SUPREME COURT OF INDIA

M. Chandru

Vs.

The Member Secretary, Chennai Metropolitan Development Authority

C.A. No. 1079 of 2009

(S.B. Sinha and Dr. Mukundakam Sharma JJ)

17.02.2009

JUDGMENT

S.B. SINHA, J.

1. Leave granted.

INTRODUCTION

2. Legality and/or validity of Infrastructure Development Charges (IDC) by Chennai Metropolitan Development Authority (CMDA) allegedly on behalf of Chennai Metropolitan Water Supply and Sewerage Board (the Sewerage Board) for issuing planning permission in regard to the construction of multi-storeyed building and/or special building is in question in this appeal which arises out of a judgment and order dated 20.12.2006 passed by a Division Bench of the High Court of Judicature at Madras in W.P. No.34702 of 2006.

BACKGROUND FACTS

3. Appellants herein are builders and developers and individuals who had applied for grant of permission for construction of multi-storeyed building and/or special building before the CMDA. They were asked to deposit specified sums towards IDC payable to the Sewerage Board by CMDA. Contending that CMDA had no power to collect IDC and the Sewerage Board is otherwise obligated to supply water and provide sewerage connection, they filed writ petitions before the High Court of Madras. The said writ petitions have been dismissed by reason of the impugned judgment.

SUBMISSIONS

4. Mr. L. Nageshwar Rao, learned counsel appearing on behalf of the appellants, would contend :

1) The Chennai Metropolitan Water Supply and Sewerage Act, 1978 (the 1978 Act) containing no provision for delegation of power to an outsider, the purported demand made by the CMDA must be held to be wholly illegal;

2) As no special services are to be rendered to the builders and/or developers or individuals so as to satisfy the doctrine of quid pro quo, the impugned judgment cannot be sustained.

5. Mr. Krishnamurty, learned senior counsel appearing on behalf of the respondent, on the other hand, urged :

1) The Board being bound by the directions issued by the State of Tamil Nadu, delegation to compute the IDC and collect the same by CMDA cannot be held to be ultra vires the power of the Sewerage Board..

2) CMDA being the local authority and having been in-charge of supply of water and providing sewerage, such delegation was made for convenience of the applicants.

3) As charges are being levied and collected towards provision for or improvement of water supply

or sewerage service, the same meet the legal requirement of quid pro quo.

STATUTORY PROVISIONS

6. The Legislature of the State of Tamil Nadu enacted the Tamil Nadu Town and Country Planning Act, 1971 (the 1971 Act). Levy of development fees by CMDA is prescribed thereunder as a pre-condition for grant of permission to construct building. Relevant provisions of the 1971 Act read as under:

"9-A. Establishment of the Chennai Metropolitan Development Authority.--(1) With effect from such date as the Government may, by notification in the Tamil Nadu

Government Gazette appoint in this behalf, there shall be established for the Chennai Metropolitan Planning area an authority by the name of the Chennai Metropolitan Development Authority.

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9-E. Relation with the Chennai Metropolitan Water Supply and Sewerage Board.--(1) Notwithstanding anything contained in this Act, the Chennai Metropolitan Development Authority shall fully consult and collaborate the Chennai Metropolitan Water Supply and Sewerage Board constituted under the Chennai Metropolitan Water Supply and Sewerage Act, 1978 with respect to any provision regarding water supply or sewerage services and matters connected therewith that may be included in any development plan prepared or to be prepared under this Act for the Chennai Metropolitan Planning Area or any part thereof. (2) With respect to any such development plan, the execution of or the carrying out of any work under such plan shall, in so far it relates to water supply or sewerage service or matters connected therewith, be entrusted to and be the sole responsibility of the Chennai Metropolitan Water Supply and Sewerage Board, and if any work under such plan is in the process of being executed or carried out on the date of coming into force of this section, the Chennai Metropolitan Development Authority shall continue and complete such work in accordance with section 27 of the Chennai Metropolitan Water Supply and Sewerage Act, 1978.

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59. Levy of development charges.--(1) Subject to the provisions of this Act and the rules made thereunder every planning authority including a local authority where such local authority is the

planning authority, shall levy charges (hereinafter called the development charges) on the institution of use or change of use of land or building or development of any land or building for which permission is required under this Act in the whole area or any part of the planning area within the maximum rates specified in section 60:

Provided that the rates of development charges may be different for different parts of the planning area and for different uses:

Provided further that the previous sanction of the Government has been obtained for the rates of levy:

(2) When a planning authority including a local authority where such local authority is the planning authority shall have determined to levy development charges for the first time or at a new rate, such authority shall forthwith publish a notification in the Tamil Nadu Government Gazette specifying the rates of levy of development charges.

