
(1983) 08 GUJ CK 0004
In the Gujarat High Court

Case No : Special Civil Application No's. 3494 and 3702 of 1980

Shardulkumar Jayantkumar Pasawala and Others	APPELLANT
Vs	
Ahmedabad Urban Development Authority and Another	RESPONDENT

Date of Decision : 22-08-1983

Acts Referred:

Gujarat Town Planning and Urban Development Act, 1976 — Section 119

Citation : AIR 1984 Guj 60 : (1984) GLH 325 : (1984) 1 GLR 401

Hon'ble Judges : S.A. Shah, J;N.H. Bhatt, J

Bench : Division Bench

Advocate : G.N. Desai, for the Appellant; S.B. Vakil and R.R. Shah, Asst. Govt. Pleader, for the Respondent

Judgement

Bhatt, J.—These two petitions by two different sets of petitioners, but against the common respondent, namely, the Ahmedabad Urban " Development Authority constituted under the Gujarat Town Planning and Urban Development Act, 1976, and the common respondent No. 2-the State of Gujarat raise common questions of law 1A the context or background of similar facts and they can be conveniently taken up together and disposed of by this common judgment.

2. A few facts are required to be noted in order to understand. what the controversy is in these two petitions. The first two petitioners of the first petition No. 3459 of 1980 contended that certain lands set out in paragraph 2 of that petition belonged to them, Out of the land, "S. Nos. 44, 45-P, and 46-P , admeasuring 11156 sq. yds. of land belonged to the Petitioner No. 1 as the Karta of the Hindu undivided family and the land of S. No. 47-P and S.1 No. 53 admeasuring in all 40937 sq. yds, belongs to, the petitioner No. 1 in his personal capacity. The petitioner No. 1 in that petition is the constituted attorney of the petitioner No. 1 for the purpose of submitting a Scheme under Sections 20 and 21 of the said Act and for doing all incidental things for the purpose of implementing and executing the said Scheme under the Urban Land Ceiling Act. The respondent No. 1 is an urban authority constituted u/s 22 of the Act and it is

the authority for urban area of Ahmedabad with adjacent areas and the lands above-mentioned fall within that area. The petitioners by their application dated 28-2-80 had sought for permission for carrying out development of the land comprised in the said application, as the lands were included in the draft town planning scheme made and published by the respondent No. 1 and the petitioner No. 1 had been allotted final plots Nos. 99, 104 and 105 in lieu of the said lands. The petitioners had submitted necessary plans and drawings and had also filled in the necessary form "C" under Rule 9 of the Gujarat Town Planning and Urban Development Rules, 1970 for obtaining permission for carrying out the 4 fore mentioned development in the land of final plot No. 104. The respondent No. 1 in the initial stages obtained from the petitioners an amount of Rs. 533.80 calling it as development fee. This was on 1-3-80. The application was, however, rejected by the Senior Town Planner of the respondent No. 1 by his letter dated 9/10-4-80. Another application, therefore, was made on- 18-4-80 submitting,. The revised plans as per the objections raised in the aforesaid letter of 10-4-80. At that time, Rs. 76.50 were recovered as the development fee. By the order dated 2/3-5-80 the permission was granted to carry out the development under sections 26, 29(1) and 49 of the said Act, though the petitioners say that the relevant section applicable was Section 49 of the Act. Then the petitioners were required to submit the revised plans and drawings before the respondent for obtaining permission with respect , to the revised plans for carrying out development under S. 49 of the Act and, they were required to pay almost under constrain a sum of Rs. 4,720.75 as development fees, which" they paid under test. The petitioners then found that some changes were required, to be done in the plans and so revised Plans" were submitted and at that time, the respondent No. 1 again recovered from the petitioners an amount of Rs. - 4720.25 purporting to be development fees and named by the respondent No. 1 as scrutiny fee at the rate of 25 paise per sq. meter for the entire area which includes not only the Proposed built-UP area but also open land. The petitioners were obliged to pay conversion charges for converting the said land for non-agricultural use under the provisions of the Bombay Land Revenue Code. The petitioner therefore, filed the present petition for the following reliefs:-

