

(1970) 11 BOM CK 0007

In the Bombay High Court

Case No : O.C.J. Appeal No. 95 of 1965 and Miscellaneous Petition No. 165 of 1964

Shri Krishna Rubber Works

APPELLANT

Vs

The Union of India (UOI)

RESPONDENT

Date of Decision : 30-11-1970

Acts Referred:

Constitution of India, 1950 — Article 114, 14, 19, 226, 265
Rubber Act, 1947 — Section 12, 19, 4, 8

Citation : (1971) 73 BOMLR 496

Hon'ble Judges : S.P. Kotval, C.J;Nain, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Nain, J.—This is an appeal by the petitioners against the order dated September 6/7, 1965 of Kantawala J. dismissing their petition under Article 226 of the Constitution of India challenging the validity of a levy u/s 12 of the Rubber Act, 1947, as amended in 1960 and the Rules framed thereunder and recoveries made and demand notice issued in respect of such levies. This levy was also challenged in other petitions filed by other persons on whom such levy was made. By a judgment dated September 6/7, 1965 in Misc. Petition No. 119 of 1964 (G.B. Parwar v. Union of India) Kantawala J. upheld the validity of such levies. Following the said judgment he dismissed the petition, from which the present appeal arises.

2. The petitioners are a firm manufacturing rubber balloons at Chandansar near Bombay. They are manufacturers by whom rubber is used. From April 1, 1961 the Union of India have levied a duty of excise on all rubber produced in India u/s 12(1) of the Rubber Act, 1947 (hereinafter referred to as "the Rubber Act") at the rate of 80 paise per kg. Consequently certain duties have been levied on and recovered from the petitioners and certain demand notices have also been issued against them. The petitioners contend that Section 12 of the Rubber Act and

Rules 33(e) and (f) and Rules 33B, C and D of Rules framed under the Rubber Act and consequently the levies, recoveries and demand notices thereunder are illegal, invalid, inoperative, ultra vires and unconstitutional on several grounds set out by them in the petition including alleged contravention of Articles 14, 19 and 81 of the Constitution of India.

3. These provisions of the Rubber Act and the Rules were challenged in the Punjab High Court, which held the provisions valid. In appeal therefrom the Supreme Court has upheld the said decision in the case of Jullunder Rubber Goods Manufacturers' Association Vs. The Union of India (UOI) and Another, . The present petitioners intervened and were heard in the Supreme Court and are concluded with regard to the contentions taken in the petition in the Punjab High Court. In those proceedings it was, however, assumed that the levy u/s 12 of the Rubber Act was a tax and no contention was taken that the levy was not a tax, but was in essence and character a fee and the consequences arising from the levy being a fee were not canvassed either in the High Court or in the Supreme Court. In the present appeal the petitioners have confined themselves only to such contentions as are open to them in view of the Supreme Court judgment. These contentions are:

(1) The impost authorised by Section 12(1) of the Rubber Act is in essence and character a fee and not a tax inasmuch as the levy is a consideration for certain services rendered or required to be rendered by the Rubber Board and secondly the money levied is earmarked for the purpose of the Act.

(2) Inasmuch as there is no quid pro quo relation between the levy or the manufacturer like the petitioner from whom it is sought to be recovered the levy is in violation of Article 265 of the Constitution.

(3) In so far as Section 12(2) and Rule 33 make a duty payable by and recoverable from the manufacturer the same is in violation of Articles 265 and 81(1) of the Constitution.

(4) Assuming while denying that there is rendition of service to the manufacturer, the levy is unduly unreasonably excessive so as to make it colourable exercise of the power to levy fees.

4. For the appreciation of these contentions a reference to Section 12(1), (2) and (1) and to some other provisions of the Rubber Act is necessary.

12. (1) Imposition of new rubber cess. With effect from such date as the Central Government may, by notification in the Official Gazette, appoint, there shall be levied as a cess for tile purposes of this Act, a duty of excise on all rubber produced in India at such rate, not exceeding fifty naye paise per kilogram of rubber so produced, as the Central Government may fix.

(2) The duty of excise levied under Sub-section (1) shall be collected by the Board in accordance with rules made in this behalf either from the owner of the estate on which the rubber is produced or from the manufacturer by whom such

rubber is used...

