

(2016) 04 PAT CK 0142

In the Patna High Court

Case No : Letters Patent Appeal No. 1391 of 2012

M/s. Tribro Ad Bureau

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 26-04-2016

Acts Referred:

Bihar Municipal Act, 2007 — Section 147, 147, 155
Bihar Tax on Advertisement Act, 2007 — Section 28

Citation : (2016) 3 PLJR 927

Hon'ble Judges : Mr. Navaniti Prasad Singh and Smt. Nilu Agrawal, JJ.

Bench : Division Bench

Advocate : Mr. Sanjay Singh Mr. Sangeet Deokuliar and Mr. Amrendra Kumar, Advocates, for the Appellants; Mr. Lalit Kishore, Senior Advocate (PAAG), Mr. Nasrul Hoda Khan, SC-18, for the State; Mr. Sanjay Prakash Verma, Advocate, for the PMC; Mr. Sanjay Singh Mr. Sang

Final Decision : Allowed

Judgement

Smt. Nilu Agrawal, J.(Cav)—Appellants are proprietorship concern, having its office at Patna, are advertisers engaged in the business of Outdoor Media Publicity and, have preferred these Intra Court Appeals against the order dated 29.06.2012 passed in CWJC No. 5108 of 2012 and CWJC No. 5369 of 2012 which were heard as analogous cases by the learned Single Judge.

2. With consent of the parties, these appeals have been heard together and are being disposed of at this stage itself.

3. For the sake of convenience facts in relation to L.P.A. No. 1391 of 2012 is being referred to and the observations/directions and legal proposition will be applicable to L.P.A. No. 1436 of 2012 as well.

4. Appellant, who was the writ petitioner before the learned Single Judge, had sought quashing of Demand note contained in Letter No. 26 dated 11.02.2012 issued under the signature of the Chief Engineer (Town), Patna Municipal

Corporation, Patna (hereinafter referred to as the "Corporation") raising a demand of Rs. 64,50,040/- towards royalty/fee/tax to be paid, as well as office order dated 02.11.2007 issued by the Town Commissioner whereby various rates of royalty/penalty were purportedly prescribed under the provisions of the Bihar Municipal Act, 2007. Petitioner before the Learned Single Judge had also sought quashing of the Resolution No. 18 and Proposal No. 551 passed by the Council of the Corporation under its 19th Meeting dated 15.12.2010, whereby it was resolved to cancel the registration of those advertising agencies, who have defaulted in making payment of the said royalty/fee/tax. The appellant further by filing supplementary affidavit had brought on record the various representations by which while admitting that they were paying royalty/fee/tax on the basis of an arrangement between the representatives of the advertisers and the Corporation since 2005, but at the same time stated that they challenged the said charge on the ground that being registered under the Bihar Tax on Advertisement Act, 2007 under the provisions of the Bihar Finance Act, 2007, they have been paying tax as charged under the provisions of the said Act and that they cannot be subjected to double taxation under the Bihar Municipal Act, 2007.

5. Learned Single Judge after detailed hearing of the said writ application along with other analogous writ applications, however, did not interfere with the charge of royalty/fee/tax imposed by the authorities of the Corporation, as by way of arrangement they had agreed to pay the same since 2005, and were also held entitled to pay at the rate fixed by the Corporation in the year 2007, but observed that it would not be entitled to charge penalty as Regulations under the Municipal Act not having been framed till then.

6. Thus, the primal question to be decided in this appeal is whether the Municipal Corporation is authorised by law to levy, demand and/or collect tax on Advertisement?

7. The facts of the case are not in dispute. The advertising agency, such as the petitioner, had agreed to pay royalty to the Corporation as per the arrangement made between the representatives of the advertising agencies and the Corporation on 29.08.2005 at the rate of Rs. 1.00 per square feet per year. The Bihar Municipal Act, 2007 came into existence with effect from 05.04.2007. The rates of royalty were exorbitantly enhanced with effect from 02.11.2007 @ Rs. 10/- per square feet by the Town Commissioner of the Corporation and different rates of royalty for different kinds of Hoardings and advertisements were to be charged from the advertisers and failure to make payment would attract penalty. Thereafter vide Resolution No. 18 and Proposal No. 551 passed by the Council of the Corporation under its 19th Meeting dated 15.12.2010, it was resolved to cancel the registration of those advertising agencies who have defaulted in making payment of the enhanced royalty/fee/tax. A Letter No. 26 dated 11.02.2012 was subsequently issued raising a demand of Rs. 64,50,040/- towards royalty/fee/tax to be paid by the appellant/writ petitioner.

