

(2008) 09 GUJ CK 0026

In the Gujarat High Court

Case No : Special Civil Application No. 531 of 2008

Reliance Communications Limited

APPELLANT

Vs

Junagadh Municipal Corporation and Another

RESPONDENT

Date of Decision : 09-09-2008

Acts Referred:

Constitution of India, 1950 — Article 265

Citation : (2008) 3 GLH 273

Hon'ble Judges : Harsha Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : S.N. Soparkar, with Mr. Amar N. Bhatt, for the Appellant; H.S. Munshaw, for the Respondent

Final Decision : Allowed

Judgement

H.N. Devani, J.—By this petition, the petitioner seeks the following substantive reliefs :

[7] The petitioner therefore prays that this Honourable Court may be pleased to :

[A] Issue an appropriate writ to quash and set aside the attachment warrant dated 10/1/2008 at Annexure "A" hereto issued by the respondent No. 1 herein and quash and set aside the letters of the respondents dated 22/10/2007 (Copy at Annexure "A" hereto), 21/11/2007 (Copy at Annexure "E" hereto) and 10/12/2007 (Copy at Annexure "F" hereto).

[AA] Issue an appropriate writ to command the respondents to place on record Resolution No. 63 dated 30/8/2007 and Administrative Order No. 248 dated 11/9/2007 and thereafter quash and set aside the same in so far as they seek to charge permission fees, administrative penalty and annual rent from the cellular/mobile service provider company and declare that the said Resolution and the Administrative Order are illegal and void.

[AAA] Issue an appropriate writ to quash and set aside the demand raised by the

respondents for annual rent, permission fees and administrative penalty to the tune of Rs. 13,99,000/- from the petitioner as per the order dated 18/1/08, and direct the respondents to refund an amount of Rs. 1,40,000/- collected from the petitioner on 24/12/2007."

The petitioner, a Company, is engaged in the business of telecommunications. For the purpose of providing mobile / telecommunication service to its customers/subscribers, the petitioner is required to have certain Base Trans Receiver Station Installations which are popularly known as Mobile Towers. For setting up such Mobile Towers, the petitioner enters into agreements with private property owners and thereafter, applies for permission from the local authorities to place tower/s in the said property. The Mobile Towers are placed on structures, either on the ground floor or on the terraces of the buildings. The Poles are sometimes placed on high-rise buildings. In Junagadh city, the petitioner has six ground base/terrace base towers and two terrace base poles through which the petitioner provides telecommunication service to its subscribers in the city of Junagadh and its nearby areas. Except for one tower base pole, the respondent No. 1 has granted permission for placing the towers on private properties and one ground base/terrace base tower, for which the procedure for permission is going on, and the application made by the petitioner for such permission is pending.

2. By communication dated 22.10.2007, the respondent No. 1 informed the petitioner that the General Body of the respondent No. 1 had passed a resolution being Resolution No. 63 on 30th August, 2007 which was followed by an administrative order dated 11th September, 2007 whereby the petitioner was required to pay* a total amount of Rs. 8,32,000/- towards permission fees/administrative penalty and annual rent for its ground base/terrace base towers and Rs. 5,67,000/- for its terrace base poles and called upon the petitioner to make payment within seven days thereof. The demand for annual rent included the annual rent for the years 2005-06 and 2006-07 also. The petitioner sent a reply to the aforesaid communication on 27.10.2007. The respondent No. 1 once again reiterated the aforesaid demand vide letter dated 21.12.2007. Vide communication dated 10.12.2007, the petitioner was informed that the respondent No. 1 was authorised to take decision regarding penalty and fees and was, accordingly, called upon to make payment. Thereafter on 11.1.2008 the respondent No. 1 issued an attachment warrant under Rule 42 of the Bombay Provincial Municipal Corporation Taxation Rules directing the petitioner to pay the outstanding amount of Rs. 13,99,000/- within seven days of the receipt of the notice, failing which the movable property of the petitioner would be attached. Being aggrieved by the aforesaid action of the respondents, the petitioner has moved the present petition praying for the reliefs noted hereinabove.

3. Heard, S.N. Soparkar learned Senior Counsel with Mr. Amar N. Bhatt learned Advocate for the petitioner and Mr. H.S. Munshaw learned Advocate for the respondents.