(A) That it lie declared that the provisions of Ss. 119(1) and 119(2)(c) of the Gujarat Town Planning and Urban Development Act, 1976 are ultra vires;

(B) That it be declared that regulations Annexures A & B purported to have been made by first respondent under the Gujarat Town Planning and Urban Development Act, 1976 are ultra vires Articles 14, 19 and 21 of the Constitution of India and, therefore, void

(C) That it be declared that regulations Annexures A & B made by first respondent under the development Act are ultra vires its powers and the said regulations are ultra vires the Gujarat Town Planning and Urban Development Art, 1976;

(D) That this Hon"ble Court may be pleased to issue an appropriate writ, order

or direction in the nature of mandamus or any other appropriate writ, order or direction, directing first respondent not to enforce and/or implement regulations Annexure A or Annexure B and not to levy or recover any amount as development fee under the said Regulations.

(E) That this Hon'ble Court may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction directing first respondent to refund the amount of development fees of Rs. 5,330.65 charged from the petitioners Nos. 1 and 2; "

3. The facts of the second petition are that the petitioner No. 1 is a co-operative housing society brought into being under the provisions of the Gujarat Co-operative Societies Act, 1961 and its business is to provide houses for its members. The petitioner No. 2 there is a Non-Trading Corporation created under the Non Trading Corporations Act and one of its objectives is to protect the interests of developers of housing and estate within the State of Gujarat. The land of the petitioner No. 1 is situated in S. No. 93/1 of Manager and under the draft town planning scheme No. 1 Manager, it is given final plot No. 99. After obtaining requisite non-agricultural permission from the District Development Officer, Ahmedabad the petitioner-society made an application to the respondent No. 1 under S. 49(1)(a) of the Act and by the reply dated 29-11-1979 they were informed by the respondent No. 1 that as the petitioner No. 1 society had not paid the necessary development fee, the permission could not be granted. Annexure A is the said reply. The petitioners', say is that they are not liable to pay any such, charges for want of any authority with, the respondent No. 1 to charge the same. Still, with a view to avoid delay, the petitioner No. 1 society had paid on 5-12-1979 an amount of Rs. 153.90 being the development fee as demanded by the respondent No. 1, Then the respondent No. 1 by its letter dated 11/16-1-1980 rejected the application on the ground that the plan submitted by the petitioner No. 1 society did not show, the Whole of the limits of original survey number and the area mentioned of the final plot as being 4,73() sq. meters was not the correct area of the final plot as mentioned in the Town Planning Scheme-1. It was suggested that the area there was shown as 5,645 sq. meters. Annexure C is the said reply. On that ground the permission was refused. Thereafter the petitioner No. 1 society, with a view to avoid any technicality submitted a fresh application on 5-3-1980 with necessary corrections and removing objections raised by the respondent No. 1 earlier. At that time it was insisted that Rupees 403.85 were required to be paid as development fee. That amount also was paid under constrain on 19-3-1980. Again the respondent No. 1 refused the permission on the ground that the development fee paid by the petitioner No. 1 society was less than the prescribed one and that the application was not accompanied by the Record of Rights. Again the petitioner No. 1 society was obliged to pay an amount of Rs. 42/- and also submitted the Record of rights. This was on 9-4-1980. Then the respondent No. 1 by its letter dated 18/19-4-1980 informed the petitioner No. 1 that its application was rejected on the ground that there was some mistake in producing the Record of Rights. It

