax and not fee. It is pointed out in the same context that the rate of fee is higher if the proposed building is a shop or meant for business purposes. It is true that normally a fee is uniform and no account is taken of the paying capacity of the recipients of services, but absence of uniformity will not make it a tax if correlation is established between the total collections and the expenditure incurred for rendering the services. *H.H. Sudhendra Thirtha Swamiar Vs. Commissioner For Hindu Religious and Charitable Endowments, Mysore*, ; *Govt. of Madras v. Zenith Lamps* (supra).

The next question is whether the Corporation renders any service to the person applying for building permission and whether correlation is established between the total collections and the expenditure incurred in rendering the services. In our opinion, the inspection of site, approval of site, scrutiny of plan of proposed building, issue of building permission, inspection during construction, inspection after construction and issue of completion certificate and permission to occupy the building by the Corporation are all such acts which benefit the person who constructs the building and pays the fee and these acts can be said to be services rendered by the Corporation to him. The aforesaid regulatory acts of the Corporation done under Clupter XXIV of the Act are for ensuring safety and protection of health of the person owning the building and other persons residing in the locality. The fee is charged to cover the expenses incurred in the performance of these regulatory acts and it is not correct to say that no services are rendered by the Corporation to the persons paying the fee.

While dealing with Rule 11 of the Custom House Agents Licensing Rules, 1960, which levied a fee of Rs. 50/- for issue of the licence, the Supreme Court in Chandrakant Krishnarao Pradhan and Another Vs. The Collector of Customs, Bombay and Others, sus-tained the fee so far as fresh applicants were concerned on the ground that the expenses incurred in scrutinising the applications, subjecting the applicants to an examination and providing them with licences could be reimbursed from the fee collected and that the fee was not unreasonable having regard to the "services involved". The same amount of fee for renewal of licence was held to be excessive for in case of renewal all that was necessary for the licencing authority was to make an endorsement on the licence that it was renewed for a further period. In Nagar Mahapalika, Varanasi v. Durga Das (supra) the Supreme Court held that a licence fee charged under the U. P. Municipalities Act from rickshaw owners and rickshaw drivers was excessive as nearly 66% of the collections were used for paving bylanes and for lighting streets which were ordinary municipal services for the benefit of the general public. But the case further shows that the fee could be charged for payment of salary to the staff maintained for issuing licences and inspecting rickshaws as also for making provision for parking grounds. The Privy Council in AIR 1931 217 (Privy Council) considered a case relating to a licence fee levied u/s 178 (2) of the Rangoon City Municipal Act, 1922, for keeping open a private market. It was held that the licence fee might reasonably cover the cost of all special services necessitated by the duties and liabilities imposed upon the Corporation in respect of supervision and regulation of private markets. These cases support our conclusion that the Corporation can levy a fee u/s 366 (3) for the grant of building permission to cover the cost of inspection of site, approval of site, scrutiny of plan of proposed building, issue of building permission, inspection during construction and issue of completion certificate and permission to occupy the building. As already seen these regulatory duties flow from the provisions of the Act and performance thereof amounts to services rendered to the person who constructs the building.

In *Corporation of Calcutta v. Liberty Cinema* (supra) a fee was levied for keeping open a cinema house under the Calcutta Municipal Act, 1951. The said Act did not provide for rendering any service to the cinema owners. The Bye-laws provided for inspection of cinema houses to ensure that the licensee carried out the conditions of the licence. It was held that inspection of such a nature was not service rendered to the licensee. It was further held that the fee was in its true nature a tax. This case is clearly distinguishable on facts. We have already stated that the Corporation in the instant case renders service to the person who applies for building permission by performing various duties laid on it in Chapter XXIV of the Act.

The next thing to be seen is whether there is a reasonable correlation between the amount collected as fee and the expenses incurred in rendering the services. It has already been stated that according to the Corporation's additional return, which is not controverted, the collections from fee in 1974-75 amounted to Rs. 1,34,752.00 and the expenditure on the services was roughly Rs. 1,25,000.00. The correlation necessary to sustain a fee need only be of a general nature and arithmetical exactitude has not to be established: *Indian Mica Micanite Industries Vs. The State of Bihar and Others*, . In *The Delhi Cloth and General Mills Co. Ltd. Vs. The Chief Commissioner, Delhi and Others*, . only 60% of the amount of licence fee was spent for rendering services and it was held that correlationship was established. Similarly in *State of Maharashtra v. Salvation Army* (supra) 62% of the amount of fee was spent for rendering services and the Court held that requirement of correlation was satisfied- Having regard to these cases it has to be held that what is necessary is only an approximate correlation which is present in the instant case. Moreover, the learned Deputy Advocate-General has stated before us that the Corporation will not in future re-cover the fee at a higher rate for buildings to be used as business premises and that the fee for these buildings also will be recovered at the normal rate. This stand is consistent with justice because the purpose for which a building is constructed makes no difference to the Corporation on the question of expenses in rendering the services for which the fee is charged. This equation of rate of fee will further reduce the difference between the amount of fee and the expenditure for rendering services. The necessary correlation, therefore, is fully established.

For the reasons stated above, the petition fails and is dismissed, but without any order as to costs. The security amount shall be refunded to the petitioner.