(7) The proceeds of the duty of excise collected under this section reduced by the cost of collection as determined by the Central Government shall first be credited to the Consolidated Fund of India and then be paid by the Central Government to the Board for being utilised for the purposes of this Act, if Parliament by appropriation made by law in this behalf so provides.

4. The preamble to the Hubber Act provides "Whereas it is expedient to provide for the development (under the control of the Union) of the rubber industry". Section 8(e) defines "manufacturer" as any person engaged in the manufacture of any article in the making of which rubber is used. Section 8(h) provides that "rubber" does not include rubber contained in any manufactured article. Section 4 provides for the constitution of a Rubber Board. Section 8 provides that it shall be the duty of the Rubber Board to promote by such measures, as it thinks fit, the development of the rubber industry, more particularly by undertaking, assisting or encouraging scientific, technological and economic research, training students in improved methods of rubber cultivation, supplying technical advice to rubber growers, improving marketing of rubber, collection of statistics, in improvement of the conditions of labour, advising Government on matters relating to the development of rubber industry including import and export of rubber and participation in international conferences and reporting to the Government on the development of rubber industry. Section 9-A(2) makes provisions for making cash grants for the development of rubber estates and Section 9-B (2), for rehabilitation of small growers. Section 19 provides for levy of fees for the issue and renewal of licences to dealers in and planters of rubber.

5. It will be noticed that Section 12(1) provides for levy of "a duty of excise" "as a cess for the purposes of this Act" and not for the levy of a "fee". A duty of excise as well as a cess would be a tax and not a fee for services to be rendered and, therefore, it need not provide a quid pro quo between the service rendered and the levy or a service to the person on whom the levy is made. Nomenclature of the levy is, however, not conclusive upon the Court in determining the nature of the exaction. The true nature and character of the levy whether it is a duty of excise, cess or fee has to be determined by the Court notwithstanding the nomenclature. According to the definition in Article 366(28) of the Constitution of India, all these would fall in the generic word "tax". But in the entries in the legislative lists and in legislation, however, these words are used in distinctive senses. It has been stated in American Jurisprudence, 1956, Reprint, Vol. 51, page 56, para. 28 :

28...

It has been variously stated that the character or nature of a particular tax must be determined by its operation, practical results, and incidents, and by the substance and natural and legal effect of the language employed in the statute or law imposing it. Such factors should be relied upon, rather than the name given

the tax by the legislature or the particular descriptive language which may have been applied to it. Although the name or designation given by the legislature to a particular tax in the statute imposing it is not conclusive upon the court in determining the nature of the exaction, it must be given much, or at least some, weight. However, it is for the court to determine the nature and effect of a particular tax and uphold it or void it accordingly as its nature and effect as determined may require, the legislature not being empowered to change the nature of a tax by mere designation. Thus, a property tax cannot be made an occupation, license, or excise tax by calling it so....

6. A "tax" as neatly defined by Latham C. J. of the High Court of Australia in *Matthews v. Chicory Marketing Board* (Vict.) (1938) 60 C.L.R. 268 is

a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered.

This has become a classic definition of tax and at the same time distinguishes a tax from a fee. Therefore, although under Article 366(28) of the Constitution a fee would fall within the generic word "tax", in its technical sense a fee is excluded from the definition. This definition has been cited with approval by Mukherjea J. in the case of *Commr., H. R. E. v. L.T. Swamiar* A.I.R [1934] S.C. 282. The other propositions that emerge from the said judgment may be briefly stated.

7. A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered. This definition brings out the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it. 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. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is no element of "quid pro quo" between the tax payer and the public authority. Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the tax payer depends generally upon his capacity to pay.

8. A fee is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is normally based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that

would be applicable to all cases.

9. A careful examination reveals that the element of compulsion or coerciveness is present in all kinds of imposition though in different degrees and it is not totally absent in fees. This, therefore, cannot be made the sole or even a material criterion for distinguishing a tax from fees.

10. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden while a fee is a payment for a special benefit or privilege. Fees confer a capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licences, is secondary to the primary motive of regulation in the public interest. Public interest seems to be at the basis of all impositions but in a fee it is some special benefit which the individual receives. It is the special benefit accruing to the individual which is the reason for payment in the case of fees; in the case of a tax, the particular advantage if it exists at all is an incidental result of State action.

