

(2011) 11 KAR CK 0349

In the Karnataka High Court

Case No : W.A. No"s. 1 of 2011 and 551-552 of 2011 (LB-RES) and W.A. No. 76 of 2011

Wireless -TT Info Services Ltd.

APPELLANT

Vs

State of Karnataka and Others
 Vodafone Essar South
Ltd. (Formerly Known as Hutchison ESSAR South Ltd.) Vs
Corporation of the City of Belgaum

RESPONDENT

Date of Decision : 23-11-2011

Acts Referred:

Karnataka Municipal Corporations Act, 1976 — Section 103
Karnataka Municipalities Act, 1964 — Section 2 (1-A), 2 (3)
Karnataka Panchayat Raj Act, 1993 — Section 103, 2 (3)

Citation : (2011) 11 KAR CK 0349

Hon'ble Judges : Vikramajit Sen, Acting C.J.;A.S. Bopanna, J

Bench : Division Bench

Advocate : Skailesh K Kapoor, for Sri B.N. Jayadeva, in W.A. Nos. 1/2011 and 551-552/2011, Sri Col. Bhupinder Singh. in W.A. Nos. 1009/2011, Sri Uday Holla for Sri S.V. Bhat and Sri B.T. Girish, in W.A. Nos. 13-25//2011 and W.A. Nos. 130-136/2011, Sri S.V. Bhat and Sri B.T. Girish, in W.A. Nos 50-51/2011, Sri Gururaj D.M., for M/s. Gururaj Associates in W.A. No 76/2011, W.A. Nos 77-79/2011 and W.A. Nos 80-84/2011 and 3307-3310/2011, for the Appellant; B Veerappa, AGA. for R1 and . 2, Sri Pramod P. Kulkarni, for R3 Sri Neeralagi, for R4 Sri D.S. Hosmath, for R5 in W.A. Nos. 1/2011 and 551-552/2011, Sri B. Veerappa, AGA. W.A. Nos. 1009/2011, Sri B. Veerappa . AGA. for R2 and 2, Sri D. Nagaraj, for R4, Sri M. Nikhilesh Rao, for M/S. Indus Law, for R5, R3-Served in W.A. Nos. 13-25//2011, Sri B. Veerappa, AGA. for R1 and 2 R3 and R4 Served in W.A. Nos 50-51/2011, Sri B. Veerappa, AGA. for R1 and 2 R3. R4 and R5-Served in W.A. Nos. 130-136/2011, W.A. No 76/2011 and W.A. Nos 77-79/2011 and Sri B. Veerappa, AGA. for R1 and 2, Sri B.K. Manjunath, for R4, Sri Y.S.H. Reddy, for R7 R3 and R9 Served W.A. No 76/2011 and W.A. Nos 80-84/2011 and 3307-3310/2011, for the Respondent

Final Decision : Allowed

Judgement

A.S. Bopanna, J.—The appellants herein who are the licencees under the

provisions of the Telegraph Act, 1885 for providing telecommunication services to the general public had approached this Court by filing the respective writ petitions from which the present appeals arise: In the said writ petitions, the petitioners had called in question the demands raised against the petitioners by the respective Local Bodies. The demands had been raised in respect of the erection of the base trans-receiver station. The contention on behalf of the petitioners therein was that the Municipal authorities/Local Bodies have no authority to make physical demand in respect of the telecommunication towers installed. It was their contention that the provisions of the Karnataka Municipalities Act, Panchayath Raj Act and Karnataka Municipal Corporation Act does not provide for the imposition of property tax, licence fee, permission fee etc., on telecommunication towers.

2. The learned Single Judge though has accepted the contention that there is no provision to collect the permission fee and installation charges in respect of communication towers has thereafter held that the structure viz., the telecommunication tower answers the definition of "building" as defined u/s 2(3) and 2(1-A) of the respective Acts. Though the demand notices were quashed, the learned Single Judge was of the view that the quantified amount as fixed by the Bruhat Bangalore Mahanagara.Palike is to be adopted by the other local bodies. A further direction was also issued for framing such law/rules in this regard. The petitioners claiming to be aggrieved by the decision of the learned Single Judge are before this Court in these intra-Court appeals.

