

(2010) 03 BOM CK 0056
In the Bombay High Court
Case No : Writ Petition No. 840 of 1999

The Morarjee Gokuldas Spinning and Weaving Company Limited. and Mr. Pramod Kumar Gothi APPELLANT

Vs

State of Maharashtra and Brihan Mumbai Mahanagarpalika a Statutory Body corporate and created and governed by the provisions of Bombay Municipal Corporation Act, 1888 RESPONDENT

Date of Decision : 19-03-2010

Acts Referred:

Bombay Municipal Corporation Act, 1888 — Section 140, 169, 3, 398, 479
Constitution of India, 1950 — Article 14
Water Charges Rules, 1994 — Rule 1.4, 1.5, 1.6

Citation : (2010) 6 BomCR 781

Hon'ble Judges : Ferdino I. Rebello, J;A.A. Sayed, J

Bench : Division Bench

Advocate : Venkatesh R. Dhond, instructed by Federal and Reshmikant, for the Appellant; K. Kajale, A.G.P. and A.Y. Sakhare and Shobha Ajit Kumar, for the Respondent

Judgement

Ferdino I. Rebello, J.—The petitioner No. 1 is a Company incorporated under the Indian Companies Act. The 2nd petitioner is a citizen of India and a shareholder of the 1st petitioner company.

2. By the present petition the petitioners challenge as unconstitutional and manifestly unreasonable the resolution SCR No. 1653 dated 22nd February 1996. By that resolution according to the petitioners, the Standing Committee of the 2nd respondent in the guise of revising the tariff made changes in the Water Charges on certain industries by doubling the rate of water charges payable by such industries. The 2nd respondent is the planning authority created under the provisions of the Bombay Municipal Corporation Act, 1888. The 2nd respondent in exercise of its powers under the B.M.C. Act has framed Rules and Regulations including Water Charges Rules which have been revised from time to time. Section 140 of the Mumbai Municipal Corporation Act, 1888 which hereinafter

shall be referred to as the Act confers a power on the Corporation to charge various taxes for property taxes which includes water tax and additional water charges, sewerage tax and additional sewerage tax and other taxes and cases as mentioned in the Section. Section 169 of the Act falls under the heading "Special Provisions Concerning the Water and Sewerage Taxes and Charges". Section 169 confers power on the Standing Committee to make Rules for the supply of water and for charging for the supply of water and for any fittings, fixtures of services rendered by the Corporation under Chapter X and by such Rules determine the charges for the supply of water by a water tax and a water benefit tax levied u/s 140 of a percentage of the rateable value of any property provided with a supply of water, or a water charge in lieu of a water tax, based on a measurement or estimated measurement of the quantity of water supplied or combined charges under Clauses (i) and (ii) or a compounded charge in respect of what is set out above.

3. The petitioner No. 1 was established sometime in 1870 A.D. Since the year 1870 the company was engaged inter alia in Spinning and Weaving process of textiles. The 2nd Respondent, which hereinafter shall be referred to as the B.M.C., has granted licence u/s 398, 479 of the B.M.C. Act to the company to carry on its business at its work. Under the provisions of the Bombay Town Planning Act, 1954 draft Development Control Rules had been framed and the Development Plan (DP) had been published. The Maharashtra Regional Town Planning Act, 1966 hereinafter referred to as MRTP Act was enacted repealing the provisions of the Town Planning Act, 1954. The Development Plan of 1967 along with D.C. Rules of the same year were notified in the year 1967. Under these Rules there existed only two Industrial Zones viz. Zone 1-1 (light industrial zone) and Zone 1-2 (special or heavy industrial zone). The petitioners works were situated in Zone I-1. Another Unit fell in Zone I-2. The D.C. Rules of 1967 for the first time included the concept of retention activity, of permitting non-hazardous and non-polluting industries to remain even in residential/commercial zone which existed on or before 1958.