8. The counsel for the appellant contended that they were registered with the

Department of Commercial Taxes, Government of Bihar under the Bihar Finance Act, 1981 and paying advertisement tax under the Advertisement Tax Act, which is under Part-II of the Bihar Finance Act, 1981 and has been paying advertisement tax at the rates prescribed under the law. The Bihar Tax on Advertisement Act, 2007 was enacted on 31.03.2007 to provide for levy of tax on advertisements other than advertisements published in newspapers and broadcast by Radio or on Television. The Bihar Tax on Advertisement Rules, 2007 was promulgated there under on 20.07.2007 and the writ petitioner being registered under the said Act with renewal year to year, made payment of tax under the provisions of the said Act and Rules.

9. That so far as power of the Corporation to levy advertisement tax is concerned, it can first be traced to Section 196 of the Patna Municipal Corporation Act, 1951. Suffice to say that this power was subject to the maximum and minimum tax rate to be laid down by the State of Bihar in this behalf. The State Government did not authorise the Corporation by stipulating rates to levy tax on advertisement.

10. So far as the royalty/fee/tax charged by the Corporation is concerned, in the year 2005 by a mutual arrangement between the advertising agencies and the then Municipal Commissioner of the Corporation, they had agreed to pay royalty at the rate of Rs. 1.00 per square feet per year, however, they were not under any statutory obligation to make such payment of such royalty/fee/tax. After the enactment of Bihar Municipal Act, 2007, new rate of royalty was revised and failure to make payment at such revised rates would attract penalty. It is upon the imposition of such enhanced revised rates and penalty, the challenge by the appellant before the learned Single Judge stating that the appellant was being charged to tax under two different provisions of two different Acts simultaneously, i.e., one under the Bihar Municipal Act, 2007 and the other under the Bihar Tax on Advertisement Act, 2007, which is impermissible. At this juncture, learned counsel for the appellant, Mr. Sanjay Singh has referred to the various legal provisions. He has submitted that the Corporation is not authorised, by law, to levy any such tax on advertisement much less to demand or collect the same. He submits that Article 265 of the Constitution of India clearly provides that tax can be levied and collected only by authority of law. Tax herein includes fee. Law herein would mean law made by legislature or under their authority.

11. In order to appreciate, I may first refer to Article 265 of the Constitution, which is quoted hereunder:

"265. Taxes not to be imposed save by authority of law. ? No tax shall be levied or collected except by authority of law."

I may then refer to Part IXA of the Constitution as inserted by Constitution (Seventy-fourth Amendment) Act, 1992 with effect from 01.06.1993, which gives constitutional recognition to local self-government in the form of Municipality.

12. Article 243-X of the Constitution, which is quoted herein below, as relevant, provides that the Legislature of State may, by law, authorise the municipality to levy such tax, duties, tolls and fee in accordance with such procedure and subject to such limits.

" 243-X. Power to impose taxes by, and Funds of, the Municipalities. ? The Legislature of a State may, by law ?

(a) authorise a Municipality to levy, collect and appropriate such taxes, duties, tolls and fees in accordance with such procedure and subject to such limits;

(b) assign to a Municipality such taxes, duties, tolls and fees levied and collected by the State Government for such purposes and subject to such conditions and limits:"

13. The Patna Municipal Corporation Act, 1951 was repealed and Bihar Municipal Act, 2007 was promulgated wherein Chapter XVII of the Act makes provisions for tax on advertisement and licence fee for advertisement spaces, Section 127(1) (f) empowers the Municipality to levy tax on advertisements other than the advertisements published in newspapers. Section 127 (3), inter alia, provides that the levy, assessment and collection of taxes under this Act shall be in accordance with the provisions of this Act and the Rules and the regulations made there under. Section 129 vests the power to the Municipality to levy fees and fines wherein Section 129 (c) confers power on the Municipality for issuance of licence under various categories, activities, sites. Now, coming to the provisions contained in Chapter XVII relating to tax on Advertisements. Sections 147 (1) and 147(3) are quoted here under:

"147 (1) Every person, who erects, exhibits, fixes or retains upon or over any land, building, wall, hoarding, frame, post, kiosk, structure, vehicle, neon-sign or sky-sign any advertisement, or displays any advertisement to public view in any manner whatsoever (including any advertisement exhibited by means of cinematograph), visible from a public street or public place in any location in a municipal area including an airport or a port or a railway station, shall pay for every advertisement, which is so erected, exhibited, fixed or retained or so displayed to public view, a tax calculated at such rate as may be determined by regulations:

147(3) The tax on any advertisement levyable under this section shall be payable in advance in such instalments, and in such manner, as may be determined by regulations:" Section 147 provides for tax on advertisement calculated at such rate as determined by regulations."