3. Heard Sri Udaya Holla, learned senior counsel Sri Shailesh K. Kapoor, Col. Bhupinder Singh, Sri Gururaj learned counsel appearing for the respective appellants and Sri B. Veerappa, learned Additional Government Advocate, Sri Indra Kumar, learned senior counsel and the respective learned counsel for the other respondents and perused the appeal papers.

4. The sum and substance of the contentions urged on behalf of the appellants is that the installation of the towers is for the wireless communication system as provided under the Indian Telegraph Act, 1885. The licence is granted under the Act by the Ministry- of Communication and IT, pursuant to which a licence agreement is entered into which would govern the nature of installation of the equipments as per the rights guaranteed to the petitioners. The communication apparatus in question though called a tower is a "post" to which the equipments are fixed and as such the same cannot be considered as "such structure" which is included in the definition of "building" as contained in Sections 2(3) and 2(1-A) of the respective Acts governing the local bodies. The only right under the said Acts to the Local Bodies is to impose tax on land and buildings and as such, the telecommunication equipment which does not answer the definition cannot be taxed. There is no other provision in the said Acts which empowers the Local Bodies to raise a demand, more particularly, when the permission granted to the appellants is under a Central enactment. In this regard, it is also contended that the telephones, wireless or otherwise is indicated at Entry 31 to List 1 of the VII

Schedule and therefore, the Local Bodies in any event cannot rely upon the State Law to raise demands. Elaborating the said submissions and by placing reliance on the decisions which would be referred to hereafter, the appellants contend that the respondents cannot raise any demand in respect of the same.

5. On the other hand, the gist of the contention on behalf of the respondents is that the Entry 49 in List 2 to Schedule VII of the Constitution of India relates to taxes on lands and buildings. Therefore, the State legislature is empowered to make laws for imposition of tax on lands and buildings. In this regard, Section 94 of the Municipalities Act provides for imposing tax on land and building. Similarly, Section 103 of Municipal Corporations Act and Section 198 of the Karnataka Panchayath Raj Act also provides for levy of tax. In this background, the structure put up by the appellants is a building as defined in Sections 2(3) and 2(1-A) of the respective Acts governing the Local Bodies and as such, the local bodies are empowered to regulate as well as impose tax. In this regard, the word "structure" as contained in the definition of "building" is heavily relied on to contend that the tower is to be construed as building and therefore, the tax levied is justified.

6. In the light of the rival contentions and keeping in view the justification sought to be put forth by the respondents that the telecommunication equipment viz., the tower is a metal structure and therefore the same fits into the definition of "building" as contained in Section 2(3) of the Karnataka Municipalities Act, Section 2(1-A) of Karnataka Municipal Corporations Act and Section 2(3) of Karnataka Panchayath Raj Act, it is necessary to notice the definitions as contained therein.

KARNATAKA MUNICIPALITIES ACT

2(3). "Building" includes a house, outhouse, stable, latrine, urinal, shed, hut, wall, verandah, fixed platform, plinth, doorstep, staircase or any other such structure, whether of masonry, bricks, wood, mud, metal or any other material whatsoever; but does not include a portable shelter.

KARNATAKA MUNICIPAL CORPORATIONS ACT

(2) [1-A] Building includes,-

(a) a house, out-house, stable, privy, shed, hut, wall, verandah, fixed platform, plinth, door step and any other such structure, whether of masonry, bricks, wood, mud, metal or any other material whatsoever;

(b) a structure on wheels simply resting on the ground without foundations;

(c) a ship, vessel, boat, tent and any other structure used for human habitation or used for keeping or storing any article or goods.

KARNATAKA PANCHAYATH RAJ ACT

2(3). "Building" includes a house, outhouse, shop, stable, warehouse, workshop,

canopy, shed, hut or other enclosure whether used as a human dwelling or otherwise and shall include a wall, compound wall, fencing, verandah, platform, plinth doorstep and the like.

