

(1957) 11 RAJ CK 0012
In the Rajasthan High Court
Case No : Civil Writ Petition No. 140 of 1955

The Maharaja Kishangarh Mills Ltd.

APPELLANT

Vs

Municipal Board Kishangarh and Another

RESPONDENT

Date of Decision : 22-11-1957

Acts Referred:

Citation : AIR 1960 Raj 135 : (1958) RLW 159

Hon'ble Judges : K.N. Wanchoo, C.J;K.L. Bapna, J;D.M. Bhandari, J

Bench : Full Bench

Advocate : C.L. Agarwal, for the Appellant; R.K. Rastogi, for the Respondent

Judgement

Wanchoo, C.J.—The following question has been referred to a Full Bench for reply:

""Whether the Municipal Board, Kishangarh, could validly impose in exercise of the powers under Section 128(xiv) of the Uttar Pradesh Municipalities Act, licence fee or tax on factories situated within the boundary of Kishangarh Municipality to be collected on the basis of Horse Power of the factories."

2. The facts which have led to this reference may be briefly narrated. The applicant is a joint stock company having its registered office at Kishangarh and is carrying on business of production and sale of cotton yarn and cloth at that place. The State of Rajasthan by means of a notification No. F-2(157) LSG/50 dated 21st August 1950 published in the Rajasthan Rajpatra dated 25th November, 1950 sanctioned the imposition of a licence fee on flour mills and other factories at a certain rate based on Horse Power.

This was done under Sub-section (2) of Section 135 of the Uttar Pradesh Municipalities Act, 1916 as that Act was in force with respect to Kishangarh Municipality at the time. In consequence of this notification, the Municipal Board of Kishangarh made a demand for a large sum of money from the applicant on account of licence fee for the period from December, 1950 to March, 1955. The applicant contested the legality of the demand. The Municipal Board, however,

attached two cars belonging to the applicant in that connection. Further demand on account of licence fee from 1st of April, 1955 to 31st of March, 1956 was made later and steps were being taken by the Municipal Board to sell the attached cars.

Consequently, the applicant filed the present writ application attacking the legality of the tax on various grounds. It is not necessary for purposes of this reference to refer to all the grounds raised on behalf of the applicant. It is enough to say that one of the contentions of the applicant was that the tax or licence fee was not levied by any authority of law and could not be levied under the law at all and, therefore, could not be recovered in view of the provisions of Article 265 of the Constitution.

3. The application has been opposed on behalf of the opposite parties and their case is that the levy is justified u/s 128(i)(xiv) of the Uttar Pradesh Municipalities Act and items 5 and 66 of List II and items 36 and 47 of List III of the Seventh Schedule to the Constitution of India.

4. Section 128 of the Uttar Pradesh Municipalities Act provides for taxes which may be imposed by the Municipalities and Clause (xiv) is as follows:

"Any other tax which the State Legislature has power to impose in the State under the Constitution."

5. We shall have, therefore, to look into the Constitution to find justification for the levy which has been made in this case. For this purpose, we will have to go to List II and List III of the Seventh Schedule to the Constitution. Taxes are mentioned in items 45 to 63 of List II besides fees taken in all courts except the Supreme Court which appear in item 3. Now this levy is not being justified under any of the above items relating to taxes. Then we come to fees in item 66 of List II which is in these terms:

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

6. There are no taxes provided in List III but fees are provided in item 47 of List III in these words:

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

7. Thus, looking to List II and List III, the justification for this levy will have to be found either in item 66 of List II or item 47 of List III. If this levy cannot be justified under either of these two Items, it will be hit by Article 265 of the Constitution.

8. Now there is a well recognised distinction between a tax and a fee and this Court had occasion to consider this distinction in *Maharaja Shri Umaid Mills Ltd. Vs. State of Rajasthan and Another*, We need not repeat all that was said in that case to draw out the distinction. Briefly however it was held that a tax was an

impost levied by the State for purposes of raising revenue.

