
(1964) 04 AP CK 0003

In the Andhra Pradesh High Court

Case No : Writ Petition No. 780 of 1961

Nizam Sugar Factory Ltd.

APPELLANT

Vs

City Municipality, Bodhan and Another

RESPONDENT

Date of Decision : 16-04-1964

Acts Referred:

Constitution of India, 1950 — Article 265

Hyderabad District Municipalities Act, 1956 — Section 101, 101(2), 230(2), 97(1)

Citation : AIR 1965 AP 91

Hon'ble Judges : Satyanarayana Raju, J;Ananthanarayana Ayyar, J

Bench : Division Bench

Advocate : B.V. Subrahmanyam and M. Krishnamurthy, for the Appellant; D.V. Sastry, for P. Ramachandra Reddy, for the Respondent

Judgement

Ananthanarayana Ayyar, J.

(1) The petitioner is Nizam Sugar Factory represented by its General Manager. It has prayed for issue of a writ of certiorari or any other appropriate writ, order or direction quashing the order in Case No. 117/a/7 of 1960 dated 6-2-1961 to the effect that a large specified amount was due from the petitioner as water tax. The two respondents are the City Municipality. Bodhan, represented by its Executive Officer and the City Municipal Committee, Bodhan represented by its President.

(2) The relevant facts are as follows :

In 1492, the City Municipality of Bodhan came into existence. Its jurisdiction included a large block of buildings belonging to the petitioner-factory which had been existing from a long time back along with a complete water supply system serving those blocks of buildings. In 1946-47, the Municipal Committee, Bodhan started its water works and began supplying a limited area within the Municipality. It has not extended its water supply to block of buildings belonging to the petitioner. The nearest public water tap which has been erected by the

Municipality is far away from the blocks of buildings belonging to the petitioner .

(2a) The contention of the petitioner is that the levy made by the Municipality is a fee and not a tax and is, therefore, illegal as there is no service rendered to the petitioner which would justify any such levy.

(2b) On behalf of the respondents, a counter-affidavit was filed contending that the levy was not a fee but was a property tax u/s 97 of the Hyderabad District Municipalities Act and was perfectly legal and that it was a general tax and not a fee for actual quantity of water supplied or consumed coming under Chapter XIII of that Act.

(3) This petition came up before this Bench on an order of reference by our learned brother, Basi Reddy J., as follows :

"In view of the stakes involved, I direct this writ petition to be posted before a Bench after the vacation."

(4) The main question concerned in this case is whether the levy is a tax or a fee. The contention of Sri Venkatappayya Sastry on behalf of the Government Pleader before us is that it is a tax coming under Entry 49 in List II in Schedule VII to the Constitution . On the other hand, the contention of the learned Advocate for the petitioner is that it comes under Entry 17 and Entry 66 in List II in Schedule VII.

(5) The entries in List II (State list) are as follows ;

"Entry 17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I. (We are not concerned in this case about entry 56 of List I).

Entry 66 : Fees in respect of any of the matters in this list, but not including fees taken in any Court."

Entry 49 : Taxes on lands and buildings."

(6) In Hyderabad District Municipalities Act (Hyderabad Act XVIII of 1956) (hereinafter referred to for convenience as the Act), Chapter II bears heading "Municipality taxes" and includes Section 96 to 136. Section 97 runs as follows :

"97 (1). The following taxes shall, subject to exception, limitations and conditions herein provided, be levied on buildings and lands within municipal limits and shall hereinafter be referred to as property taxes namely :

(a) a general tax ;

(b) a general water tax ;

(c) a drainage tax ;

(d) a lighting tax ;

(e) a conservancy tax.

97 (2). Save as otherwise provided in this Act, these taxes shall be levied at such percentages of their rateable value as may be fixed by the Committee"

(6a) Section 101 runs as follows :

"(1) A Committee may levy a general water tax when public water taps or stand posts have been fixed or are being fixed for the use of the public within the municipal limits.

(2) When in any building or land a private pipe connection is taken the owner of the said building or land shall have to pay either the general water tax or the fee for the private pipe connection whichever be greater.

* * *

(7) Section 102 states as to how the rateable value is to be determined.

(8) Chapter XVIII of the Act bears title "water supply and fire service" and includes Sections 227 to 243. Of these sections 227 to 236 come under sub-heading "water supply". Section 228 (1) runs as follows :

"S. 228 (1) . In every town administered by a Committee where a sufficient supply of protected water for domestic use does not already exist, the Committee shall provide or arrange for the provision of such supply where it can be obtained at a reasonable cost."

(9) S. 230 provides for supply of water by the Committee to occupier of any building or land. Sub-section (2) of Section 230 runs as follows :

"The occupier of every building so connected with the water supply shall be entitled to have for domestic use, in return for the water fees, if any, such quantity of water as the Committee may fix."