7.,The respondents on contending that the metal structures erected for telecommunication, either on the building or on land should also be construed as "building" since the relevant definitions in the instant case includes "other such, structure", relied on the decision of the Hon"ble Supreme Court in the case of The Municipal Corporation of Greater Bombay and others Vs. The Indian Oil Corporation Ltd., . The question that arose for consideration in the said case was as to whether the petroleum storage tank is a "building" or "land". The said question was considered in the background of the definition contained in Section 3 (r) and (s) of Bombay Municipal Corporations Act, 1888, which included "every other such structure". In that context, it was considered as to whether the land therein was amenable to property tax as provided in Section 143(a) and 154 of that Act. Their Lordships ultimately concluded as hereunder;

32. The tanks, though, are resting on earth on their own weight without being fixed with nuts and bolts, they have permanently been erected without being shifted from place to place. Permanency is the test. The chattel whether is movable to another place of use in the same position or liable to be dismantled and re-erected at the later, place? If the answer is yes to the former, it must be a movable property and thereby it must be held that it is not attached to the earth. If the answer is yes to the latter it is attached to the earth. For instance a shop for sale of merchandise or eatables is a structure. The same could be sold by keeping in a push cart which has its mobility from place to place. Merely because it is stationed at a particular place and business was carried on, it cannot be said that push cart is a shop. The fact that no nuts and bolts were used to imbed the tank to the earth by itself is not conclusive. Though the witness stated that the tank is capable of being shifted, as a fact the tanks were never shifted from the places of erection. By scientific process, the tanks stand on their own weight on the earth at the place of erection as a permanent structure.

33. The petroleum products are being stored through pipes and are taken out by mechanical process. The operational mechanisation also though relevant, is not conclusive. The rateable value is based on the rent, which the building or land is capable to fetch. Due to erection of the tanks whether the value of the demised property had appreciated or not, is also yet another consideration. Undoubtedly, when the tanks are erected and used for commercial purposes, the value of the demised property would get appreciated. The annual letting value is capable of increase.

However, the rate of increase is a question of fact but the fact remains that the value of the land gets increased by virtue of erection of the storage tanks. Considering from this perspective we have no hesitation to hold that the petroleum storage tanks are structures or things attached to the land within the definition of Sections 3(s) and 3(r) of the Act. Thereby they are exigible to

property tax. In this view, the appeal is allowed and the judgment of the High Court is reversed and that of the Court of Small Causes is affirmed. But in the circumstances each party is directed to pay and receive their respective costs throughout.

8. The factors that had been considered in that case to conclude that the structure therein answers the definition of "building" or "land" so as to make it amenable to property tax cannot be made applicable to the instant case inasmuch as the installation of the metal structure/post on the buildings or on the land for reception of telecommunication waves is to be considered in the context as to whether that structure would fall within the phrase "other such structure" as contained in the enactments in issue. For the very reason the Full Bench decision of High Court of Delhi in the case of Municipal Corporation of Delhi Vs. Pradeep Oil Mills P. Ltd., relied on by the respondents also would not be of assistance. In the said case also, the question that was considered was relating to the petroleum storage tanks.

9. That apart, when the sweep of the phrase "other such structures" arose for consideration before the Hon"ble Supreme Court in the case of- Indian City Properties Ltd. and Another Vs. The Municipal Commissioner of Greater Bombay and Another, , the decision in the case of Indian. Oil Corporation Ltd. (supra) was also referred therein. Further, though the question that arose for consideration was with regard to the acquisition of the property by the Municipal Corporation in line with the street, the manner of determination of the nature of structure was explained keeping in view Section 299 of the Bombay Municipal Corporations Act, 1888 in construing the phrase "not occupied by any building" and "some other structure external to a building". In the background of the existing structures that were listed out, the Court referred to Section 3(s) of the Act wherein building was defined in a similar manner as in the Acts under consideration before us in these cases. Therefore, the purport of the similar phrase "every other such structure" arose for consideration. On consideration, the Court prescribed the test as follows:

19. The word "structure" is used as generic term so that while all buildings may be structures, all structures are not buildings. That, structure which is not a building and is a platform, verandah, step, or some other such structure external to a building may be taken over by the Commissioner u/s 299(1) if it is within the regular line of the street. The words "some other such" must be construed as structures similar or like platform, verandah and step. The words must be read ejusdem generis with the preceding words since the word "such" means "of the type previously mentioned". The word "other" has also been held to indicate that it must be construed, ejusdem generis. The underlying characteristic of platforms, verandahs and steps is that they are not independent structures and are external to a building, that is they are attached to the outside and form an inessential part of a building. In our opinion, therefore in order to be a building for the purpose of Section 299, the structure would have to be an independent,

permanent structure. Thus, there is no repugnancy if one were to read the definition of building and Section 299 and in our opinion, the word "building" has been used in Section 299 in the sense defined in Section 3(s).