4. The learned Senior Advocate submitted that the respondent No. 1 is empowered to collect tax only as provided under the provisions of the Bombay Provincial Municipal Corporations Act, 1949 (BPMC Act). Referring to the provision of Section 127 of the BPMC Act, it was further pointed out that the tax sought to be levied does not fall within any of the categories (sic) thereunder. Attention was also drawn to the provisions of Chapter XXII of the BFMC Act, which provides for "Licences and Permits". It was pointed out that Chapter XXII consists of nine parts. Part I to VIII make provision for different categories of licences viz. (I) Licensing for Surveyors, Architects or Engineers etc., (II) Trade licences and other licences for keeping animals etc., (III) Licences for sale in municipal markets, (IV) Licences for private markets, (V) Licences for sale of Articles of Food outside of Markets, (VI) Licensing for Butchers etc. (VII) Licences for diary products, (VIII) Licences for hawking, etc. whereas Part IX contains general provisions regarding Licences and Permits. Thus Part IX makes provision regarding grant, suspension or revocation of licences and levy of fees etc. in respect of the matters specified under Part I to VIII. Part I to VIII do not envisage obtaining licence under the Act for the purpose of putting up Mobile Towers or poles. Drawing attention to the provisions of Article 265 of the Constitution of India which provides that no tax shall be levied or collected except by authority of law, it was submitted that in absence of any statutory provision the levy of permission fees was violative of Article 265 of the Constitution. In support of his submissions, the learned Counsel placed reliance upon the decision of the Supreme Court in the case of Mumbai Agricultural Produce Market Committed and Another Vs. Hindustan Lever Limited and Others, as well as the decision of the Supreme Court in the case of Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others, for the proposition that in absence of express provision a delegated authority cannot impose tax or fee. Such power of imposition of tax or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee.

5. It was further submitted that the petitioner was already paying taxes under the BPMC Act by treating the structure as a building and that there is no provision under the Act for grant of licence in connection with putting up Mobile Towers or poles. It was stated that insofar as municipal taxes are concerned, the same are being regularly paid. As regards levy of fees, it was submitted that it is settled legal position that if no service is being rendered, no fee could be levied. On the principle of quid pro quo fees cannot be levied as no service is provided by the Corporation. It was submitted that assuming that the respondents had the authority to levy fees, the same should be commensurate with the service being rendered. That fees cannot be levied in such a manner so as to cause unjust enrichment in favour of the State. It was, accordingly, submitted that the respondents had no power to levy such fees, penalty or annual rent. That nothing had been brought on record to show as to in exercise of which power such fees, penalty and annual rent were sought to be levied. It was pointed out

that the Mobile Towers/ poles were set up on private properties, hence the respondent No. 1 had no right or authority to charge annual rent in respect of such property. It was contended that retrospective recovery of permission fees and administrative penalty was not permissible under law. Drawing attention to the demand notices, it was pointed out that the annual rent was sought to be recovered with retrospective effect for several years prior to the passing of the resolution in question. It was submitted that in any case such levy cannot be retrospective in effect. It was accordingly urged that the impugned Resolution being without any authority of law deserves to be quashed and set aside.

6. On the other hand Mr. H.S. Munshaw learned Advocate for the respondents vehemently opposed the petition. It was submitted that, prior to determining it's policy on the issue of collection of installation fees and yearly permission fees for such towers, the respondent No. 1 had undertaken a study of the existing policies of Rajkot Municipal Corporation, Ahmedabad Municipal Corporation and Jamnagar Municipal Corporation and had thereafter formulated its policy for levying such fees as well as penalty in case of violation of the provisions of all the Acts and the General Development Controlling Regulation (GDCR). It was submitted that the respondent No. 1 had followed the provisions of section 386(2) of the BPMC Act for fixation of such fees and a proposal dated 7.12.2006 had been forwarded to the Secretary of the Junagadh Municipal Corporation for placing the matter before the Standing Committee, which was initially turned down, but later on a Resolution came to be passed on 10.7.2007 approving the said proposal. Subsequently, the General Body of the respondent No. 1, vide the impugned Resolution dated 30.8.2007 gave its approval to the resolution passed by the Standing Committee. A perusal of the said Resolution would show that the same was passed to collect installation charges, yearly permission fees and penalty. It was submitted that due procedure has been followed as laid down under the provisions of the BPMC Act. That subsequently on the basis of the rates determined by the respondent No. 1, demand notice was issued to the petitioner on the issue of payment of fees as well as penalty, and the petitioner was called upon to supply necessary details. However, despite issuance of notices, the petitioner failed to fulfill necessary conditions and requirements, hence the petitioner was held liable to pay installation fee, yearly permission fee and penalty as determined by the authority. It was accordingly submitted that the action taken by the respondents was just, legal and proper and in consonance with the provisions of the BPMC Act and as such did not call for any intervention by this Court.

7. As is apparent from the facts noted hereinabove, the challenge in the petition is to the attachment warrant under Rule 42 of the Rules as well as notices dated 22.10.2007 and 14.12.2007 as well as the Resolution dated 30.8.2007 and administrative order dated 11.9.2007 which form the basis of the aforesaid notices and attachment warrant. Hence, the core issue that arises for consideration is as to the legality and validity of the resolution dated 30.8.2007.