(3) The development charges shall be livable on any person who undertakes or carries out any such development or institutes or changes any such use.

(4) Notwithstanding anything contained in sub- section (1) and (2), no development charges shall be levied on development, or institution of use or of change of use of, any land or building vested in or under the control or any State Government or of any local authority.

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63-A. Apportionment of development charges in certain cases.--Where any development charges are levied or recovered under the provisions of this Chapter in respect of the use or change of use of land or building or development of any land or building in the Channai Metropolitan Planning Area, and if any such chare or any part, thereof is relateable to provision for or improvement of water supply or sewerage service, the Chennai Metropolitan Development Authority shall pay over the Chennai Metropolitan Water Supply and Sewerage Board constituted under the Chennai Metropolitan Water Supply and Sewerage Act, 1978, such charge or part thereof."

7. The 1978 Act was enacted to provide for the constitution of Sewerage Board to attend to the

growing needs and for proper development and regulation of water supply and sewerage services in the Chennai Metropolitan Area. Relevant provisions of 1978 Act are as under :

2.(f) "local authority" means - (i) the Municipal Corporation of Chennai; or

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(v) the Tamil Nadu Water Supply and Drainage Board constituted under Section 4 of the Tamil Nadu Water Supply and Drainage Board Act, 1970 (Tamil Nadu Act No.4 of 1971) (hereinafter referred to as the Tamil Nadu Water Supply and Drainage Board); or

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(vii) the Chennai Metropolitan Development Authority established under Section 9-A of the Tamil Nadu Town and Country Planning Act, 1971 (Tamil Nadu Act No.35 of 19721), (hereinafter referred to as the Chennai Metropolitan Development Authority);

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6. Powers of the Board.--(1) The Board shall, subject to the provisions of this Act, have the power to do anything which may be necessary or expedient for the purpose of carrying out its functions and duties under this Act.

(2) Without prejudice to the generality of the foregoing provision, the Board shall have the power --

(i) to take over all existing responsibilities, powers, controls, facilities, services and administration relating to water supply and sewerage in or for the Chennai Metropolitan Area;

(ii) to enlarge, improve or develop existing facilities and to construct and operate new facilities for water supply and sewerage in or for the Chennai Metropolitan Area;

(iii) to prepare schemes for water supply and sewerage (including abstraction of water from any natural source and the disposal of waste and pollution water) in or for the Chennai Metropolitan Area;

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(xii-a)to collect infrastructure development charges from the applicant builder or developer of such multistoreyed building or special building as may be prescribed for the provision of adequate water supply or sewerage;

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(xv) to do all things necessary for the purpose of carrying out the provisions of this Act."

7. Powers of Board to call for information.-- The Board may, for the purpose of carrying out the provisions of this Act, by notice require any person to furnish such information in his possession relating to water supply and sewerage systems, and shall act as a centre for the collection and exchange information on such matter, in

order to facilitate the preparation of studies, scheme or plans and the development of policies which promote the purposes of this Act. 81. Power to make regulations.--(1) The Board may make Regulations not inconsistent with this Act for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of foregoing power, such regulations may provide for all or any of the following matters, namely :-

(a) to (j) ... (jj) the manner of and the basis on which the infrastructure development charges shall be collected; (k) to (p) ..."

8. Clause (jj) of Section 81 of the 1978 Act provides for regulation making power pursuant whereto or in furtherance whereof the State of Tamil Nadu made Regulations in the year 1998 known as The Chennai Metropolitan Water Supply and Sewerage Infrastructure Development Charges (Levy and Collection) Regulations, 1998 in respect of `manner' and `basis' for collection of charges, relevant

provisions whereof are as under :

"3.(a) Applicant mean and includes the applicant builder or development of multi-storeyed buildings or special buildings as the case may be for the provision of adequate water supply or sewerage and matters connected thereto.

(b) `Multi-storeyed building' means and block or buildings exceeding of 4 floors and/or 15 meters in height.

(c) `Special building' means any block or buildings means not less than three floor but not exceeding four floors.