4. On 25th March, 1991 the D.C. Regulations of 1967 were replaced by the Development Control Regulations, 1991 hereinafter referred to as the DCR of 1991. In terms of the plan and the Regulations, the lands were zoned for various purposes which includes Residential Zone, Service Industries Zone (I-1), General Industries Zone (I-2) and Special Industries Zone (I-3). Under the new D.P., Unit No. 2 belonging to the petitioners is located in Zone I-3, whereas the works are listed under Zone (I-2). The DCR of 1967 and DCR of 1991 both permitted retention activity, which would mean that even in non-conforming zone the petitioners units are lawful and the land/building/premises, now existing prior to 1967 could be used for the same purpose. The D.C. Regulations of 1991 however, has gone a step further and permitted the same to be extended or enlarged. It is pointed out that the demarcation of the different zones by the B.M.C., on the new D.P. is not contiguous. They are different and scattered. Different plots are shown in the same Zone. This has led to a discrepancy in the

zoning of the company's works and its other unit in different zones.

5. The Standing Committee of B.M.C., vide Resolution dated 27th May, 1994 brought into force the Water Charges Rules, which hereinafter shall be called as WCR 1994. Rule 1.5 prescribed the rate of Rs. 12/- per 1000 liters for the company's works which fall partly in the Residential Zone and partly in the General Industries Zone (I-2). The Company has been paying to the B.M.C., the water charges in accordance with Water Charges Rules 1994. The Company is neither assessed nor does it pay any water tax in respect of the meter connection. On 22nd February, 1996 by Resolution No. 1653 the Committee revised the rates at which water charges shall be levied under the WCR, 1994. Consequent to that resolution under Rule 1.5 (iii) which prescribed the rate, the company's units which was charged at Rs. 12/- per 1000 liters would stand deleted and the works would fall under the category under Rule 1.6(xxiii) chargeable at Rs. 22/- per 1000 litres. The Resolution further provided that the industries under Water Charges Rule Nos. 1.4, 1.5 and 1.6, located in non-conforming zone will be charged at twice the rates applicable to industries in the conforming zone. The Company's works, therefore, were obliged to pay Rs. 44/- per 1000 litres. The petitioners were not intimated of this Resolution until the letter dated 31st October, 1998.

6. By the letter of 31st October, 1998 the B.M.C., informed the Company that the Competent Authority had accorded sanction to charge its works at twice the rate applicable to the industries in the conforming zone as the said works were located in non-conforming zone. The Company was, therefore, informed that the water connection will be charged at the rate of Rs. 44/- per 1000 litres with effect from 1st April, 1996 onwards and supplementary bills were being issued. The Company then was in correspondence with the Respondent-B.M.C., pointing out that it was paying Rs. 22/- for water charges and Rs. 11/- for sewerage charges. On 27th January, 1999 the Company received water charges bill for the period from 1st October, 1998 to 31st December 1998 for an amount of Rs. 61,42,686/- at the rate of Rs. 66/- per 1000 litres which was inclusive of Rs. 44/- water charges and Rs. 22/- for sewerage charges.

7. By communication of 4th February, 1999 the Company addressed a letter to the B.M.C., reiterating its objections to the higher rate and forwarded a cheque towards the water charges for the month of December, 1998. On 22nd February, 1999 the B.M.C., issued demand notice. Thereafter a final notice was received on the same day by the company. The Company thereafter once again wrote to the B.M.C., on 11th March, 1999 objecting to the levy and stated the reasons why the same was not payable. Averments have been made of the discussion held between the various branches of the Government. On 17th March, 1999 the Company received notice in respect of water charge towards its works and further notice on 22nd March, 1999.

8. On 23rd March, 1999 as the demand was not withdrawn the petitioner filed the present petition on 24th March, 1999. On 1st August, 1999 the matter came

up for admission whereby Rule was issued and interim relief was granted in terms of prayer Clause (d) which was to prevent the B.M.C., from acting pursuant or in furtherance of its demand or implementing the order dated 31st October, 1998 and various other consequential orders.

