(2017) 05 CAL CK 0062

In the Calcutta High Court

Case No : Writ Petition No. 717 of 2009

Vodafone Mobile Services Limited — APPELLANT

Vs

The Kolkata Municipal Corporation — RESPONDENT

Date of Decision : 03-05-2017

Acts Referred:

Calcutta Municipal Corporation Act, 1980 — Section 203
Constitution of India, 1950 — Article 226

Citation : (2017) AIR(Calcutta) 103

Hon'ble Judges : Debangsu Basak, J.

Bench : Single Bench

Advocate : Mr. Pratap Chatterjee, Senior Advocate, Mr. Jishnu Saha, Senior Advocate, Mr. Arindam Chandra, Mr. Atish Ghosh, Mr. Ishan Saha and Mr. Souvik Ghosh, Advocates, for the Petitioners; Mr. L.K. Gupta, Additional Advocate General Mr. A.K. Ghosh, Mr. D. Chatterjee, and Mr. D. Mondal, Advocates, for the Respondents

Final Decision : Disposed Off

Judgement

Debangsu Basak, J.—The petitioners have challenged the demand for licence and permission fees raised by the Kolkata Municipal Corporation authorities for the hoardings set up by the petitioners.

2. Learned Senior Advocate for the petitioner has submitted that, the petitioners, in its usual course of business, are required to set up hoardings for the purpose of advertisement of their product. The hoardings and glow signs of the petitioners are exempted from payment of advertisement tax under Section 204(2)(c) of the Kolkata Municipal Corporation Act, 1980. Learned Senior Advocate for the petitioners has relied upon All India Reporter 2007 Calcutta page 136 (Calcutta Soft Drinks Pvt. Ltd. v. Calcutta Municipal Corporation & Ors.) in this regard.

3. Learned Senior Advocate for the petitioners has referred to Sections 202 and 203 of the Kolkata Municipal Corporation Act, 1980 and submitted that, these

two sections deal with permission fee and licence fee respectively. He has also referred to Section 204 of the Act of 1980. Referring to Section 131 of the Act of 1980 learned Advocate for the petitioners has submitted that, the same relates to annual budget of the Kolkata Municipal Corporation. He has submitted that, neither Section 202 nor Section 203 confers any power on the Kolkata Municipal Corporation to levy any fees on the hoardings and glow signs. He has referred to 2005 Volume 4 Supreme Court Cases page 245 (Calcutta Municipal Corporation & Ors. v. Shrey Mercantile (P) Ltd. & Ors.) and 2015 Volume 13 Supreme Court Cases page 748 (State of Tamil Nadu & Anr. v. TVL. South Indian Sugar Mills Association & Ors.) in support of such contentions. He has submitted that, imposition of tax without authority of law is violative of Article 265 of the Constitution of India. He has referred to the demands raised by the Corporation authorities and submitted that, the demands are on recurring basis and, therefore, they are to be treated as tax and not fees. Moreover, he has submitted that, the Act of 1980 does not authorize the Corporation authorities to levy a licence fee or a permission fee. He has relied upon 1992 Volume 3 Supreme Court Cases page 285 (Ahmedabad Urban Development Authority v. Sharadkumar Jayantimkumar Pasawalla & Ors.) in support of such contention.

4. Learned Senior Advocate for the petitioners has submitted that, the Corporation authorities are not rendering any service to the petitioners. The demand for permission fee or a licence fee, therefore, is void. He has referred to the affidavit-in-opposition filed by the Corporation authorities and submitted that, the Corporation authorities have not stated nor have demonstrated that, the Corporation authorities are rendering any service for them to demand a permission or a licence fee. He has prayed for quashing of the demands raised by the Corporation.

5. Learned Additional Advocate General appearing for the Corporation authorities has submitted that, the right to carry on business under Article 19 of the Constitution of India is subject to reasonable restrictions. The Corporation authorities are seeking to modulate the setting up of hoardings or glow signs in the general public interest. The Corporation authorities are responsible to look at the structural stability of a hoarding or a glow sign. They are also required to look into whether or not the hoardings or glow signs obstruct any public view or causes any traffic hazard. He has referred to the policy guidelines of the Corporation authorities and submitted that, the Corporation authorities are required to assess a hoarding or a glow sign to find out whether or not they are within the policy guidelines. He has relied upon All India Reporter 1952 Supreme Court page 196 (The State of Madras v. V.G. Row), All India Reporter 1960 Supreme Court page 430 (Narendra Kumar & Ors. v. The Union of India & Ors.) and All India Reporter 1985 Supreme Court page 660 (K. Ramanathan v. State of Tamil Nadu & Anr.) in support of the proposition that, restrictions would include a prohibition. On the aspect of the Corporation authorities being entitled to obtain licence fee, he has referred to All India Reporter 1985 Supreme Court page 61 (M/s. Samarias Trading Co. Pvt. Ltd. v. S. Samuel & Ors.). He has relied upon