Section 147 (3) of the Act provides that tax on any advertisement levyable under this Section shall be payable in advance in such instalments, and in such manner, as may be determined by regulations. Chapter XIX of the said Municipal Act, 2007 specifies payment and recovery of tax by the Municipality. Section 155 of the Act provides that save as otherwise provided in this Act, any tax levied under

this Act may be recovered in such manner, as may be determined by the regulations. Section 156(1) of the Act provides that the tax levied under this Act shall be payable on such date, in such number of instalments, and in such manner, as may be determined by the regulations. Section 158 of the Act provides for framing of the regulations regarding payment and recovery of tax. Section 421 of the Act authorizes the Municipality to make regulations for the purposes of the Act and giving effect thereto. Section 422 of the Act lays down certain restrictions on the exercise of such power. Section 423 of the Act provides that the regulations would be subject to approval of the State Government and Section 424 authorizes the State Government to cancel or modify the regulations.

14. Thus, seen from the provisions aforesaid that before tax can be levied, demanded or recovered, there is necessity to frame regulations in this regard and in absence of regulations there will be no law authorising levy, imposition or collection of said tax.

15. The regulations which have been so framed for the first time has been appended to by the respondents-Municipality, as Annexure-C to this appeal, which has been issued with the approval of the State Government on 04.07.2012 and published in the Gazette on 13.08.2012. From a plain reading of Clause 1(3) of The Patna Municipal Corporation (Grant of Permission for Display of Advertisement and Similar Devices) Regulations, 2012 (hereinafter referred to as Regulations 2012) states that these regulations shall be applicable in relation to all the matter pertaining to grant of permission for display of advertisements and similar devices in any places, locality or the locations falling within the jurisdiction of the Corporation. Part-II of the said regulation provides for "General Norms for Advertisement, Permission." Part-III of the said regulation from Regulations 25 to 33 provides for Procedure for Application for Regular Advertisement Permits. Regulation 31 provides for fees and deposits for other advertisement permits.

16. This 2012 Regulations, which have been framed for the first time, are clearly referable to Sections 145, 146, 148, 149, 150, 151 and 152 of the Act. They are only licensing provisions and not taxing provisions.

17. Now, coming to the Bihar Tax on Advertisement Act, 2007, which was earlier Part-II of the Bihar Finance Act, 1981, but now it is part of the Bihar Finance Act, 2007 and Bihar Tax on Advertisement Rules, 2007 promulgated on 20.07.2007, Section 28 of the Advertisement Act, 2007 provides that every advertising agent shall pay on every advertisement made by him a tax at such rates as specified by the State Government. Section 31 provides for registration by the person who shall make an advertisement. Section 33 provides for payment of tax under the Act and penalty in case of failure. Rule 4 of the Bihar Tax Advertisement Rules, 2007 provides for return and payment of tax in the manner prescribed.

18. Thus, from the reading of various provisions of the aforesaid two Acts as also submission made by Mr. Sanjay Singh, learned counsel for the appellant, that the

regulations of the Corporation so framed, do not speak of tax, rather, entire regulations are only with regard to the permission to be taken and thereby grant of such permission for display of advertisement and similar devices, which is, in fact, just a licence for permission to be obtained from the Corporation for display of advertisement by various means, like, posters, hoarding boards, banners, temporary arches, illuminated signs, name boards, direction boards, balloons etc. The regulations do not speak of tax or royalty or fee, but a permission to be obtained and the permission fee which is in fact a licence fee for putting up advertisements through various manner. Mr. Sanjay Singh also contended and rightly so that by the action of the Municipality, appellant is being subjected to double taxation by two different authorities for the same service/item for the same period and the Constitution of India by empowering the State to enact a legislation on the advertisement tax did not bestow power on the State to impose tax twice for the same item for the same period. This is complete violation and derogation of the rights enshrined under Articles 14, 16 and 19 of the Constitution of India and, hence, is bad and unsustainable in the eye of law. The said so called Regulation, 2012, which have been so framed is only permission for display of advertisement and similar devices for which a permission/permit fee is charged and by no stretch of imagination can be termed as tax. It is clear from the provisions of Regulation 2012 and the State Act of 2007 that the former is a licensing/regulatory provision, whereas the latter is the taxation Act. The former does not provide for taxation.