10. If in the above manner, the "structure" which is the subject matter in the instant case is considered, it is a metal pole or tower to which the antenna is attached and has the backup system at its base. No doubt, it would have to be fastened to the roof of the building or embedded to the land with concrete base, nuts, bolts and the height of the pole may vary from case to case. Such structure though may suggest an element of permanency, in our opinion does not belong to the genus of the type previously mentioned in the section defining the building. If the phrase used was "other structures", the term would have been wider to include other structures without reference to the first part of the section. But when it states "other such structure", the structure in question will have to be of nature of the items mentioned in the first part of the section. Therefore, the tower/post which is not relatable to the items mentioned in the first part cannot be construed as a building to bring it within the sweep of Section 94 of the Karnataka Municipalities Act 1964, Section 103(b) (i) of Karnataka Municipal Corporations Act, 1976 and Section 64 of Karnataka Panchayath Raj Act, 1993.

11. in order to appreciate this aspect in better light, it is necessary to notice the charging sections in the respective enactments.

Karnataka Municipalities Act 1964

Section 94. Taxes which may be imposed.- (1) Subject to the general or special orders of the Government, a municipal council.-

(a) xxx

(b) (xxxx) at rates not exceeding those (specified in this Act) may levy any one or more of the following taxes.-

(i) a tax on building or vacant lands or both situated within the municipal area (hereinafter referred to as "property tax")

(ii) xxx

(iii) xxx

(iv) xxx

(v) xxx

(vi) xxx

(vii) xxx

(viii) xxx

(ix) xxx

(x) xxx

(xi) xxx

(xii) A duty on transfers of immovable property in the shape of an additional stamp duty;

(xiii) A tax on advertisements (other than advertisements published in news papers) erected, exhibited, fixed or retained upon or over any land, building, wall, hoarding, frame, post or structure or upon or in any vehicle or display to public view in any manner whatsoever visible from a public street or public place (including any advertisement exhibited by means of cinematograph];

Explanation 1.- The word "structure" in this sub-clause includes any movable board on wheels used as an advertisement or an advertisement medium;

Explanation 2- "Public place" for the purpose of this sub-clause means any place which is open to the use and enjoyment of the public, whether it is actually used or enjoyed by the public or not;

Explanation 3.- The word "advertisement" in this sub-clause means any word, letter, model, sign, placard, notice, device or representation, whether illuminated or not, in the nature of, and employed wholly or in part for the purpose of, advertisement, announcement or direction:

Karnataka Municipal Corporations Act, 1976.-

103. Taxes which may be imposed.- Subject to the general or special orders of Government, a Corporation shall.-

(a) xxx

(b) [at rates not exceeding those specified in this Act] levy any one or more of the following.-

i) a tax on [buildings or vacant lands or both] situated within the city (hereinafter referred to as the property tax);

ii) xxx;

iii) xxx;

iv) xxx;

v) xxx;

vi) a tax on advertisement;

vii) a duty on certain transfers or property in the shape of an additional stamp duty;

viii) xxxxxx]

ix) xxxxxx]

Karnataka Panchayat Raj Act, 1993

199. Levy of taxes, rate, etc. by Grama Panchayats.

(1) Every Grama Panchayat shall in such manner and subject to such exemptions as may be prescribed and not exceeding the maximum rate specified in Schedule - IV levy tax upon buildings and lands which are not subject to agricultural assessment, within the limits of the Panchayat areas.

Provided that where an owner of the building or land has left the Panchayat area or cannot otherwise be found, the occupier of such building or land shall be liable for the tax leviable on such owner.

(2) A Grama Panchayat may levy water rate for supply of water for drinking and other purposes.

(3) A Grama Panchayat may also levy all or any of the following taxes and fees at such rates as the Grama Panchayat may by bye-laws determine but not exceeding the maximum specified in Schedule-IV and in such manner and subject to such exemptions as may be prescribed, namely:-

(a) tax on entertainment other than cinematograph shows;

(b) tax on vehicles, other than motor vehicles;

(c) tax on advertisement and hoarding;

(d) pilgrim fee on persons attending the jattras, festivals, etc., where necessary arrangement for water supply, health and sanitation are made by the Grama Panchayats;

(e) market fee on persons who expose their good for sale in any market place;

(f) fee on the registration of cattle brought for sale in any market place;

(g) fee on buses and taxies and auto-stands provided adequate facilities are provided for the travellers by the Grama Panchayat; and

(h) fee on grazing cattle in the grazing lands.