Section 203 of the Kolkata Municipal Corporation Act, 1980 and has submitted that, the Corporation authorities have the power to impose fees. He has submitted that, for the purpose of levy of fees there has to be a quid pro quo. He has relied upon 1999 Volume 2 Supreme Court Cases page 274 (Secunderabad Hyderabad Hotel Owners'' Association & Ors. v. Hyderabad Municipal Corporation, Hyderabad & Anr.) and submitted that, the Corporation authorities are entitled to levy fees for the services rendered by the Corporation authorities in assessing the hoardings or the glow signs.

6. Learned Additional Advocate General has relied upon the various provisions of the Kolkata Municipal Corporation Act, 1980 including Sections 199, 543 and 131 in support of the contention that, the Corporation authorities have the power to impose and demand the licence and permission fees as sought to be done in the instant case. Learned Additional Advocate General appearing for the Corporation has relied upon 1976 Volume 1 Supreme Court Cases page 283 (Dr. Satyabrata Dutta Choudhury v. State of Assam & Ors.), 2001 Volume 6 Supreme Court Cases page 446 (Meghalaya State Electricity Board & Anr. v. Jagadindra Arjun), 1997 Volume 9 Supreme Court Cases page 495 (Krishnan Kakkanth v. Government of Kerala & Ors.), 1998 Volume 4 Supreme Court Cases page 117 (State of Punjab & Ors. v. Ram Lubhaya Bagga & Ors.) and 2014 Volume 4 Supreme Court Cases page 156 (Pathan Mohammed Suleman Rehmatkhan v. State of Gujarat & Ors.) in support of such contentions.

7. The first petitioner carries on the business of providing mobile, telephone services to consumers. The first petitioner vends and markets its products and services, inter alia, through showrooms and outlets. In order to attract business, the first petitioner installs glow signs boards or back-lit boards or non-back-lit boards or sign boards outside or atop the outlets. The Kolkata Municipal Corporation authorities had demanded licence or permission fees for the glow signs. According to the petitioners, the Corporation authorities are not entitled to such fees. According to the petitioners, the Corporation being a statutory authority and established under the provisions of the Kolkata Municipal Corporation Act, 1980, such Act of 1980 does not permit the Corporation authorities to demand or realise any licence fees for glow signs put on outlets of the first petitioner.

8. The Corporation authorities have traced their rights to impose and demand licence fees and permissions fees to Sections 131, 199, 203, 204 and 543 of the Act of 1980. Such sections are as follows:-

"131. Annual Budget of the Corporation.

- (1) The Corporation shall, on or before the 22nd day of March in each year, adopt for the ensuing year a budget estimate which shall be the estimate of the receipts and the expenditure of the Corporation to be received and incurred on account of the municipal government of Kolkata.

(2) The budget estimate shall separately state the income and the expenditure of

the Corporation to be received and incurred in terms of the following accounts -

(a) the Water-supply, Sewerage and Drainage Account,

(b) the Road Development and Maintenance Account,

(c) the Bustee Service Account,

(d) the Commercial Projects Account, and

(e) the General Account.

(3) The budget estimate shall state the rates at which various taxes, surcharges, cesses and fees shall be levied by the Corporation in the year next following.

(4) The budget estimate shall state the amount of money to be raised as loan during the year next following.

(5) The Mayor shall present the budget estimate to the Corporation on the 15th day of February in each year or as soon thereafter as possible.

(6) The budget estimate shall he prepared, presented and adopted in such form and in such manner, and shall provide for such matters, as may he prescribed."

"199. Certificate of enlistment for profession, trade and calling.- Every person engaged or intending to be engaged in any profession, trade or calling in Kolkata as mentioned in Schedule IV, either by himself or by an agent or representative, shall obtain, a certificate of enlistment or get the same renewed annually, as the case may be, from the Municipal Commissioner upon presentation of an application in such form as may he specified by the Municipal Commissioner together with such application fee, not exceeding rupees two thousand and five hundred, as may be determined by the Corporation under sub-section (3) of Section 131. Such application form shall be available from the Corporation on payment of such fee as may be determined by the Municipal Commissioner:

(2) The Municipal Commissioner shall, after making such enquiry ns may be necessary and within thirty days of the receipt of the application, grant him such certificate if the application is in order, or shall reject the application if it is not in order.