19. This comparison of the provisions of the Municipal Act and the State Act of 2007 as also the Municipal Regulations of the year 2012 would bring out why no regulations were ever approved by the State authorising Municipality to levy tax on advertisement. The reason is simple. The 2007 State Act and the State Act prior to it provided for such a tax, therefore, only licensing provisions were allowed to be bestowed upon to the Municipality and no regulation authorising imposition of tax or realisation thereof under the municipal law was ever made. In this connection, he relied upon a judgment in the case of *Indian Medical Association v. V.P. Shantha and others.*, since reported in (1995) 6 Supreme Court Cases 651, wherein at paragraph 47, the characteristics of tax has been defined in the following words:

"47. The essential characteristics of a tax are that (i) it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law; (ii) it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax and (iii) it is part of the common burden, the quantum of imposition upon the taxpayer depends generally upon his capacity to pay."

He also referred the judgment rendered in the case of *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, since reported in (1954) 1 SCR 1005 wherein it has been held as follows:

"A tax is a compulsory exaction of money by public authority for public purposes

enforceable by law and is not payment for services rendered. A fee is a charge for a special service rendered to individuals by some governmental agencies. The distinction between a tax and a fee primarily lies in the fact that a tax is levied as part of a common burden, while a fee is a payment for a special benefit or privilege."

Learned counsel also relied upon the judgment in the case of *Jindal Stainless Ltd. (2) and another v. The State of Haryana and others*, since reported in (2006) 7 Supreme Court Cases 241 wherein the distinction between tax and fee has been discussed with the conditions of their respective applicability.

20. On the other hand, learned counsel for the Patna Municipal Corporation as well as learned counsel for the State, Mr. Lalit Kishore, Principal Additional Advocate General, who was also called upon to assist this Court, have submitted that as per the agreement and understanding between the representatives of the advertising agencies in Bihar and the Patna Municipal Corporation on 29.08.2005, it was agreed that the advertisers would pay tax to the Corporation at the rate of Rs. 1/- per square feet per year, which was being paid by the advertisers without any coercion. However, a new rate came into force with effect from 02.11.2007, which was duly approved by the Empowered Standing Committee and subsequently passed by the Board of the Corporation. On 18.07.2009, a meeting was held between the Municipal Commissioner and the representatives of the advertising agencies in which the new rate was not opposed by the advertisers. The Patna Municipal Corporation, Respondent nos. 2, 4 to 8 have also enclosed the Regulation, 2012 stating therein that under powers conferred under Section 421 of the Bihar Municipal Act, 2007, a regulation has been promulgated and approval has been given by the State Government, whereby new rates for advertisement tax came into existence and contended that there are specific provision under the regulation for levy of fees and tax on advertisement and has also referred to some of the provisions.

21. I find substance in the argument advanced by the learned counsel for the appellant, Mr. Sanjay Singh. The Municipalities are empowered to regulate licensing of such advertisements, and, therefore, levy a fee for grant of such licence, which is indicated in Sections 145 and 146 of the Municipal Act and other Sections of Chapter XVII and the various Clauses of Regulations referred earlier, except for Section 147, which provides for tax on advertisement but it has to be levied as per the regulations. But the Regulations, which have been brought on record, are only with respect to permission for licence and thereby permit fee for such advertisements. These regulations are also with effect from 2012 and not earlier. These provisions, as discussed above, do not speak of tax, but merely a permission fee for grant of permit for display of advertisement and similar devices. As held in the case of *Jindal Stainless Ltd. (supra)*, tax is levied as a part of common burden based on the ability or capacity of the tax payer to pay with no identification of specific benefit, not capable of direct measurement whereas fee so charged, there is an indication of a quantifiable data, namely,

benefit, which is measurable. The said quantifiable benefit is represented by the cost incurred in procuring the facilities/services, which costs in turn become the basis of reimbursement/recompense for the provider of the services/facilities. Hence, the liability to pay advertisement tax and collection by the Municipality thereto is to be authorised by regulations but the Regulations only speak of permit fee for grant of permission to display by advertisers. The demand of tax on advertisement, as being sought to be made by the Patna Municipal Corporation and the penalty thereon under the provisions of Bihar Municipal Act, 2007 and its Regulations is not authorised by law especially so when the appellant/petitioner has been paying tax under the Bihar Tax on Advertisement Act, 2007. It is to be noted that now the Corporation has proposed penalty for non-payment of demands. These demands are not in relation to Regulations of 2012 but prior to it. Prior to 2012 the Corporation had absolutely no authority to levy, assess or demand any amount either by way of fee or tax in respect of advertisement. Tax is under the State Act of 2007 and now licensing regulation is with Corporation with effect from 2012 only.