8. A perusal of the resolution dated 30.8.2007 shows that by the said resolution the General Board of the respondent No. 1 has approved of the resolution dated 10.7.2007 of the Standing Committee for determination of permission fees, annual rent and penalty. Hence it would be necessary to refer to the contents of the resolution dated 10.7.2007 passed by the Standing Committee of the respondent No. 1. By the said resolution the Standing Committee has given its approval to the proposal made by the Commissioner in respect of the necessary documents for setting up base transmission tower/pole within limits of the Junagadh Municipal Corporation, permission fees, annual rent and penalty. Moreover in case of those towers which have been put up in an illegal manner and in case of those terrace towers in respect of which permission is sought for in future, in each case permission shall be granted only upon production of certificate of an architect registered with the Corporation giving a clear opinion in writing that technically as well as in relation to FSI, no problem shall be caused to the structure of the building on account of the mobile tower.

9. On the facts of the present case, we are concerned with the first part of the resolution, which provides for collection of permission fees, annual rent and penalty. The case of the respondents is that the impugned resolution has been passed in exercise of powers u/s 386(2) of the BPMC Act. Section 386 of the BPMC Act as is relevant for the present purpose reads as under:

"386. (1) Whenever it is provided by or under this Act that a licence or a written permission may be given for any purpose, such licence or written permission shall specify the period for which, and the restrictions and conditions subject to which, the same is granted and the date by which an application for the renewal of the same shall be made and shall be given under the signature of the Commissioner or a municipal officer empowered u/s 69 to grant the same.

(2) Except as may otherwise be provided by or under this Act, for every such licence or written permission a fee may be charged at such rate as shall from time to time be fixed by the Commissioner, with the sanction of the Corporation."

10. On a bare reading of the aforesaid provision it is apparent that the Corporation is empowered to determine the rates of fees for such licence or written permission only in those cases where the Act provides that a licence or a written permission may be given for any purpose. Thus, the purpose for which licence or written permission may be given is required to be specified under the BPMC Act, and it is only in case of such licence or written permission that the Corporation is empowered to determine the rates of fees. A perusal of the provisions of the BPMC Act shows that provision for "Licences and Permits" is made under Chapter XXII and specific categories of cases are enumerated thereunder in Part I to VIII of the said Chapter, which have been referred to hereinabove in detail. A perusal of the said categories shows that the same do not include licences or permits in respect of Mobile Towers. The learned Advocate for the respondents is not in a position to point out any other provision of the Act, which makes provision for licences or permits in relation to Mobile Towers so

as to attract the provisions of sub-section (2) of section 386 of the BPMC Act. In the circumstances, in absence of any statutory provision permitting the respondents to impose permission fees in respect of Mobile Towers, the levy of permission fees is without authority of law and as such is violative of Article 265 of the Constitution and cannot be sustained. This view gets support from the decision of the Supreme Court in the case of Ahmedabad Urban Development Authority v. Sharadkumar Jayantikumar Pasawala & others (supra) wherein the Court while dealing with the validity of levy of development fee under the Gujarat Town Planning and Urban Development Act, 1976, held that in a fiscal matter, in absence of express provision, a delegated authority is not competent to impose tax or fee. In the view of the Court, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. The delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incidental or ancillary power in the matter of exercise of fiscal power.

11. As regards determination of annual rent, the source of powers according to the respondents is section 386(2) of the BPMC Act. From the language employed in the said provision it is clear that the same empowers the Commissioner to determine the rate of fees for licences or written permissions. The same nowhere envisages the determination of annual rent. Besides, undisputedly, the towers/bases/poles are set up on private properties, hence, the respondent No. 1 has no right or authority to charge annual rent in respect of private property. In the circumstances, the levy of annual rent is also bad in law.

12. Insofar as administrative penalty is concerned, the learned Advocate for the respondents is not in a position to point out any provision of law that permits the respondents to impose such penalty. It is settled legal position that in absence of any statutory provisions for imposition of penalty, no penalty can be imposed. In the circumstances, merely by virtue of a resolution passed by the respondent No. 1, administrative penalty could not have been imposed, that too without first enacting any provisions as to under what circumstances such penalty could be imposed. In other words without specifying the default, which would entail the imposition of penalty no penalty could have been imposed. Hence, the imposition of administrative penalty being without any authority of law cannot be sustained.

13. For the foregoing reasons, the impugned resolution insofar as it provides for determination of permission fees, annual rent and penalty, deserves to be set aside. Consequently the demand notices and attachment warrant based upon the said resolution must suffer from the same fate. In the result, the petition succeeds and is accordingly allowed. The impugned Resolution No. 63 dated 30th August, 2007 passed by the respondent No. 1 insofar as it provides for determination of permission fees, annual rent and administrative penalty as well as Administrative Order No. 248 dated 11.9.2007 are hereby quashed and set aside. Consequently the impugned demand notices and attachment warrant are

also quashed and set aside. As a necessary corollary, the petitioner would be entitled to refund of any amount recovered under the impugned demand notices. Rule is made absolute accordingly, with no order as to costs.