Provided that no profession, trade or calling, referred to in subsection (1), shall be commenced or carried on without any licence or permission, as required under this Act, being taken out and produced before the Municipal Commissioner, failing which the certificate of enlistment shall not be renewed."

"203. Licence for use of site for purpose of advertisement. -

(1) Except under and in conformity with the terms and conditions of a licence, no person being the owner, lessee, sub-lessee, occupier or an advertising agent shall use or allow to be used any site in any land, building, wall or erect or allow to be erected on any site, any hoarding, frame, post, kiosk, structure, neon-sign

or sky-sign for the purpose of display of any advertisement.

(2) For the purpose of advertisement, every person-

(a) using any site before the commencement of this Act, within ninety days from the dale of such commencement, or

(b) intending to use any site, or

(c) whose licence for use of any site is about to expire, shall apply for a licence or renewal of a licence, as the ease may be, to the Municipal Commissioner in such form as may be specified by the Corporation.

(3) The Municipal Commissioner shall, after making such inspection as may be necessary and within thirty days of the receipt of the application, grant, refuse, renew or cancel a licence, as the ease may be, on payment of such fees as may he determined by the Corporation by regulations or as the budget estimate shall state under sub-section (3) of section 131.

(4) The Municipal Commissioner may, if in his opinion the proposed site for any advertisement if unsuitable from the considerations of public safety, traffic hazards [, aesthetic design, or obstruction of the view of, or harmony with, any heritage building,] refuse a licence or refuse to renew any existing licence.

(5) Every licence shall be for a period of one year except in case of sites used for temporary fairs, exhibitions, sports events or cultural or social programmes.

[* * *]

(7) The Municipal Commissioner shall cause to be maintained a register wherein the licences issued under this section shall he separately recorded in respect of advertisement sites -

(a) on telephone, telegraph, tram, electric or other posts or poles erected on or along public or private streets or public places,

(b) in lands or buildings,

(c) in cinema halls, theatres or other places of public resort."

"204. Tax on advertisements. - (1) Every person, who erects, exhibits, fixes or retains upon or over any laud, building, wall, hoarding, frame, post, kiosk or structure any advertisement or, displays any advertisement to public view in any manner whatsoever, visible from a public street or public place (including any advertisement exhibited by means of cinematograph), shall pay for every advertisement which is so erected, exhibited, fixed or retained or so displayed to public view, a tax calculated at such rate as the Corporation may determine by regulations [or as the budget estimate shall state under sub-section (3) of section 131]:

[* * *]

Provided that a surcharge not exceeding fifty per cent of the applicable rate may be imposed on any advertisement on display in temporary fairs, exhibitions, sports events or cultural or social programmes.

(2) Notwithstanding the provisions of sub-section (1), no tax shall be levied under this section on any advertisement which-

(a) relates to ''non-Commercial advertisement'' or ''advertisement related to public interest'' as defined in the Explanation to subsection (4) of section 202; or

(b) is exhibited within the window of any building if the advertisement relates to the trade, profession or business carried on in that building; or

(c) relates to the trade, profession or business carried on within the land or building upon or over which such advertisement is exhibited or to any sale or letting of such land or building or any effects therein or to any sale, entertainment or meeting to be held on or upon or in the same; or

(d) relates to the name of the land or building upon or over which the advertisement is exhibited or to the name of the owner or occupier of such land or building; or

(e) relates to the business of a railway administration and is exhibited within any railway station or upon any wall or other properly of a railway administration; or

(f) relates to any activity of the Government or the Corporation.

(3) The tax on any advertisement leviable under this section shall be payable in advance in such number of instalments and in such manner as the Corporation may by regulations determine or as the budget estimate shall state under sub-section (3) of section 131:

Provided that the Corporation may under the terms and conditions of the licence under section 203 require the licensee to collect and pay to the Corporation, subject to a deduction of five per cent. to be kept by him as collection charges, the amount of tax in respect of such advertisements as are displayed on any site for which he is the licensee."