(10) It will be seen from the above sections that the general water tax provided for under S. 97 (1) (b) is designated and classified by the Act as a "tax" on buildings and lands and as property tax and distinguished from water fee charged under S. 230, which is designated and classified as fee. It is also made clear that the quantum of general water tax is levied on the basis of rateable value of the building or land concerned and not on the basis of the quantity of water supplied and consumed. Whereas, on the other hand, the fee is charged under S. 230 (2) of chapter XIII and its quantum is fixed on the basis of water supplied and consumed. Section 101 (2) specifically provides that, where the water fee payable under S. 230 (2) is not equal to the general water tax, the person concerned can pay the higher of the two. This provision in Section 101 (2) only provides for contingency arising out of the amount of general water tax being different from water fee in quantum but leaves unaffected from water fee in quantum but leaves unaffected their individual qualities by way of being

property tax (general water tax) or water fee, their bases of valuation and the distinction between the two levies.

(11) In AIR 1945 48 (Privy Council) , it was observed by their Lordships of the Privy Council that it is not the name of the tax but its real nature, its "pith and substance", as it has sometimes been said which must determine into what category it falls.

(12) In Commr. of Municipal Council v. Venkateswara Rao 1956 AWR 616 : AIR 1957 A P 103 also it was held that what matters is not the nomenclature given to a particular levy but the purpose for which it is made which was a real test as to the category in which the levy fell.

(13) In The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., contention was made that certain contribution was really a tax and as such was beyond the legislative competence of the State Legislature to enact such provision. On the other hand, it was contended on behalf of the appellant, Commissioner of H. R. C. E. Madras and by the learned Attorney-General that the contribution levied was a fee and not a tax. Their Lordships of the Supreme Court referred to a neat definition of tax as given in Matthews v. Chicory Marketing Board, 60 C L. R. 263 and observed as follows (at page 358) :

"This definition brings out, in our opinion, the essential characteristics of a tax as distinguished from other forms of imposition which, in general sense, are included within it it is said that the essence of taxation is compulsion that is to say, it is imposed under statutory power without the taxpayer's consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax Another feature of taxation is that it is a part of the common burden, the quantum of imposition upon the tax-payer depends generally upon his capacity to pay....."

In Jagdish Prasad v. Administrator, Municipal Board Saharanpur, AIR 1961 583, the relevant facts were as follows : The Saharanpur Municipal Board demanded from petitioners, water-tax on their lands and building which was assessed at ten per cent on the annual valuation of lands and buildings as authorised by Section 128 (1) of the U. P. Municipalities Act. The petitioners challenged the legality of the demand. Contention was raised that the provisions of Sections 128 (1) Clause (x) were beyond the legislative competence of the U. P. Legislature and that Entry 49 List II of Schedule VII to the Constitution cannot be read to include water tax. The learned Judge (S. N. Dwivedi J.) observed as follows (at page 586) :

"One may agree that the subject of water-tax is not included in Entry 49, which deals with the topic of "Taxes on lands and building".

The learned Judge referred to the decision in The Commissioner, Hindu Religious

Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., and other decisions of the Supreme Court and observed as follows (at page 587) :

"The instant case is, in my view, covered not by the first decision but the subsequent two decisions of their Lordships of the Supreme Court. The water-tax is imposed upon the owners of lands and buildings within the Municipality for the water works service rendered by the Municipal Board. The tax is also co-related on the face of the legislative provision itself to the expenses incurred by the Municipality for purposes of rendering water works service. Clause (b) of S. 129 expressly directs that the water-tax would be imposed solely with the object of defraying the expenses connected with construction, maintenance, extension or improvement of Municipal Waterworks, and that all monies derived therefrom would be expended solely on the aforesaid objects. The receipts of water tax are thus ear-marked by the legislative provision for expenses in connection with the Municipal water works service."

(13a) The learned Judge concluded as follows (at page 588) :

" I am, therefore, of opinion that Cl. (x) of sub-section (i) of section 128 of the Act is not ultra vires the U. P. Legislative even after the commencement of the Constitution."