The person, who had to pay the tax, had no option but to do so provided the tax was validly imposed, and could not object to it on the ground that the State did not render him any particular service in lieu of the tax. A fee, on the other hand, was not generally meant to augment general revenues. It was levied for some service rendered by the State to the particular person concerned, and the levy generally took place when the particular person asked for permission to do something for which regulations existed. As the levy was not meant to augment the general revenue of the State, it was fixed generally at such a level as to meet the expenses of the services rendered by the State in connection with the matter for which the fee was levied.

9. It was further pointed out in that case that this distinction was not always kept in mind rigorously in legislative enactments, and many a time what was called a fee was really a tax meant for raising revenues. Therefore, fees were divided into two parts. There were some fees which were really taxes though they were called fees. There were other fees strictly so called which were not meant for raising general revenues, but for meeting the expenses of the departments of the Government created for regulating professions, trades, callings and employments from which licence fees were levied.

10. Now the Constitution recognises the distinction between taxes and fees strictly so called. We are of opinion that the fees mentioned in item 66 of List II and item 47 of List III are fees strictly so called and not taxes. They have, therefore, to be justified as fees and if the levy in this case is to be justified under these two items, it has to be justified as a fee strictly so called and not as a tax for purposes of raising revenue generally. We have already pointed out that it is not the case of the opposite parties that this levy is justified as a tax under any item in List II.

It can, therefore, be only levied legally if it can be justified as a fee strictly so called under item 66 of List II or item 47 of List III. The fact that this levy, when realised, does not go to the general revenues of the State, in our opinion, makes no difference. The contention was that as the amount realised through this levy did not go to the general revenues of the State, but went to the coffers of the Municipality, it could not be a tax at all and must be treated as a fee strictly so called. We are of opinion that the distinction between fees and taxes which applies when fees and taxes are levied by the State equally applies when fees and taxes are levied by the Municipality.

Just as the State, when it is levying a fee: strictly so called, cannot convert it into a tax cannot pitch it so high as to augment general revenue, BO when the Municipality is levying a fee strictly so called as opposed to a tax, it can only justify it as a fee and cannot justify it as a tax; for the municipal revenue must also be divided into two parts namely the general revenue of the municipality collected through taxes and other revenue of the municipality for particular

departments collected through fees strictly so called. Our meaning will be clear from an illustration. A municipal Board has a large number of functions.

Some of these functions are of a general nature for which it may raise taxes, as for example, taxes on the entry of goods into a local area (item 52 of List II) and taxes on professions, trades, callings and employments, (item 60 of List II) and so on depending upon the power given to it under the law by the State. But there are other duties and functions of the municipality which are of a specific nature for which it can charge fees strictly so called. Take for example the Education Department of a municipality.

Through that Department, the municipality may be imparting education to boys. For that purpose, it may levy fees from boys reading in municipal schools. That would be a fee strictly so called and would be justified under item 66 of List II read with item 11 of the same List. But suppose that the education budget of a municipal board is rupees five lacs, but it levies fees on boys reading in the schools at such a high pitch as to bring it an income of rupees fifty lacs, the balance of rupees forty five lacs going to what may be called the general revenues of the municipality for general purposes.

It can hardly be said in such a case that what the municipality was charging from the boys in municipal schools was a fee, for one of the main characteristics of a fee is that its incidence is such as to meet more or less the expenses of the services rendered by the State or by the Municipality. Therefore, when any levy is being justified under item 66 of List II or item 47 of List III as a fee, it should be shown that it is for some service rendered by the State or by the Municipality to the particular person concerned and that its incidence is such as to meet the expense of the service rendered, more or less.

