

(2013) 03 PAT CK 0098

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No.8317 Of 2009

M/s Aditya Birla Telecom Ltd.

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 21-03-2013

Acts Referred:

Citation : (2013) 2 BBCJ 595

Hon'ble Judges : Smt. Sheema Ali Khan, J.

Bench : Single Bench

Advocate : Mr. Y. V. Giri, Sr. Advocate, Mr. Rajeev Ranjan Prasad, Mr. Ashish Giri and Mr. Akash Chaturvedi, Advocates, for the Petitioner In CWJC No.8317 Of 2009; Mr. P. K. Verma, AAG V and Mr. S. R. Saran, AC to AAG V, for the Respondents In CWJC No.8317 Of 2009; Mr. S.D.Sanjay, Mr. Gautam Kejriwal and Mr. Sushila Agrawal , Advocates, for the Petitioner In CWJC No.13483 of 2009; Mr. P. K. Verma, AAG V and Mr. S. R. Saran, AC to AAG V, for the Respondent In CWJC No.13483 of 2009; Mr. Y. V. Giri, Sr. Advocate, Mr. Anil Kumar Jaiswal and Mr. Ashok Giri, Advocates, for the Petitioner In CWJC No.7394 of 2009; Mr. P. K. Verma, AAG V and Mr. S. R. Saran, AC to AAG V, for the Respondent In CWJC No.7394 of 2009; Mr. Rajeev Ranjan Prasad, Mr. Nilanjan Chatterjee, Mr. Raghwendra Kumar Singh, Advocates, for the Petitioner In CWJC No.12493 of 2009; Mr. P. K. Verma, AAG V and Mr. S. R. Saran, AC to AAG V, for the Respondent In CWJC No.12493 of 2009; Mr. Rajeev Ranjan Prasad, Mr. Nilanjan Chatterjee and Mr. Raghwendra Kumar Singh, Advocates, for the Petitioner In CWJC No.9169 of 2009; Mr. P. K. Verma, AAG V Mr. S. R. Saran, AC to AAG V, for the Respondent In CWJC No.9169 of 2009

Final Decision : Dismissed

Judgement

Smt. Sheema Ali Khan, J. (CAV) - These batch of writ applications have been filed challenging the Government resolution dated 28.03.2008 by which a decision has been taken by the State Government through the Road Construction Department to levy Rs. 5,000/- per kilometer per year as land usage charges for allowing the petitioners to lay underground optical fibre cables on the lands belonging to the State Government.

2. The Government of India formulated a new telecom policy in the year 1994 aimed at giving highest priority to the development of telecom services in the country in conformity and in furtherance of Government of India's Economic Policy. The mobile cellular telecommunication essentially requires laying down the optical fibre cables as per network planning for ensuring that signal of adequate length is available to all users and as such, the Government of India granted licenses under Section 4 of the India Telegraph Act, 1885 giving permission to the companies in the said business to lay down underground telecom cable. The Government of India, Ministry of Road Surface Transport came out with a circular dated 29th September, 2000 whereby they provided mobile guidelines for streamlining the provisions of right of way to telecom service licensees and also to the infrastructure providers. This document has been annexed in almost all the writ applications. The mobile guidelines have been formulated, keeping in view the object of creating a robust telecommunication infrastructure with adequate bandwidth at affordable rates and in order to promote Development and Proliferation of Information Technology, Electronic Governance, E-Commerce, convergence of Information, Communication and Entertainment sectors so as to improve the state of economy, enhance the quality of life of the citizens and to ensure development of urban and rural areas with equity throughout the country. This document has recommended the broad guidelines under which right of way permissions may be granted to licensed telecom operators and registered infrastructure for laying telecom cables, ducts under, over, along, across, in or upon a property vested in or under the control or management of a local authority or of any other person including public authority, public corporation, autonomous body, State Government or Central Government in their respective licensed service area during the pendency of their licence.

3. Initially, when permission was granted to the petitioners companies to lay down the optical fibre cables, a resolution was passed on 11.07.2005 vide memo no. 4564(S) me, giving certain directions to the companies which were utilizing the right of way on the lands which belong to the Road Construction Department. Laying down of optical fibre cables essentially required that the earth/road had to be dug up at various points so that the optical fibre cables could be installed underground. The Government gave certain directions regarding the manner in which the companies should act for restoring the land/road to its original form, directing the companies to pay a certain cost so that the Road Construction Department can reconstruct the roads and restore them. It may be mentioned here that the Government of India has presently exempted the mobile companies from any charge with respect to usage of land belonging to the National Highway.