"543. Signature, conditions, duration, suspension, revocation, etc., of licences and written permissions. - (1) Whenever it is provided in this Act or the rules or the regulations made thereunder that a licence or a written permission shall be signed by the Municipal Commissioner or by any other officer empowered to grant the same under this Act or the rules or the regulations made thereunder or by any other officer of the Corporation authorised by the Municipal Commissioner or officer empowered as aforesaid in this behalf shall specify in addition to any other matter required to be specified under any other provision of this Act or the rules or the regulations made thereunder -

(a) the date of the grant thereof;

(b) the purpose and the period (if any) for which it is granted;

(c) restrictions or conditions, if any, subject to which it is granted;

(d) the name and address of the person to whom it is granted; and

(e) the fee, if any, paid for the licence or written permission.

(2) Except as otherwise provided in the Act or the rules or the regulations made thereunder, for every such licence or written permission a fee may be charged at such rate as may from time to time be fixed by the Municipal Commissioner with the sanction of the Mayor-in-Council, and such fee shall be payable by the person to whom the licence or the written permission is granted.

(3) Save as otherwise provided in this Act or the rules or the regulations made thereunder, any licence or written permission granted under this Act or any rules or regulations made thereunder may at any time be suspended or revoked by the Municipal Commissioner or the officer by whom it was granted, if he is satisfied that it has been secured by the grantee through misrepresentation or fraud, or if any of its restrictions or conditions has been infringed or evaded by the grantee, or if the grantee has been convicted for the contravention of any of the provisions of this Act or the rules or the regulations made thereunder relating to any matter for which the licence or permission was granted:

Provided that -

(a) before making any order of suspension or revocation, reasonable opportunity shall be accorded to the grantee of the licence or the written permission to show cause why it should not be suspended or revoked;

(b) every such order shall contain a brief statement of the reasons for the suspension or the revocation of the licence or the written permission.

(4) When any such licence or written permission is suspended or revoked, or when the period for which the same was granted has expired, the grantee shall, for the purposes of this Act or the rules or the regulations made thereunder, be deemed to be without a licence or written permission until such time as the order suspending or revoking the licence or the written permission is rescinded or until the licence or the written permission is renewed.

(5) Every grantee of any licence or written permission granted under this Act shall, all reasonable times while such licence or written permission remains in force, if so required by the Municipal Commissioner or by the other officers by whom it was granted, produce such licence or written permission."

9. Section 199 requires every person engaged or intending to be engaged in any profession, trade or calling within the city limits of Kolkata as mentioned in Schedule IV of the Act of 1980, to obtain a certificate of enlistment or get the same renewed annually. Section 203 deals with licence for use of site for the purpose of advertisement. Section 204 deals with tax on advertisement. Section 543 allows the Corporation authorities to specify the conditions, duration, the grounds for suspension and the revocation of any licence or written permission

given by it. Section 131 of the Act of 1980 provides for the annual budget of the Corporation. Sections 203 and 204 of the Act of 1980 have been considered in Calcutta Soft Drinks Pvt. Ltd. (supra). It has held that, it is not necessary for the advertiser to either have a trade licence for carrying on business in the premises over which the advertisement is given in order to get the benefit of 204(2)(c) of the Act of 1980 or to have the ownership or any right to occupy the same. If the trade licence holder erects any advertisement of its own name or own trade name over the premises whether he carries on business, no advertisement tax is necessary to be paid. It reasons that, a person who has a trade licence to carry on business in a particular premises falls within the expression "occupier of such land or building" as a lawful occupier of a premises is given trade licence to carry on a business in a premises.

10. Shrey Mercantile (P) Ltd. & Ors. (supra) has held that, a charge or fee, if levied for the purpose of raising revenue under the taxing power is a tax. If it is for the primary purpose of regulation and control, it may be classified as fees. However, if revenue is the primary purpose and regulation is merely incidental, then the imposition is a tax. A tax is an enforced contribution expected pursuant to a legislative authority for the purpose of raising revenue to be used for public or governmental purpose and not as payment for a special privilege or service rendered by a public officer, in which case it is a fee. It has held that, the main difference between a fee and a tax is on account of source of power. The source of power for a fee is the police power. The judgment has been rendered in the context of whether the imposition for the purpose of change in the name of the owner in the assessment book of the Kolkata Municipal Corporation is in the nature of a fee or a tax. It has struck down the action of the Corporation authorities in charging different rates depending upon the value of the property at the time of mutation.