12. The above provisions indicate that apart from the other specific items for which power to tax has been provided, the power is also to impose tax on land and building alone. In fact in Karnataka Municipalities Act. 1964, the provision for tax on advertisements is exhaustive and includes "post" and "structure" and the term "structure" has been explained further but it only relates to advertisement. This in fact indicates that the telecommunication structure has not been indicated separately nor does it get included in the definition of "building". Therefore, we are of the considered opinion that the telecommunication tower/post is not liable to tax under the existing power available to impose tax on "land" and "buildings".

13. It is in a circumstance of the present nature that Article 265 of the Constitution of India comes into play wherein the mandate is that no tax shall be

levied or collected except by authority of law. On this proposition, the learned counsel for the appellants have relied on the decision rendered by the Hon''ble Supreme Court in the case of Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., ; State of Kerala Vs. Madras Rubber Factory Ltd., ; The State of West Bengal Vs. Kesoram Industries Ltd. and Others, and Gupta Modern Breweries Vs. State of Jammu and Kashmir and Others, . Having noticed the said decisions, we do not find it necessary to elaborate further on the well established legal position as contained in Article 265 of the Constitution of India itself.

14. Further in the ease of Indus Towers Ltd Vs. State of Gujarat (2010 GHJ 24 329) relied on by the appellants, the Division Bench of the High Court of Gujarat was seized of an identical situation as in the ease on hand wherein there was no specific provision for imposing tax on telecommunication equipment, but it had been considered as a "building" and the regulations were enforced, in fact in that case, in the absence of provision in the Act, which is a requirement under Article 265 of the Constitution of India a Government resolution had been issued in exercise of powers under Article 162 of the Constitution of India providing for such regulations. The validity of the same had arisen for consideration. The Court after adverting to all aspects of the matter and also keeping in view the decisions of the Hon''ble Supreme Court had quashed the same. However, in the course of the judgment, the Court observed that it would be open for the legislature to make such amendments in the Acts making provision for bringing the technological advances within the purview of the Act. We are in agreement and subscribe to the said view, as otherwise it would not be permissible for the local authorities to regulate, levy and collect taxes or fees in respect of mobile, telecommunication towers/posts under the presently subsisting charging section of the Acts under consideration.

15. Having arrived at the above conclusion, the next aspect for consideration is as to whether the learned Single Judge was justified in the instant case in holding that the appellants are liable to pay tax of Rs. 12,000/- p.a. per mobile tower till appropriate Rules are framed for levying taxes on mobile towers by adopting the Rules stated to have been framed by the Bruhat Bangalore Mahanagara Palike (BBMP). Though we do not propose to express any opinion about the validity or otherwise of the Regulations stated to have been framed by the BBMP as the same do not arise for consideration herein, we are of the opinion that the course adopted by the learned Single Judge is not justified in law.

16. The decisions of the Hon''ble Supreme Court referred supra is categorical that the tax cannot be levied in the absence of express provision to do so. If there is a void, it is for the legislature to remedy the situation. It is also the well-settled position of law that it is not for the Courts either to legislate or direct the legislature to enact the law in any particular manner. In this regard, it is apposite to refer to the decisions rendered by the Hon''ble Supreme Court in the case of State of Himachal Pradesh vs. A parent of a State of Himachal Pradesh Vs. A Parent of a Student of Medical College, Simla and Others,); S.R. Batra and

Another Vs. Smt. Taruna Batra, and Divisional Manager, Aravali Golf Club and Another Vs. Chander Hass and Another, relied on by the learned senior counsel for the appellants wherein the said position has been succinctly stated. Hence, in the absence of the fiscal demands being backed by law on the subject, this Court would strike down the same. It is for the legislature to take into consideration all aspects and enact such law as it deems fit in its wisdom.

17. For the various reasons stated above, while upholding the order dated 25.11.2010 passed by the learned Single Judge to the extent of quashing the impugned orders/demand notices, the further directions issued are set aside, except of course saving the liberty reserved to the respondents to enact such amendments in accordance with law. In any event; with regard to the amendments to be made, the official respondents have not assailed that portion of the order passed by the learned Single Judge. They have conceded to the position that the amendments are necessary to be made.

The appeals are accordingly allowed, with no order as to costs.