Section 128 (1) would not have been ultra vires if the levy had fallen under Entry 49 also. In that case, it was taken as agreed, without contest, that the levy did not come under Entry 49 and the question raised and decided was whether the levy came under Entry 66 (read with Entry 17) :

(14) In Raza Buland Sugar Co. Ltd. Vs. Municipal Board, , the question of legality of same levy came up for decision before a Division Bench of the same High Court. The relevant facts of that case, as stated in that judgment, are as follows : The Municipal Board of Rampur decided to impose water tax on the annual value of land and buildings within the limit of the Municipality as provided in Section 128 (1) (x) of the U. P. Municipalities Act. The tax was fixed at the rate of ten per cent of the annual value of the lands and building. The petitioner, Baza Buland Sugar Company Ltd., came to the Court under Article 226 of the Constitution for issue of a writ or order quashing notices of demand on the ground that the tax was illegal. The learned Judge held as follows (at page 86) :

"Entry No. 49 in List II is "Taxes on lands and building". The contention of the opposition party is that the water tax imposed by the Municipal Board of Rampur is really a tax on land and buildings and the State Government has power to make laws in respect thereof.

It is obvious that the subject-matter of water-tax is not water. Though it is called water-tax it is not levied on its production

* * * * In pith and substance, a water tax imposed under clause (x) of Sub-section (i) of Section 128 is a tax on "lands and buildings."

(15) The learned Judge have given their reason for coming to the decision and relied on the case of the AIR 1930 129 (Privy Council) wherein it was held that a Bridge tax was a land tax because it was a tax on land directly imposed by the Legislature. The learned Judges held as follows (at page 86):

"In the present case, water tax is a tax which is directly imposed on buildings and lands and is, therefore, covered by entry 49 of List II of the Seventh Schedule of the Constitution."

This decision of date 12-5-1961 does not make reference to the earlier decision of single Judge in AIR 1961 583 which is dated 26-8-1960.

(16) The decision in A.R. Sethumadhavan, Proprietor, Central Cafe, Visakhapatnam and Others Vs. Visakhapatnam Municipality and Another, is relied upon by the learned Advocate for the Petitioner. Therein certain hotel keepers of Visakhapatnam town filed a petition under Article 226 of the Constitution praying for a writ of prohibition against the Municipality to forbear from collecting water rate from them as provided by its bye-laws. Under the bye-laws, residential buildings were permitted free allowance varying with the annual rental value of the buildings whereas non-residential buildings were not permitted any free allowance and were also charged at a higher rate (Rs. 6/ per thousand gallons) than the rate for residential buildings (Rs. 4/- per thousand gallons). It was contended on behalf of the petitioner that there was discrimination which was violative of Article 14 of the Constitution. Obviously the charges concerned in that case were based on the volume of water consumed and not on the annual rental value of the building though there was a free allowance which depended on the rental value of the building concerned. The charges made were in the nature of fee such as concerned in Section 230 of the Hyderabad District Municipalities Act and were different from the levy made u/s 97 of the Hyderabad District Municipalities Act. So that decision does not help the contention of the learned Advocate for the petitioner.

(17) In The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others, it was observed as follows (at p. 464) :

"In other words, whether or not a particular cess levied by a statute amounts to a fee or tax would always be a question of fact to be determined in the circumstances of each case. The distinction between a tax and a fee is, however, important, and it is recognised by the Constitution. Several Entries in the Three Lists empower the appropriate Legislature to levy taxes ; but apart from the power to levy taxes thus conferred each List specifically refers to the power to levy fees in respect of any of the matters covered in the said List excluding, At pages 465-466 :

"It is true that when the Legislature levies a fee for rendering specific services to a specified area or to a specified class of persons or trade or business, in the last analysis, such services may indirectly form part of services to the public in general. If the special service rendered is distinctly and primarily meant for the

benefit of a specified class or area the fact that , in benefiting the specified class or area, the State as a whole may ultimately and indirectly be benefited would not detract from the character of the levy as a fee. Where, however, the specific service is indistinguishable from public service, and in essence is directly a part of it, different considerations may arise. In such a case, it is necessary to enquire what is the primary object of the levy and the essential purpose which it is intended to achieve. Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences. That is true test in determining the character of the levy."

In the present case, the primary object and essential purpose are the amenity of water supply to the Municipal area though incidentally, the petitioner, which already has its supply system, does not derive immediate benefit while others within Municipal area deserve immediate benefit.

(18) In *The Western India Theatres Ltd. Vs. Municipal Corporation of The City of Poona*, , their Lordships of the Supreme Court observed as follows (at page 588) :

"The obligations and functions cast upon the municipalities are set forth in Ch. VII of the Act (Bombay District Municipalities Act, 3 of 1901). Taxes, therefore, can be levied by the Municipality only for implementing those purposes and for no other purpose. In other words, it will be open to the municipality to levy a tax for giving any of the amenities therein mentioned The first duty mentioned in that section is that the Municipality should make provision for lighting public streets and nobody can object if it imposes a lighting tax, which, indeed, is item (ix) in S. 59 (i). Take another example : It is the duty of the Municipality to arrange for supply of drinking water and it may legitimately charge a water rate which, again, is item (viii) in S. 59 (1)."