9. We may at the outset point out that the previous to 1st April, 1996 all industries whether in conforming zone or non-conforming zone were being charged at the same rate and similarly from 1st April, 2000 all industries are being charged at the same rate. The controversy, therefore, is for the period from 1st April, 1996 to 31st March, 2000. According to the petitioners the demand is arbitrary, unreasonable and, therefore, not a just demand. In the petition the petitioner has sought a declaration that the Standing Committee Resolution No. SCR1653 dated 22nd February, 1996 in so far it adopts a criteria based on location of industries in non-conforming area is ultra vires, unconstitutional and without authority of law. Accordingly the petitioners contend that the demand is illegal and the petitioners are not bound to pay the same.

10. Petitioners challenge the levy on the basis that it is unconnected either with measurement or rateable value of the building. It is the submission of the petitioners that though the petitioners industry lies in a non-conforming zone, such a classification between conforming area and non-conforming zone is not justified nor based on legal or rational consideration particularly as both under the 1967 Regulations as also the 1991 Regulation, the concept of retention charge had remained unchanged.

11. It is further submitted that the water charge can only be levied on the basis of supply of water and that there has to be some reasonable connection between the water supplied and the charge levied. The demand being in the nature of a fee a water charge can be levied only if there is some element of quid-pro-quo between the water supplied to the 1st petitioner company and the doubling of the charge to twice the rate as compared to other similar industries in the vicinity but who happened to be located in a conforming zone. The classification sought to be made is based on no intelligible differentia and at least the classification made has no rational nexus with the object which is collection of water charges. It is, therefore, submitted that under these circumstances the resolution and consequently the various demand notices as also the last notice dated 27th June, 1999 are arbitrary, unfair and violative of the principles of natural justice and indicative of the malafides on the part of the 2nd respondent.

12. Reply has been filed on behalf of the respondent No. 1. Referring to the communication of 25th February, 1999 it is informed that it was only in the nature of information informing the Director of the petitioner company that water connections granted to the Mill situate in non-conforming Zone will be charged at twice the rate. It is next submitted that the Standing Committee is empowered to make classification of consumers on relevant consideration and that is in accordance with Section 169 of the B.M.C. Act. Section 169 empowers the Standing Committee to make such rates necessary for supply of water. The

Standing Committee may fix water charges/taxes on the percentage on the rateable value of the property as will be determined by it or any other recognized mode. It is set out that the petitioner are consumers of water for non-essential use and not for necessity. The petitioners are large concerns and the tax and charges imposed upon it are transferred by them to the consumers by the Textile Industries and, therefore, the industries have a capacity to pay water charges. In view of existence of different level of consumers with difference in living conditions several categories of users have been made, who are charged on the basis of consumption of water.

That industries under Water Charges Rules under 1.4, 1.5 and 1.6 are located in non-conforming zone and hence charged at double the rate. The reasons, for collecting the charges at double the rates from the petitioners according to the respondent is (1) that the petitioners are consuming water for non-essential use and not for necessity; (2) The petitioners are large concerns and the taxes and charges imposed upon them are transferred by them to the consumers and (3) the Industries have capacity to pay the water charges than the other categories using water. Accordingly, the respondents herein are charging the domestic consumers of water at minimum rate and higher rate for water supplied for non-essential and luxurious use.

13. At the outset we may point out that the issue is not between the domestic consumers of water and non-domestic consumers. The issue is of an industry if in the conforming zone being charged at the rate of Rs. 22/- per 1000 liters but if it is a non-conforming zone the same or similar industrial undertakings or other industrial undertakings being charged at the rate of Rs. 44/- per 1000 liters of water. In other words the Corporation is charging industrial consumers water charges based on their location in the conforming zone and non-conforming zone. The learned Counsel has placed reliance on the judgments in the case of *Hirabhai Ashabhai Patel v. The State of Bombay* 1954 B.L.R. 1035, an unreported judgment in the case of *M/s. Polychem Ltd. and Ors. v. M.C.G.M. in Writ Petition No. 3928 of 1987* decided on 7th February, 1997, and *Piem Hotels Limited and Another Vs. Municipal Corporation of Greater Bombay and Others*, .