4. In the State of Bihar, the Petitioners Companies were permitted to lay down the optical fibre cables without any demand for usage of the land. While doing so, the Road Construction Department vide memo no. 575(E) me, dated 05.02.2002 addressed a letter to the M/s Reliance Telecom and others by different memo numbers, which gave them permission to lay down optical fibre

cables. As per the letter, which is contained in Annexure-A to the counter affidavit, which speaks of the development in the field of telecommunication and the Government's intention to frame a policy regarding laying down of optical fibre cables. It specifically states that the Petitioners' Companies are being granted temporary permission with the condition that once the State Government frames the policy, the Petitioners' Companies would be bound by the said policy and would have to act and accept the provisions of the said policy. Accordingly, the Petitioners' Companies were allowed to lay down their optical fibre cables.

5. In pursuance of the aforesaid permission, a resolution was taken by the State Government issued vide letter no. 4501(S) dated 28.03.2008, wherein the State Government has stated that since the telecom companies have developed, grown and established themselves as business enterprises, they no longer come under the category of being granted a subsidy as such they would have to pay Land Usage Charges at the rate of Rs. 5000/- per kilometer per year. Subsequent to the issuance of this letter, notices were issued individually to all the stake holders, which is under challenge on various grounds, which are as follows:-

1. Whether the land usage charges is a rent or not?
2. Whether the land usage charge is impost if not rent?
3. Whether any impost in nature of tax, fees, cess can be levied without any authority of law merely on executive orders?
4. Whether the said impost is not on the usage of land, but on laying of optical fibre cables, which is governed under entry 31 read with entry 96 and 97 of the Union List in the 7th Schedule?
5. Whether even if assuming that the State has power to demand such impost, whether the same is bad in law on ground of there being no reason to justify the rates so imposed by it?

All these issues have been amalgamated in the judgment.

6. I shall begin with the power of the State Government to demand Land Usage Charge for utilization of its land by companies/individuals. It has been argued that the Union Government has the power to enact laws with respect to Post and Telegraph; telephones, wireless, broadcast and other like forms of communications under Entry 31 of Schedule-VII of the Constitution. It is further being argued that it is the Union Government, under Entry 96, has the power to charge fees in any matter under the Union List, as such, the State Government could not have raised the demand asking for Land Usage Charge. In this context, it is also argued that the demand is by way of tax/fees/impost and as such, it can only be demanded or charged from a company/individual if there is a corresponding law enacted by the State Government which allows it to make such a demand. Admittedly, the State Government has not taken the help of any law enumerated regarding the said demand.

7. At the outset, it is quite obvious and requires no citation of any case to point out that the State Government has not made any law or granted any license under the topics covered by Entry 31 in the 7th Schedule of the Union List, rather if at all, it would come under Entry 18 of the State List, which reads as "Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization", which are the subject matters for which the State Government has the power to take decisions, legislate and issue policies with regard to the administration and management of land which belongs to the State Government or any of its local bodies. Thus, there should be no confusion regarding this aspect of the matter and the State is well within its rights to take a policy decision regarding the lands belonging to it.

The next question that has been argued is that the demand of Rs. 5000/- per kilometer per year for land usage is by way of a tax. In this context, I would like to first begin by making a distinction between a lease and a license and a fee and a tax. It has been argued that the said demand would come within the definition of a tax/license/fee.

8. In the case of *Associated Hotels Of India Ltd v. R. N. Kapoor* [AIR 1959 Supreme Court 1262], the Supreme Court has distinguished between a license and a fee. One R. N. Kapoor filed an application before the Rent Controller, New Delhi, alleging that he was a tenant of the spaces in the cloak rooms under the Hotel (appellant) and asking that standard rent might be fixed in respect of them. The Hotel opposed the application, contending that the Act did not apply and no standard rent could be fixed. Section 11 of the Delhi Rent Control Act defines "premises" as any building or part of a building which is or is intended to be let separately..... but does not include a room in a dharamsala, hotel or lodging house." It was contended that a room in a hotel need not necessarily be a bed room, but may be for example be a dining room, a beauty parlour etc. It has been argued that such spaces provide amenities to the persons to use the hotel and, therefore, are part of the hotel. The Apex Court held that there is a mark distinction between a lease and the license.