11. As fee is a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should, on the face of the legislative provision, be correlated to the expenses incurred by Government in rendering the services. If the money thus paid is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues for the benefit of the general public, it could be counted as fees and not a tax. There is really no generic difference between the tax and fees and the taxing power of a State may manifest itself in three different forms known respectively as special assessments, fees and taxes.

12. A fee is a payment levied by the State in respect of services performed by it for the benefit of the individual. It is levied on a principle just opposite to that of a tax. While a tax is paid for the common benefits conferred by the Government on all tax-payers, a fee is a payment made for some special benefit, enjoyed by the payer and the payment is usually proportional to the special benefit.

13. It is, generally speaking, true that a "tax" is an imposition for a public purpose and its levy is for the purposes of general revenue, while in case of a fee, the money is set apart and appropriated specifically for the performance of a particular service and is not merged in the public revenues for the benefit of the general public. There is, however, an exception to this rule viz. a "cess". A "cess" is a tax imposed for a specific purpose. The Agricultural Produce Cess Act (XXVI of 1940) imposes a cess "by way of customs duty on the export" of certain agricultural goods, for the purpose of making "better financial provision for the carrying out" of the objects of the Indian Council of Agricultural Research; similarly the Cotton Cess Act (XIV of 1933) imposes a cess on cotton produced in India for "the creation of a fund to be expended...for the improvement and development of growing, marketing and manufacture of cotton in India", Similarly the Lac Cess Act. (XXIV of 1980) imposes a cess on lac produced in or

exported from India for "the creation of a fund for the improvement and development of the cultivation, manufacture and marketing of Indian lac". In the judgment of Chandra Reddy C. J, in the case of N. Balaraju and Others Vs. The Hyderabad Municipal Corporation and Others, it is observed that "A cess is a tax levied for a specific purpose...Cess and tax are interchangeable words so far as taxing power is concerned".

14. A cess being a tax and not a fee, no quid pro quo between a service rendered and the levy is necessary to maintain its validity. Even though the proceeds of a cess go to a local fund, if the levy is not in respect of any particular service rendered, it is a tax.

15. There is, therefore, one common feature of a cess and a fee that their proceeds are not credited in the general revenue but are set apart and appropriated specifically for carrying out the special purpose or rendition of particular service as the case may be.

16. As the words used in Section 12(1) of the Rubber Act are "duty of excise", we must consider what this expression means. Sir Maurice Gwyer C. J. has observed in the case of *In re C. P. Motor Spirit Act* [1989] AIR F.C. 1, at p. 6:

...The primary meaning of "excise duty"... has come to be that of a tax on certain articles of luxury... But its primary and fundamental meaning in English is still that of a tax on articles produced or manufactured in the taxing country and intended for home consumption. I am satisfied that that is also its primary and fundamental meaning in India;...

17. Keeping these definitions in mind we must proceed to determine the true nature and character of the levy u/s 12(1) of the Rubber Act and whether it is a "fee" as contended by the petitioners.

18. Although the name or designation given by the Legislature to the levy in the Rubber Act is not conclusive upon the Court, in determining its nature it must in our opinion be an important factor. Section 12(1) describes it as "duty of excise", which, as we have noticed, is a tax on articles produced or manufactured in India and intended for home consumption. It is, therefore, firstly a tax and secondly it is an impost on articles produced or manufactured in India viz. rubber. This indicates that it is not a fee levied in lieu of services to be rendered. This factor is inconsistent with this levy being a fee.

19. Normally being a duty of excise, the collection should be for the purposes of and be merged in the general revenue of the country. Section 12(1), however, provides that the proceeds of this duty of excise shall be credited to the Consolidated Fund of India and then be paid by the Central Government to the Rubber Board for being utilised for the purposes of the Act, if Parliament by appropriation made by law in that behalf so provides. Generally speaking the fact that the collection of a levy is credited to the Consolidated Fund of India would be another important factor indicating that it is a tax and not a fee.

20. The provision that the collection shall then be paid to the Rubber Board for being utilised for the purposes of the Rubber Act would, indeed, be consistent with the levy being either a cess or a fee. It appears that it is for this reason that Section 12(1) provides that this duty of excise shall be levied "as a cess for the purposes of the Act". A cess is a tax for a particular purpose. The Legislature has, therefore, set any "speculation at rest by providing that this levy is a cess and not a fee with which it may otherwise be confused.