22. It is equally well settled in view of Article 265 of the Constitution that there has to be a law for imposition of tax. There cannot be a tax imposed or a liability to pay tax created by any agreement which is not under any law. In the present case, as I have found the tax on advertisement continued with the State Act of 2007 and it is not a power vested with the Corporation, Corporation till date has not been authorised by any regulation to impose any such tax. The agreement or denotification or the decision of Empowered Committee cannot create any liability where the law is silent.

23. In this connection, I may hold that the concept of taxation is well established by series of judgments which have been followed in India namely Attorney General of New South Wales v. Homebush Flour Mills Ltd., (1937)56 CLR 390; Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Limited, 1933 AC 168 and Attorney General v. Wilts United Dairies, Limited, (1922) All ER Rep. Ext. 845 (HL) which decisions have been discussed with approval in A. Venkata Subbarao & Ors. v. State of Andhra Pradesh etc. since reported in AIR 1965 Supreme Court 1773. I may also notice the judgment of the Supreme Court in the case of The State of Kerala v. K.P. Govindan Tapioca Exporter since reported in AIR 1975 Supreme Court 152 wherein administrative surcharge levied by State of Kerala was struck down holding that the State was only authorised to regulate the transport or export of Tapioca but not to levy administrative surcharge which became an impost on such transactions, which power was not there.

24. Learned Single Judge has upheld the demand being so levied and collected by the Patna Municipal Corporation on the basis of an arrangement between the Patna Municipal Corporation and the advertisers way back in the year 2005, but quashed the order of demand of penalty. On this learned Single Judge went wrong. When the demand of advertisement tax by the Municipal Corporation

which can be only levied as per the Regulations and when the Regulations are silent and does not speak of tax on advertisement, but permission fee being permit fee for such advertisement and the petitioner-appellant is already paying advertisement tax under the Bihar Tax on Advertisement Act, the appellants cannot be subjected to double taxation and that too without legislative mandate, as the advertisers are paying tax at the rate of 5% of the bill for an advertisement so displayed to the State. In terms of Article 265 of the Constitution, taxation can only be under authority of law. Taxation law permits State to collect Advertisement tax under the State Act of 2007. There is no law made by legislature which authorizes the Corporation to levy, assess, demand advertisement tax. Regulation of 2012, cannot have retrospective operation nor does it authorise imposition of tax.

25. To sum up, the advertisers cannot be subjected to double taxation on the same subject matter by two different authorities for the same service/item for the same period. Thus, realising tax by the advertisers as royalty on advertisement by the Corporation is not permissible. Thus, the levy, demand and collection of tax on advertisement by the Municipal Corporation is in the teeth of Article 265 of the Constitution of India, as there are no regulations authorising imposition of advertisement tax to be levied and collected thereof.

26. Having thus seen and held that the demand of tax/fee/royalty on advertisement as made by the Corporation was wholly without jurisdiction as it was made without any legislative sanction and/or authority, it is held to be violative of Article 265 of Constitution and ultra vires the powers of the Constitution. Tax being already charged under the State Act of 2007, the collection by the Corporation has consequently to be refunded forthwith. Corporation cannot appropriate the amount to itself without lawful authority. There is no case of passing on the liability by the petitioners/appellants. Neither was there any such provision nor any such fact is alleged by the Corporation. All amounts, recovered by the Corporation on this account by way of tax on advertisement, has to be refunded, which refund shall be made within one month. Consequently there will be no question of imposition of penalty by the Corporation. If the Corporation wants to levy anything in excess of the Regulation of 2012, it may do so, only after enacting proper legislation in accordance with law and not by any executive fiat or so called arrangement.

27. In course of arguments it was mentioned that recently the Corporation auction settled the right to collect Advertisement tax from advertisers to private individuals. This is totally impermissible. State or its instrumentalities cannot trade in taxation. To levy, assess and raise demand of tax is a sovereign function. It can never be auction settled to private individuals. In exceptional circumstances, only right to collect an amount already assessed by sovereign authority can be delegated but not the right to assessee and/or quantify the liability and also the right to collect.

28. Thus, the order of the learned Single Judge dated 29.06.2012 passed in

CWJC No. 5108 of 2012 and CWJC No. 5369 of 2012 is set aside and these appeals are allowed. The respondent-Patna Municipal Corporation is directed to refund the amount of tax so collected in view of the proposition discussed above. There will be no order as to cost.

Navaniti Prasad Singh, J. - I agree.