was stated that the Record of Rights was not produced with respect to S No. 93/1, but it was produced with respect to S. No. 9312 and, therefore, the permission was refused vide Annexure N. The petitioner No. 1 society had submitted by their letter dated 30-4-1980 that the Record of Rights submitted was absolutely correct and also explained the discrepancies in that behalf. The respondent No. 1 by its order dated 17-6-1980 rejected the application with the added ground that No Objection Certificate was not produced and that in sub-plot No. 3 there were three entries front the main road instead of only one entry. On such alleged ground, again permission was refused. The petitioner No. 1 society had submitted by their letter dated 21-6-1980 all clarifications and corrected the plan and submitted the same afresh and that too was rejected on 11-7-1480 on the ground that the petitioner No. 1-society had carried out unauthorised construction before permission tinder S. 49(1)(a) was granted and that so long as the respondent No. 1 did not take a decision with respect to the unauthorised construction, no permission under S. 49(1)(a) could be granted, vide Annexure K. Then there came to be Passed an order on 17-7-1980 purporting to be under the Act and a show cause notice was issued to the petitioner No. 1 society that the petitioner No. 1 had carried out development on the land without obtaining permission tinder various sections of the Act and also requiring th show as to why the said construction should not be removed. The petitioners cow ,ended that the provisions, of which violation was alleged, was not even specified. The petitioner No. 1-society replied to the said show cause notice and added them. in spite of the above, if it was necessary to pay any penalty, the petitioner -No. 1 be informed of the same and the petitioner was required to pay Rs. 7,0543.25 as alleged development fee for unatithorised development on the said land. Thus, in all the petitioner No. 1 society was made to pay the huge amount and, their say is that all those charges were illegally recovered from them and the respondent No. 1 be ordered to refund the said amounts. The prayers put forward in the petition are:-

(A) That it be declared that the provisions of Ss. 119(1) and 119(2)(c) of the Gujarat Town Planning and Urban Development Act, 1976 are ultra vires-,

(B) That it be declared that regulations Annexures R & S purported to have b-n made by first respondent under the Gujarat Town Planning and Urban Development Act, 1976 are ultra vires Articles. 14, 19 and 21 of the Constitution of India and therefore void;

(C) That it be declared that regulations Annexures R & S made by first respondent under the Development Act are ultra vires its powers and the said regulations are ultra vires the Gujarat Town Planning and Urban Development Act, 1976;

(D) That this Hon''ble Court may be pleased to issue an appropriate writ, order or direction in the nature of mandamus or any other appropriate writ, order or direction;- directing first respondent not to enforce and/or implement regulations Annexure R or Annexure S and not to levy or recover any amount as

development fee under the said Regulations;

(E) That this Hon"ble Court may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction, directing first respondent to refund the amount of Rs. 7,657.00 (rupees seven thousand six hundred fifty seven only) being the amount of development fee and fine charged from petitioner No. 1;

(F) That it be declared that the construction carried out by petitioner No. 1 society on the said land is authorised and legal and the permission applied for on 23-11-1979 is deemed to have been granted under the provisions of the said Act and the construction earned -out is not unauthorised."

4. At the time of the hearing. G. N. Desai the learned advocate appealing for the petitioners in both the petitions however, canvassed only following questions, though in the initial stages he had enumerated questions also:-

(a) Levy of development fee is not authorised by the statute and. therefore, the action of the respondent No. I in collecting various amounts from these petitioners of the two petitions in the form of development fee is an act unauthorised,

(b) No development fee could be charged even by the State Government, as there is no provision in any entry in List ii of Schedule 7 appended to the Constitution of India:

(c) This levy of development fee is ultra vires, as -it does not fall u/s 119 and the Regulations made by the respondent authority are, to that extent, unauthorised and illegal; and

(d) There was unauthorised delegation of the powers to levy development fee in favour of the respondent-authorities even if there is such a power with the State Legislature;

5. In order to understand the controversy, a few facts relating to the scheme some other of the Act require to be noted. The term appropriate authority" in relation to a development area, means an area development authority or an urban development authority a s the case may be. "Urban Development Authority" means an urban development authority constituted under S. 22 of the Act. Chapter 11 of the Act deals with development area and constitution of area development authorities whereas Chapter III deals with the declaration of Urban Development Areas and Constitution of Urban Development Authorities. Chapter IV of the Act deals with control of Development and use of land included in Development plans and Chapter V deals with Town Planning Schemes. The lands in both these petitions are beyond the limits of the Ahmedabad Municipal Corporation, but they are within the operative field of the respondent No. 1-authority, namely, the Ahmedabad Urban Development Authority. Section 49 of the Act deals with restrictions on use and development of land after declaration of a scheme and it is this question that is applicable to the lands in both these petitions. It is because of this restriction that the petitioners of both these,

petitions were required to submit an application for the development of their respective lands and in the course of processing their applications from time to time, various amounts were taken from them as development fee. The first and foremost question that arises for our consideration is whether there is any legislative competence to charge development fees" either by the State Government or by the respondent No. 1-authority. Entry 66 in the Seventh Schedule appended to the Constitution makes the position very clear. The said Entry 66 is captioned as follows:-