9. Section 105 of the Transfer of Property Act defines a lease of immovable properties as transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. Under Section 108, the licensee is entitled to be put in possession of the property, a lease is, therefore, a transfer of an interest in the land. The interest transfer is called a lease hold interest. On the other hand, Section 52 of the Indian Easement Act defines a licence as "Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence." The Apex Court laid down the following propositions. "

- (1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form ;
- (2) the real test is the intention of the parties-whether they intended to create a lease or a licence;
- (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and
- (4) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease."

10. Thus, in the present case, it cannot be said that the State Government had granted a license to the Petitioners' Companies nor can it be lawfully said that they had leased the properties as the Companies did not come into exclusive possession over the lands that were utilized or are to be utilized by them.

11. Another judgment which would be relevant for the purposes of explaining what is a tax or fee is the case of Commissioner, Hindu Religious Endowments, Madras v. Lakshmindra Thirth Swamiar, [AIR 1954 SC 282]. The facts of this case are not very relevant for the purposes of the present dispute. The power of the State Government to enact laws on subject of religious and charitable endowments which is covered by Entry 28 of List-III, Schedule-VII of the Constitution was not under challenge, the challenge was to the demand of an annual contribution contained in Section 76 of the Charitable Endowment Act which was invoked at the time when the matter was taken up. It was argued that the provisions was amounting to a tax as Section 76 of the Act empowered the Government to charge the amount that they were required to pay by way of the salaries, pensions and other remuneration to the Commissioner, Deputy Commissioners, Assistant Commissioners and other officers of the religious institutions employed for the purposes of this Act including the expenses incurred by the Area Committees. The Apex Court has referred to the definition of tax by Lathan, C.J. of the High Court of Australia in Matthews v. Chicory Marketing Board [60 C.L.R. 263, 276]. A "tax", according to the learned Chief Justice, "is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered". The main essence of a tax is that it is compulsorily payable, it is imposed by a statutory body without the tax payer consent and the payment is enforceable by law. It does not confer any special benefit to any particular individual i.e. to say there is no element of quid pro quo between the taxpayer and the public authority. A fee, on the other hand, is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service. The distinction between a tax and a fee, lies primarily in the fact that a tax is levied as part of common burden while a fee is payment for special

benefit or privilege.

12. Counsel also refers to the judgment of *Gupta Modern Breweries v. State of J &K and Others* [(2007) 6 SCC 317]. The Excise Commissioner under rule 17 of the Jammu & Kashmir Distillery Rule sought to impose charges on account of salary of Excise Department staff which were to be recovered from the management to the extent of 50 per cent of the total expenditure. In several decisions, such as *CCE v. Chhata Sugar Co. Ltd.* [(2004) 3 SCC 466, The Apex Court has held that the stand of the concern authority that they were rendering services by deputing staff for the purposes of ensuring proper manufacture cannot be held to be a fee as there is no quid pro quo between the fee charged and the services rendered. This case referred to really does not help the Petitioners' Companies except that it highlights the differences between a tax and a fee. It is obvious that in the present case, the demand of Land Usage Charge cannot come within the ambit of a tax or a fee.

13. The decision cited by the Counsel for the Petitioners' Companies, which I may merely mention in passing would not be applicable in the facts of this case as they deal with the imposition of tax and fees, are, *Consumer Online Foundation and Others v. Union of India and Others* [(2011) 5 SCC 360], *Commissioner of Income Tax, Udaipur. Rajasthan v. McDowell and Company Limited* [(2009) 10 SCC 755], *Bholanath Gupta and Others. v. the State of Bihar and Another* [1975 BBCJ 397], *Bimal Chandra Banerjee v. State of Madhya Pradesh* [AIR 1971 SC 517], *Shree Digvijay Cement Co. Ltd. And another v. Union of India and another* [AIR 2003 SC 767]. All these cases have been cited for the propositions that the power to impose tax or fee can only be exercised under any law authorizing such levy and not by the executive power of the State. Especially, Counsel has referred the case of *Union of India and another v. Association of Unified Telecom Service Providers of India and other* [(2011) 10 SCC 543. The relevant facts are that the licenses granted to the service providers stipulated a license fee, which was payable by the service providers within a stipulated time. The licensees defaulted during the period 1994 to 1999, in payment of license fee and made a representation to the Government of India, Ministry of Telecommunications for relief against the license fee for the survival of the telecom industry. The Government of India considered their representations and offered a new package. There were disputes regarding the terms of the license, which was referred to the Tribunal for adjudication. The points that were considered by the Supreme Court in this judgment do not cover any part of the issues raised by the petitioners in these cases. The findings of the Apex Court that only the Central Government and no other has a right to carry telecommunication activities cannot be doubted. In the present cases, the licenses have been granted by the Central Government. The State Government is not taking any fee for grant of license; rather the demand is with respect to usage of land belonging to the Road Construction Department or the local authorities. It is also clear that the State Government is not making a demand of any tax as Land Usage Charge cannot come within the purview of a tax.