21. The reference in Section 12(1) of the Rubber Act to the appropriation by law for the purposes of the Rubber Act appears to have been rendered necessary by Articles 266 and 114 of the Constitution, under which all revenue received by the Government of India shall be credited to the Consolidated Fund of India and can be paid out of it only by an Appropriation Act. This procedure is more consistent with a cess than with a fee.

22. The purposes of the Rubber Act are set out firstly in its preamble and secondly in Section 8(1) viz. development of the rubber industry. This does not indicate any service being rendered to the person or class of persons on whom the levy is made. Sections 8(2), 9- A(2)(d) and 9-B(2), which provide for research, training of students, technical advice to growers, collection of statistics, improving of marketing and conditions of labour, cash grants for development of rubber estates and to small growers all indicate that the pith and substance and the dominant purpose of the Rubber Act is the development of rubber industry as a step towards the improvement of national economy of the country rather than rendition of any service to a person or class of persons. In this opinion we find support in the Statement of Objects and Reasons of the Rubber Act which expressly states that the Indian Rubber Production Board was set up in 1942 with the object of encouraging and ensuring increased production of rubber by all possible means and that it is in the national interests to ensure the production of natural rubber in the country. This is a laudable public purpose and a compulsory exaction of money by the Rubber Board for this purpose is a tax and not a payment for services rendered in the words of Latham C.J. Rendition of service does not appear to have been the prime or dominant purpose of the Act at all.

23. It has been argued on behalf of the petitioners that cash grants to plantations and small growers, research, training, collection of statistics, improving marketing and labour conditions, rendering technical service, are bound to benefit individual producers of rubber as well as manufacturers using rubber and these are the services which are contemplated by the Act. This, in our opinion, is not the correct test. Public interest is the basis of all impositions but in a fee it is some special benefit that an individual receives. It is this special benefit accruing to the individual, which is the reason for the benefit or payment in the case of fees; in the case of tax the particular advantage if it exists at all, is an incidental result of the State action. In this case with the development of rubber industry and other measures enumerated hereinabove being carried out, the individual plantation owners, small growers and manufacturers using rubber

may benefit but the dominant purpose of the Act is to benefit the national economy and interest. The particular advantage to the tax-payer is purely incidental and is not the prime purpose of the Act.

24. A reference to Section 19 of the Rubber Act also shows that where the Rubber Act intended to provide for levy of fees, it has expressly used that word.

25. The judgment of the Supreme Court in the case of *Commr., H.R.E. v. L.T. Swamiar* has been followed so far as distinction between a cess and fee is concerned in the case of *Hingir-Rampur Coal Co. v. State of Orissa* A.I.R.[1961] S.C. 450. On behalf of the petitioners great stress was laid on the fact that in that case the word "cess" in the Orissa Mining Areas Development Fund Act was held on true interpretation to be a fee. It was argued that the provisions of that Act were similar to those of the Rubber Act. The Orissa Act showed that the principal object of that Act was to develop mineral areas and to assist more efficient exploitation of mineral wealth in those areas by the existing mine owners in those areas, by supply of water and electricity in those areas and by other measures. There was an element of quid pro quo in the scheme. The purpose of the said Act was held to be to render service to the notified areas. These features, it was held, impressed upon the levy the character of a fee as distinct from a tax. In our opinion that case was decided on the interpretation of the provisions of that Act. But the provisions of the Rubber Act do not lend themselves to the interpretation that the levy is a fee.

26. For the reasons hereinabove recorded, we are unable to accept the contention that the true nature and character of the levy imposed by Section 12(1) of the Rubber Act is that it is a fee for any services rendered or required to be rendered. It is in our view a duty of excise levied as a cess for the purposes of the development of the rubber industry in national interest. The question of quid pro quo between the services rendered and the levy or of service to the person on whom the levy is made does not arise. In this view the question of the validity of the impugned rules does not arise, and the remaining contentions do not survive.

27. The appeal is, therefore, dismissed with costs.

28. The petitioners had given guarantees to the Prothonotary from time to time under the orders and directions of this Court for payment of certain duties. We direct that the amounts due under the said guarantees be paid to the Indian Rubber Board. Liberty to the respondents to withdraw the security amount towards their costs.