11. Let us now look at the levy in this case in the light of the principles enunciated above. The notification by which this impost was levied was in these terms:

"The Government have, in exercise of the powers conferred under Sub-section (2) of Section 135 of the U. P. Municipalities Act, 1916, as adapted to the Former Rajasthan Municipalities been pleased to sanction the imposition of the following taxes and licence fees by the Municipal Board, Kishangarh, with effect from the 1st December, 1950:

(4) Licence fee on flour Mills and other factories:

(a) upto 5 Horse Power Rs. 25/- per annum each.

(b) from 6 to 15 H. P. Rs. 5/- p. a. per Horse Power each.

(c) from 16 to 50 H. P. Rs. 3/- p. a. per Horse Power each.

(d) from over 50 H. P. Rs. 2/- p. a. per Horse Power each."

12. The Notification as it stands calls this impost licence fees. But admittedly no

licences are issued to factories by the Municipal Board, Kishangarh. Besides, licence fees are levied under the Uttar Pradesh Municipalities Act u/s 294 which reads as follows:

""The board may charge a fee to be fixed by bye-law for any licence, sanction or permission which it is entitled or required to grant by or under this Act."

13. This impost however was not levied under the power granted to the Board u/s 294 and is not being justified under that section. What is being said is that though in the notification this impost is called as licence fee, that was a misnomer and it is really a tax which is justified u/s 128(i)(xiv) of the Uttar Pradesh Municipalities Act. We have already set out Clause (xiv) and have pointed out that this impost cannot be Justified as a tax under any entry in List II. It can only be justified as a fee under item 66 of List II or item 47 of List III.

So, though the calling of this impost as licence fee may be a misnomer for purposes of the Uttar Pradesh Municipalities Act, for it was not levied u/s 294, it will still have to be justified, if it is not to be hit by Article 265 of the Constitution, as a Fee under item 66 of List II or item 47 of List III.

14. We, therefore, turn now to consider whether this impost can be justified under either of these two items. It was urged in the first place that this impost was justified under item 66 read with item 5. Item 5 deals with Local Government of all kinds and the argument is that a fee can be levied under item 66 read with item 5 of List I, for purposes of Local government. We must say that we are not able to understand how a fee can be levied for purposes of Local Government, in this case the Municipality.

If that were possible, all that the State Government need do in order to provide local bodies with funds is to give them power to levy a fee for purposes of Local Government on such basis as may be thought to be reasonable. We do not think, however, that that was the intention of the Constitution makers. It is true that item 66 speaks of fees with respect to any of the matters in this List. But it does not necessarily follow that it must be possible to levy fees with respect to each and every one of the earlier 65 entries.

It is obvious that fees could not be levied with respect to each and every one of the earlier 65 entries in List II. For example, item 46 of List II mentions tax on agricultural income. It could not be contended with any show of reason that under item 66 fees could be levied on tax on agricultural income also. It seems to us therefore, that when item 66 speaks of fees in respect of any of the matters in this List, it really means levying of fees with respect to such of the items in the List as can be justified as a fee strictly so called.

That means that there must be some kind of service rendered by the municipality to the person concerned and the incidence of the levy should be such as to meet the expense of the service rendered, This cannot be said if we were to hold that a fee can be levied for purposes of Local government. In such a

case, there would hardly be any service rendered to any particular individual, nor can it be possible to say that the expense of the service rendered was met by the fee.

We are, therefore, of opinion that the fee, which it is possible to levy under item 66 of List II must be a fee strictly so called for service rendered and the relation between fee and the service rendered to the individual must be clear and proximate and not remote. In the case of a fee for purposes of Local Government, it is obvious that the relation between the fee and the service rendered to any individual within the municipal limits is neither clear nor proximate.

It is really so remote that what may euphemistically be called a fee for purposes of Local Government really becomes a tax for the general revenues of the municipality. Such a tax cannot, in our opinion, be justified as a fee for purposes of Local Government under item 66. That the relation between the fee and the service rendered should be clear and proximate will be clear from another example. Take item 10 of List II relating to burials and burial grounds; cremations and cremation grounds. Now suppose that a municipality maintains burial grounds and cremation grounds.