"fees in, respect of any of the matters in this List, but not including fees taken in any court.",

Entry 5 of, the very . Schedule, that is, list No. 2, mention constitution and powers of- improvement trusts and other local authorities for the purpose of local self Government and/or village administration. Entry 66, therefore, shows that it is within the legislative competence of the State Legislature to make provision for fees in respect of any matters in this list including, the matters set out in Entry 5 of that second list. It is, therefore, not correct to say that the Legislature has no competence to provide for fees to be charged by local authorities. The Urban Development Authority constituted under S. 22(1) of the Act is a body corporate by the name aforesaid having a perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable, and to contract, and by the said name sue and be sued. Under S. 23(2) of the Act, the Urban Development Authority may, with the approval of the State Govt. delegate any of its functions to the local authority or authorities functioning in the urban development area. So it is not difficult to say that the respondent No. 1-authority is a local authority for the purpose of local self-government or is a sort of improvement trust.

6. Even though we have agreed that the power to charge fees is there, the question is whether the said power has been conferred by the Legislature on the respondent No. 1 -authority. Simply because a Power to charge any tax or fees is there, simply because it is competent for the State Legislature to provide for any tax or fees, it does not necessarily follow that whenever there is an opportunity, the State Legislature must have exercised that power. While making laws with respect to various items and constituting various authorities in exercise of the legislative power, the Legislature may or may not invest the authorities, so created with all the powers, which it is competent for the Legislature to confer on it. We find that the Legislature by the aforesaid enactment namely, The Gujarat Town Planning and Urban Development Act, 1976, has not thought it fit to invest the respondent No. 1-authority or as a matter of fact any other utility under the Act "with the power to charge fees, much , less the power to charge development fee properly so called. As the Supreme Court has stated in the case. of the 14ihgir- Vasantlal Maganbhai Sanjanwala Vs. The State of Bombay and Others, ", "It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities: but

whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return. a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it". it is to be remembered with pertinence that tax and fees are obligatory payments to be made by a citizen, however unwilling he may be. Even in the earlier judgment of the Supreme Court in the case of Mahant Sri Jagannath Ramanuj Das and Another Vs. The State of Orissa and Another, , the Supreme Court has clearly provided that "there is no generic difference between a tax and a fee and both are different forms in which the taxing power Of a State manifests itself ". Wherever there is compulsory exaction of any money from a citizen, there may be a specific provision for the same. There is no room for any intendment. There is no equity about a tax. In a taxing Act one has to look merely at what is clearly said. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied . One can only look fairly at the language used." The above is the pith and concise exposition of law regarding compulsory exactions of moneys from citizens at the hands of the Queen's Bench, Court of Appeal, in the case of Commrs. of Customs; and Excise v. Top Ten Promotions Ltd. (1969) 3 All ER 39 .

7. Even In the recent reported judgment of the Supreme Court in the case of Municipal Corporation of Delhi and Others Vs. Mohd. Yasin, the very nature of compulsory character of the tax and fee is reiterated. There also, it has been stated that "there is no generic difference between a tax and a fee though broadly a tax is a compulsory exaction as part of a common burden, without promise of any special advantages to classes of tax payers whereas a fee is a Payment for services rendered, benefit provided or privilege conferred". On going through the various provisions of the Act and particularly S. 49 equivalent to S. 26 and Ss. 61, 67, 72, 77, 79, 90, 91, 94, 99, 100 and 101 and even 119. we do not find any provision anywhere providing for making a special act liable to payment of fees. We reiterate that power to charge fees must be express ant] if" such a Power is not expressly provided for, there cannot be any implied power for the same.