11. TVL. South Indian Sugar Mills Association & Ors. (supra) has also noticed the distinction between a tax and a fee. It has held that, the distinction between a tax and a fee lies primarily in the fact that, a tax is levied as part of a common burden, while a fee is for payment of specific benefit or privilege, although the special advantage is secondary to the primary motive of regulation in public interest. In determining whether a levy is a fee or not, emphasis must be on whether its primary and essential purpose is to render specific services to a specified area or class. The element of quid pro quo in the strict sense is not always a sine qua non for a fee. All that is necessary is that, there should be a reasonable relationship between the levy of fee and the services rendered. The service to be rendered is not a condition precedent. The same does not lose the character of a fee provided the fee so charged is not excessive. It is also not necessary that the services to be rendered by the collecting authority should be confined to the contributories.

12. Sharadkumar Jayantimkumar Pasawalla & Ors. (supra) has held that, in the absence of express provision a delegated authority cannot impose any tax or fee.

13. V.G. Row (supra) has held that, the legislature can impose reasonable restrictions to fundamental rights. The imposition of such restrictions is justiciable before a Court of law.

14. Narendra Kumar & Ors. (supra) has held that, the word restriction will include cases of prohibition also. Similar view has been expressed in K. Ramanathan (supra).

15. Secunderabad Hyderabad Hotel Owners'' Association & Ors. (supra) has held that, the Municipal Corporation is entitled to licence fees since it is regulating the eating houses or hotels mentioned in Section 521 of the Hyderabad Municipal Corporation Act, 1955. It has held that, licence fees can also be regulatory for the activity for which the licence is given, is required to be regulated or controlled. An element of quid pro quo for the levy of such fees is not required although such fees cannot be excessive.

16. Dr. Satyabrata Dutta Choudhury (supra) has considered instructions issued by the Assam Public Services Commission in absence of Rules with regard to fixation of seniority. It is not relevant to the facts of the present case.

17. Jagadindra Arjun (supra) relates to service conditions and has held that, in absence of statutory regulations the electricity board has the power to lay down the service conditions.

18. Krishnan Kakkanth (supra) has held that, the authorities have the right to impose reasonable restriction to the fundamental right to carry on trade or business, however, the reasonableness of the restrictions is justiciable.

19. Ram Lubhaya Bagga & Ors. (supra) has held that, a policy matter ought not to be a subject matter of a judicial review. However, a policy can be struck down, if it is arbitrary or violative of any constitutional, statutory or any other provision of law.

20. Pathan Mohammed Suleman Rehmatkhan (supra) has held that, it is open to the authorities to take economic and management decision depending upon the exigencies of a situation guided by appropriate financial policies notified in public interest.

21. The Corporation authorities have contended that, they have a policy guidelines of display of advertisement within the Kolkata Metropolitan area. Under such policy guidelines, the authorities are to look at the desirability of the content of the advertisement in the hoardings or glow signs. They are also to look at whether the hoardings or glow signs by themselves or the contents therein are causing any public nuisance or is a threat to the public convenience. Since the Corporation authorities are discharging such functions, they are entitled to a fee on the principles of quid pro quo. The Corporation is not entitled to advertisement fees from the persons noted in Calcutta Soft Drinks Pvt. Ltd. (supra). The writ petition concerns hoardings and glow signs put on the properties belonging to individuals. Section 203 of the Act of 1980 deals with

licence for use of site for the purpose of advertisement. The Section itself does not permit the Municipal Corporation authorities to levy any licence fee. It prohibits a person from putting up any hoarding except under and in conformity with the terms and conditions of the licence. Section 204 of the Act of 1980 allows tax to be levied on advertisement. However, Calcutta Soft Drinks Pvt. Ltd. (supra) has held that, the Corporation is not entitled to advertisement fees from the persons noted therein. The exemption given in Calcutta Soft Drinks Pvt. Ltd. (supra) would also apply to a hoarding. The hoardings and glow signs put in a property belonging to an individual and not visible to a member of the public from a public road is not chargeable by the Corporation. Moreover, as noted above, Section 203 does not allow the authority to levy any licence fee. On the concept of quid pro quo, it is observed that, the Corporation authorities are required to do certain things under Section 203. That would entail some cost. However, the Corporation authorities are taking trade licence fees. The Corporation authorities are, therefore, at liberty to factor in the cost involved in the exercise under the guidelines while considering the fee applicable for obtaining a trade licence.

22. In view of the discussions above, the demands for licence or permission fees for the glow signs made against the petitioner are set aside. The prayer for compensation made in the writ petition was not pressed at the hearing.

23. W.P. No. 717 of 2009 is disposed of accordingly. No order as to costs.