14. The first question that we have to, therefore, consider is whether the classification of industries being in the conforming zone and non-conforming zone based on the reasons disclosed in the affidavit filed by Respondent No. 2 can be said to be reasonable and if so does it have any rational nexus with the object. The object in the instant case being levy of water charges.

15. The Development Control Regulations of 1991 more specifically Regulation 11 sets out that in every case of development/re-development of any land, building or premises, the intended use shall conform to the use zones, purpose of designation, allocation or reservation as the case may be, unless specified otherwise. Regulation 13 provides is an exemption in respect of use of land/building/premises existing before the coming into force of the Regulations. The Regulation permits the continuation of lawful use even if it does not conform to

the use under the Regulations provided such non-conforming user is not extended or enlarged except as provided in the Regulations. By virtue of Regulation 13(2) non-conforming industries which are neither hazardous nor polluting and which have been permitted to operate, without any requirement that they must shift to a conforming zone after a specific period, may, with the Commissioner's special permission, be allowed to make additions to start a new process., etc. In other words even if an industry is located in non-conforming zone and if that industry was in existence before the D.C. Regulations came into force and if there is no provision for shifting of the industry, then that industry can continue to operate from the non-conforming area and even carry out further development as set out in the D.C. Regulations. D.C. Regulations it may be pointed out are from the point of planning perspective. We may now consider the reasons given for the classification and to examine whether those reasons justify the classification of industries into conforming and non-conforming zones for the purpose of levying water charges.

16. When the petitioners seeks to challenge the tax as being arbitrary or discriminatory the Court, as a realist instrument and respecter of the other two Constitutional branches, must allow considerable free play although never any play for caprice, mala fides or cruel recklessness in intent and effect. (See Ganga Sugar Corporation Ltd. and Others Vs. State of Uttar Pradesh and Others,).

In Khyerbari Tea Co. Ltd. and Another Vs. The State of Assam, the Supreme Court was pleased to observe as under:

The law of taxation is on the ultimate analysis the result of the balancing of several complex considerations, and so, it would be unreasonable to insist upon the application of a general rule that if a tax is levied at a flat rate, it must be treated as unreasonable. In the present case, the legislature may have considered the requirements of the trade carried on by the producers of tea and may have thought that a flat rate would be just and fair to the trade as a whole. These are questions which must normally be left to the legislature to decide. Therefore, we do not think that the main ground on which the reasonableness of the tax levied by Section 3 was impeached by R. Pathak, can be sustained.

In The Twyford Tea Co. Ltd. and Another Vs. The State of Kerala and Another, dealing with the burden of proof the Supreme Court observed that the burden of proving discrimination is always heavy and heavier still when a taxing statute is under attack, and the burden is on a person complaining of discrimination. The Supreme Court quoting the dictum of the Supreme Court of the United States in *Madden v. Kentucky* (1940) 309 US 83 quoted the following observation with approval:

In taxation even more than in other fields, Legislatures possess the greatest freedom in classification. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

Proceeding further the Court observed that the burden would be on a person

complaining of discrimination. The burden is proving not possible "inequality" but hostile "unequal" treatment.

17. The power to classify must be capable of being reasonably explained. In other words difference in treatment must be capable of being reasonably explained in the light of the object for which the particular legislation is undertaken. This must be based on some reasonable distinction between the cases differentially treated. When differential treatment is not reasonably explained and justified the treatment is discriminatory. To be able to succeed on the charge of discrimination, a person must establish conclusively that persons equally circumstanced have been treated unequally and vice versa. In the application of this principle the Courts in view the inherent complexity of fiscal adjustment of diverse elements, must permit a larger discretion to the legislature in the matter of classification, so long as it adheres to the fundamental principles underlying the said doctrine.