8. Mr S. B. vakil, the learned advocate appearing for the respondent No 1 authority ,however, submitted with the vehemence that what was true of a tax need not necessarily be true of a fee, because in his submission tax was to be paid by any citizen irrespective of his option whereas fees are to be paid by only those citizens who by their option are free to avail themselves or not to avail themselves of the services rendered by the authority seeking to, charge fees for some particular purpose. This difference is without any distinction because a citizen seeking some services from a, public servant also would like to have those services rendered out of the consolidated fund of the concerned public authority and would pay the individual fees only if he has to, but not otherwise -Mr Vakil in this connection invited our attention to S. 91 (1) and (2) of the Act and also referred to certain provisions regarding the scheme of the authorities and urged that unlike other local authorities, like municipalities and

panchayats, the Urban Development authority has no power or authority to collect any taxes and, therefore, there must be an implied power for it to charge certain fees in order to continue its public services. It cannot be gain said that there is, no specific power to levy any tax, but from that we are not prepared to jump to the conclusion that this authority must be presumed to have implied by the power to charge fees from the persons seeking development of their lands. It is to be noted with pertinence that this authority is entitled to claim statutorily the development arges, which go to contribute towards its coffers. Section 91(1) of the Act specifically provides for three different kinds of sources of funds of this authority. The first source is the moneys received by the authorities by way of grants, loans, and advances or otherwise. Grants are grants made by the Government. Loans and advances do not call for any elaboration. The term "otherwise" occurring in clause (a) of S. 91(1) was sought to be interpreted by Mr. Vakil to mean the development fees impugned in this petition, because in his submission barring development fees provided for by S. 99 of the Act, there is no other fees to be charged by the authority. We do not agree. We do not subscribe to Mr. Vakil's submission that such a power to levy fees must be readily inferred as a matter of necessity. To put Mr. Vakil's arguments in his own words : "a plenary Legislature can delegate its power to levy fees by necessary implication and it is not necessary that it should do it expressly". When S. 91(1) of the Act specifically refers to only three sources of income and when S. 91(1) of the Act makes specific provision for the expenditure to be incurred in the administration of the Act and when the legislature has not thought it fit to make a specific provision for the development fee sought to be charged only by course to the Regulations, we And it difficult to accept his submissions. We reiterate that a power to charge a tax or a fee has to be specifically, and expressly provided for and if that is not done, then the Legislature is deemed to have thought not to clothe I the creature of its with a power to charge the fees.

Legislature can delegate its power to levy fees by necessary implication and it is not necessary that it should do it expressly". When S. 91(1) of the Act specifically refers to only three sources of income and when S. 91(2) of the Act makes specific provision for the expenditure to be incurred in the administration of the Act and when the legislature has not thought it fit to make a specific provision for the development fee sought to be charged only by course to the Regulations, we And it difficult to accept his submissions. We reiterate that a power to charge a tax or a fee has to be specifically, and expressly provided for and if that is not done, then the Legislature is deemed to have thought not to clothe I the creature of its with a power to charge the fees.

9. In above view of the matter, It is futile to press into service S. 119 of the Act by which the authority under the Act is empowered to make Regulations consistent with the Act and the Rules made there under in order to enable it to carry out the purposes of the development plan and of the town planning scheme and for regulating its procedure and conduct of business. The respondent No. 1- authority has no doubt tried to read its powers to make Regulations from the

provisions of S. 119(1). Thinking that it has got such powers, it has framed Regulations for the purpose, but we find that there is nothing in S. 119 of the Act also to clothe the appropriate authority with that power to make Regulations, when the statute itself is silent about such a power.

10. In above view of the matter, both the petitions are required to be allowed by declaring that the respondent No. 1 authority has no powers to charge the development fees as they have done in these cases, their action in charging the same is declared ultra vires that the Regulations made by them for the purpose of charging fees are beyond the competence of the respondent No. 1 and that in both the cases the amounts collected under that head as a consequence shall be refunded to the concerned petitioners. Rule is accordingly made absolute with no order as to costs in both these petitions.

11. Rule made absolute.