14. It is next argued that there is no statutory law under which the term "Land Usage" would be included. It is submitted that even if it is argued that the State is the landlord and it is charging rent, then it should be under the provisions of the law laid down under which the State can demand a rent. An attempt has been made to refer to the Acts governing the field with respect to the power of the State Government to charge any form of tax, fee, rent for the usage of land to indicate that the State Government has no authority by an executive action to demand the Land Usage Charge. Referring to the provisions of the Bihar Tenancy Act, it has been submitted that the Act came into being to consolidate certain enactments relating to the law of landlord and tenant. The regulations earlier regarding the subject matter stood only in favour of the Zamindars and Tenure holders, which had nothing in it to safeguard the interests of tenants who were nothing but tenants at will. The Act sought to bring into existence "the occupational right and fixation of fair and equitable rent" and to regularize the status of raiyats after the Zamindari rights were abolished. Under the Bihar Tenancy Act, sub-Section (3) of Section 3, the tenant has been defined as a person who holds land under another person and is, or but for a special contract would be liable to pay rent for that land to that person. Sub-section (4) of Section defines a landlord which mean " a person immediately under the tenant under whom a tenant holds, and includes the Government." Rent mean whatever is lawful payable or deliverable in money or kind be a tenant to his landlord on account of use or occupation of the land held by the tenant. It has been submitted that the Bihar Tenancy Act defines in detail the manner in which the landlord or for that matter a proprietor may charge for the land. It may be noted that the Bihar Tenancy Act refers to the right of the raiyat as well as the under-raiyat of land and the State Government charges a rent under the Act from the tenant or an under-raiyat for occupation of the land. In the present case, the provision of the Bihar Tenancy Act would not be applicable as the State Government is not charging the "rent" within the meaning of the Bihar Tenancy Act from the Petitioners' Companies. The demand under the Bihar Tenancy Act would not make the demand illegal by virtue of not being covered under the Act. The application of the Bihar Tenancy Act is in different circumstances and for different purposes.

15. There is no dispute about the fact that the State Government or the agencies under it are the owners or in other words the landlords and anyone seeking to derive any benefit from the lands owned by the State Government must pay under the general law. The demand is raised depending on the purpose for which the land is being utilized. Obviously, the Acts such as the Bihar Building (Lease, Rent and Eviction) Control Act, 1982 would not be applicable under a situation such as this.

16. The introduction and expansion of telecommunication services and facilities have grown up in the last decade or two, have facilitated easy communication and access to information. The requirements to facilitate smooth functioning of the modern telecommunication system require certain measures which were not

envisaged 20 years back. There can be no doubt that use of a facility confers a benefit to the persons who is using the said facility, naturally such benefits cannot come for free either for the beneficiaries or the providers of such facilities. The Government in these extraordinary circumstances is not required to frame laws, rather it would appear that Land Usage Charge is a type of a rent demanded by the Government for conferring certain benefits to the users. The outcome of the facility i.e. providing telecommunication is for the benefit of the public at large.

17. Simply put "rent" is compensation for the use of land. In this particular case, the Government has taken a policy decision to impose rent which is charged for use of street by Telegraph Companies. The term "rental" is properly applied to the charge imposed by a city (in this case the Government) on a telegraph company for the privilege of using the street, allies, and public places of the city, graduated by the amount of such use; for it is not a privilege of licence tax, the amount paid for not being graduated by the amount of business, no sum fixed for the privilege of doing business, it is more in the nature of a charge for use of property belonging to a town, city and the like.

18. It may be noted here that the petitioners in these cases were issued a letter that they would be allowed to use the lands belonging to the Government in whatever department, subject to framing of a policy. The petitioners utilized the lands with their eyes and ears open understanding the impact of the said letter, and, therefore, they cannot be heard to say that the policy framed is de hors the law.

19. Referring to the submission on behalf of the petitioners that there are no fixed criteria that the amount charged is excessive is a stand, which can be redressed by the petitioners if they are so advised by approaching the concerned department. On this ground, the Court cannot hold that the policy framed by the Government charged for use of the roads is beyond the scope of the powers of the State Government.

20. In the result, these writ applications are dismissed.