18. Bearing these principles of burden of proof, we may now consider whether the reasons given and the judgments relied upon by the Respondent No. 1 justify the classification. In *Hirabai A. Patel (supra)* the Corporation was changing the charging of water from rateable value to measurement. The first area where the measurement concept was to be made applicable was in the area of Marine Drive and Cuffe Parade. This was sought to be challenged by the petitioner on the ground that there could not have been such a classification. This was repelled by this Court by holding that it was always open to the Corporation considering that there was power u/s 169 to charge by measurement to a particular geographical area if the Corporation found that the consumption of water was more vis-a-vis the other areas. The learned Bench of this Court on that basis was pleased to reject the contention and upheld the decision of the Corporation to levy water charges based on measurement. In our opinion this judgment is of no assistance in applying that dicta to the facts of the present case and the issue which arises herein.

19. Next reliance was placed in the judgment in the case of *Piem Hotel Ltd. and Ors. (supra)*. The challenge again was to levy of tax at a different rate on a class of consumers. The Corporation sought to justify the same based on paying capacity. In other words charging more to a particular class more affluent than the others. The Court found that such a classification would not be violative of Article 14 of the Constitution. The Court observed that it was open to the Standing Committee to prescribe the particular rate for different industries separately. In our opinion, therefore, this judgment is also clearly distinguishable.

20. If we now examine the reasons which have been placed by the Respondent No. 2 and which we have set out earlier in justifying levying of higher water charges to industry in non-conforming zone, in our opinion the reasons given are arbitrary and/or unreasonable and/or totally extraneous. Firstly merely because an industry is located in a conforming zone and another industry in a non-conforming area would be irrelevant as the consumption of water and the

purpose for which it was consumed would be the same namely industrial use. The Second contention that the petitioners which are textile industries are large concerns and the tax and charges imposed upon them are transferred by them to consumers and that the Industries have a capacity to pay water charges than the other categories using the water, in our opinion is also unsustainable. Passing on the burden as cost of production which includes the inputs and taxes which it cannot pass on is true of every industry. Therefore, on this basis there can be no valid classification. Capacity to pay would depend on the profits made by the industry and not the size. At any rate the water charges are not based on the percentage of profits or gross revenue, if there could be valid reasons in the instant case. The respondents have also contended that they are charging domestic consumers of water at a minimum rate and higher rate for water supplied for non-essential and luxurious use. In the first instance industries whether in conforming zone or non-conforming zone are not domestic users. The differentiation is not between those who consume less quantity of water and those who consume more water and/or those who have lesser capacity to pay or those who are more affluent. This reason is also irrelevant to constitute reasonable classification. The other reason that water consumed can be charged at higher rate in non-essential and luxurious use is not germane. All industries whether in conforming zone or non-conforming zone use water as an input for production. In our opinion the reasons given being not reasonable the classification must be held to be not reasonable. Apart from that the purported classification even if it is reasonable, has no nexus with the object and consequently the Resolution and the consequent demands must be quashed and set aside.

21. We may also mention that for the period previous to 31st March, 1996 all industries were being charged at the same rate. Similarly for the period after 1st April, 2000 all industries were being charged at the same rate. It is only between 1st April, 1996 to 31st March, 2000 that they were sought to be charged at different rates and which is the subject matter of the present petition. The Respondent No. 2 has given no explanation for treating the industries alike for water charges previous to 1st March, 1996 and after 1st April, 2000. The reason is apparent, that the Respondent No. 2 itself find the classification was unreasonable.

22. In the light of that the petition will have to be allowed in terms of prayer Clause (a) and consequently in the instant case as there was interim relief the question of any refund would not arise. Respondents, however, are directed not to act on their demands pursuant to the resolution being quashed and set aside.

23. In the circumstances of the case there shall be no order as to costs.