It can then levy a fee for every person buried in the burial ground or for every person cremated in the cremation ground. Here, the service rendered by the municipality, in maintaining a proper burial ground or a proper cremation ground (which will not be encroached upon and where the dead would not be trampled upon) is clear and proximate and the fee would be justified. But we cannot see how a so-called fee for Local Government can be justified, for it is, in our opinion, no different from a tax and the Constitution does not provide a tax strictly so called for Local Government. Take another example, Item 6 mentions Public health and sanitation. Now sanitation is of two kinds.

There is general sanitation relating to the whole municipality. Then there may be special service rendered by the Sanitary Department to individuals living in the municipality. What may be spent on general sanitation has to be found by a tax; but a fee may be levied by a municipality under item 6 for service rendered to individuals e. g., the municipality may provide for removal of night soil from a house; it may provide for scavenging in the compounds of individuals.

For these it can charge a fee, under item 66 read with item 6. Here, the relation between a fee and the service rendered is clear and proximate. But we may repeat again that there can be no fee under item 66 which is for the purposes of Local Government because that would not be a fee strictly so-called but a tax which is not provided anywhere in List II. This impost therefore, cannot in our opinion, be justified under item 66 of List II read with item 5 of the same List.

15. Let us see if it can be justified under item 47 of List III read with item 36 of the same List, item 36 relates to Factories and there is no doubt that it is possible to levy fees with respect to factories if certain conditions are fulfilled. An

example of such levy of fees is to be found in the provision contained in Section 6 of the Indian Factories Act under which the State of Rajasthan levied fees on factories in Rajasthan. This matter came before this Court in *Maharaja Shri Umaid Mills Ltd. Vs. State of Rajasthan* and Another, and the levy of the fee was upheld.

The reason briefly for upholding the levy of the fee on factories was that there were certain regulations with respect to factories and an Inspectorate of Factories was created and its expense had to be met. But in the case of *Municipal Board Kishangarh*, we have not been told anything which has been done to justify the levy of a fee on flour mills and factories by the Board. Nothing has been brought to our knowledge to show that the Municipal Board of Kishangarh has framed any rules or bye-laws for inspection of factories or their regulations (assuming for the moment that it could do so).

Nothing has again been brought to our knowledge to show that the Municipal Board is rendering any service to the flour mills or factories to justify the levy of this impost. We have already pointed out that though it is called a licence fee, it has not been justified as a licence fee which can be imposed u/s 294 of the Uttar Pradesh Municipalities Act. No action admittedly has been taken under that section. We are therefore, of opinion that this impost, in the circumstances as they exist at present, cannot be justified as a fee under item 47 read with item 36 of List III.

16. The conclusion, therefore, at which we arrive is this. Though the impost purports to be levied u/s 128 Clause (xiv) of the Uttar Pradesh Municipalities Act, it cannot be justified as a tax under any item of List II or List III of the Constitution. Nor can it be justified as a licence fee (and therefore, as a fee) under item 66 of List II of the Constitution; lastly it cannot be justified as a fee strictly so called under item 66 of List II or item 47 of List III.

17. Our answer, therefore, to the question put to us is that the Municipal Board, Kishangarh could not under notification No. F-2(157) L. S. G./50 dated 21st of August, 1950 validly impose in exercise of the powers u/s 128 Clause (xiv) of the Uttar Pradesh Municipalities Act a licence fee, or fee or tax on factories situated within the boundary of Kishangarh Municipality to be collected on the basis of Horse Power of the factory in the circumstances which have been revealed in this case.

18. This answer should however, not be read to mean that in no circumstances can the municipality of Kishangarh impose licence fees, for example, u/s 294 of the Uttar Pradesh Municipalities Act with respect to factories situated within its boundary or even fees under item 47 of List III of the Constitution. They can do so provided they have laid the foundation for levying a licence fee or a fee strictly so called as indicated by us in Our judgment.