The provision in item (viii) of Section 59 (1) of the Bombay District Municipalities Act obviously was similar to the provision in Section 97 (1) (b) of the Hyderabad District Municipalities Act. The above observation of their Lordships shows that levy regarding water can be of the nature of tax, if the statute authorises the Municipality to impose tax for such purpose.

(19) In *Garimell Satyanarayana and Appana Venkataraju firm of Ambajipeta and Others Vs. East Godavari Coconut and Tobacco Market Committee, Rajamundry and Others*, Division Bench of this Court, to which one of us was a party observed as follows : (at page 289 (of Andh WR) : (at p. 401 of AIR) :

"There is no generic difference between a tax and a fee but our Constitution has for legislative purposes, made a distinction between them. While there are various entries in the legislative lists as regards various forms of taxes, there is an entry at the end of each one of the three lists as regards fees which could be levied in respect of any of the matters that is included in it. (vide the *Sirur Mutt Case* (supra))."

It was also observed therein as follows : (at p. 289 (of Andh WR) : (at p. 401 of

AIR) :

"Entry 96 of List I , entry 66 of List II and entry 47 of List III (Concurrent List) specifically provide for the imposition of fees in respect of any of the matters enumerated in the three lists. The absence of a similar provision in regard to the levy of taxes in respect of any of the matters enumerated in the Lists gives a strong indication that the levy of tax was not meant to be exercised as an ancillary or incidental power."

Section 96 (1) (a) must be read with section 97. Section 96 (1) (a) is elaborated in S. 97. Section 101 makes provision in elaboration of the provision in Section 97 (1) (b). Sri. B. V. Subrahmanyam contends that Section 101 must be read to determine the nature of the levy. But, in fact, Section 101 only lays down the particular circumstances under which the levy contemplated in Section 97 (1) (b) may be made and what shall be done if the tax contemplated u/s 97 (1) (b) in any individual specific case is different in quantum from the fee for private pipe connection and makes a proviso. It does not affect the nature of the levy which is determined by Section 97 (1) (b) which gives the categories of taxes which can be levied on buildings and lands which taxes the committee is authorised to impose under S. 96 (1) (a).

Section 230 only provides for the supply of water to occupiers of that building and charge of water fee on the basis of water supplied and consumed. It does not affect the nature of the levy made u/s 97 (1) (b) read with Section 101. In all the concerned provisions, the distinction between general water tax which is a tax levied on buildings and lands based on the rateable value of the building or land and water fee charged on the basis of quantity of water supplied and consumed is consistently maintained. We respectfully agree with the decision of the Division Bench of the Allahabad High Court in Raza Buland Sugar Co. Ltd. Vs. Municipal Board, , respectfully differ from the decision of the Allahabad High Court in Lala Jagdish Prasad and Another Vs. Administrator, Municipal Board, Saharanpur and Another, and hold that the levy in the present case is a water tax on lands and buildings and comes under Entry 49 and does not come under Entry 17 and Entry 66 of List II.

(20) The learned Advocate for the petitioner points out that there were provisions in Section 93 (1) and Section 93 (5) of the Hyderabad Municipal and Town Committee Act, ,1951 (Hyderabad Act 27 of 1951) which correspond to Section 101 (1) and Section 101 (2) of the Hyderabad District Municipalities Act (XVIII of 1956) and that there were also corresponding provisions in the Hyderabad Municipal and Town Committees Ain of 1352 Fasli. He contends that in those corresponding provisions of act 27 of 1951 though the word "tax" is used, that is of the same nature as fee. He also contends that in the provisions in the Ain, no distinction is made between water tax and water fee. We find that in the provisions in the Act 27 of 1951, there is distinction drawn between "tax" and "fee". Even assuming for arguments" sake, without admitting that in the provisions in the prior statutes namely, Act 27 of 1951 and in the Ain of 1352

Fasli, there was no distinction made between tax and fee, that would not in any way affect the present provisions in the statute which is now in force namely, Act XVIII of 1956 which have to be interpreted as they now stand.

(21) The provision in Section 101 provides that water tax can be levied when public water taps or stands-posts have been fixed or being fixed for the use of the public within the Municipal limits. The rule framed under the Act provides for levy of tax only when the public water taps or stand-posts have been fixed. Sri B. V. Subrahmanyam contends that in fact no public water taps or stand-posts have been fixed in the area, which is occupied by the petitioner, and that therefore the levy is illegal. This contention cannot be accepted because what is required for levy of taxes is that water taps or stand-posts have been fixed within the Municipal limits and that provision has been complied with. The levy cannot be said to be illegal, when there is compliance with the provisions of the statute and the rule.

(22) In the result, we dismiss the writ petition with costs. Advocate's fee Rs. 100/-.

(23) Petition dismissed.