(d) `Infrastructure Development' means any provision made by the Board regarding water supply and sewerage services and matters connected therein.

4. The Board shall collect infrastructure development charges through Chennai Metropolitan Development Authority from the applicant of multi-storeyed buildings or special building as the case may be for the provision of adequate water supply or sewerage and the matters connected thereto at the flat rate of Rs.64/- per sq. meter (of the built up area)."

DELEGATION

9. On or about 5.3.1998, the Sewerage Board in the 197th meeting of its Board of Directors resolved to collect infrastructure development fee at a flat rate of Rs.64/- per square meter and to authorize CMDA to act as its agent for calculation, collection and remittance of the infrastructure development charges or IDC to the Board and to grant NOC to applicant builders of special buildings and multistoreyed flats without referring individual cases to the Board. An office order being No.9/98 issued on 23.3.1998 by CMDA as regards processing of applications for planning permission fixing Rs.64/- per square meter as IDC for multi-storeyed building which was to be collected by CMDA and transfer to Sewerage Board.

10. A Government Order being No.146 was also passed by Housing and Urban Development Department directing CMDA to collect Rs.64/- per square meter from applicants towards IDC.

11. The 1978 Act was amended in terms whereof Sections 6(2)(xii-a) and Section 81(jj) were inserted empowering the Sewerage Board to collect IDC from applicant, builder or developer of multi-storeyed or special buildings.

12. Appellant herein applied for planning permission for construction of a multi-storeyed building before CMDA on 8.11.2005. A sum of Rs.53,29,500/- towards development charges was demanded by CMDA in terms of its letter dated 8.9.2006 including a sum of Rs.5,30,500 towards IDC payable to the Sewerage Board for developing water and sewerage facilities as a pre-condition for considering the said application.

13. It is on the aforementioned premise, the writ petition was filed which by reason of the impugned judgment has been dismissed.

FINDINGS OF THE HIGH COURT

14. (a) Levy has been made for the services rendered and to strengthen and maintain the water supply and sewerage infrastructure. (b) Levy of development charges is permissible in law in terms of Section 59 of the 1971 Act.

(c) It helps the applicant to get processed the planning permission application at one location.

(d) Special Buildings and multi-storeyed buildings are responsible for the sudden spurt in demanding the infrastructure facilities at high rate and sometimes it requires huge investment.

(e) Sections 45 and 56 merely deal with charges for consumption of water and guidelines for availing the water and sewage connection whereas IDC is collected for overall infrastructure development.

DELEGATION ISSUE

15. Indisputably, development charges for land and building are levied in terms of the provisions of Section 59, 60 and 69 of the 1971 Act. Such charges are payable at the time of seeking planning permission for the development of land and building. The stipulated charges, at the relevant time,

was Rs.1,00,000/- per hectare in the case of development of land and Rs.25/- per square meter in the case of buildings. Water and sewage charges are levied in terms of Sections 45 and 56 of 1978 Act, which are required to be paid to the Sewerage Board at the time of seeking connection.

16. As noticed hereinbefore, IDC at the rate of Rs.64/- per square meter is levied only on builders or developers of special buildings or multi-storeyed buildings in terms of Section 6(2)(xii-a) of 1978 Act and Regulations made pursuant to the amendment of Section 81(2)(jj) thereof. IDC indisputably is in addition to the charges levied under Sections 59, 60 and 6 1 of 1971 Act and Sections 45 and 56 of 1978 Act.

17. Regulations, as noticed hereinbefore, were framed as regards, `manner' and `basis' for collection of charges.

18. The High Court opined that as the CMDA had been empowered to collect the said charges in terms of the Regulations by reason of a resolution of the Board of Directors of the Sewerage Board in its meeting held on 5.3.1998, the same is valid in law.

19. The Sewerage Board is a State within the meaning of Article 12 of the Constitution of India. It is a creature of a statute. It can delegate its power provided there exists a provision in the Act. Power to delegate, thus, being a statutory requirement must find its place in the principal Act itself and not in the Regulation. The High Court, in our opinion, has asked unto itself a wrong question. The appropriate question required to be posed was not as to whether the CMDA was appointed as an agent, but was as to whether the Sewerage Board could delegate its power to CMDA. It may have some advantages. But the same may not answer the legal requirement.

20. Mr. Krishnamurty, however, has submitted that the Sewerage Board is bound by the direction issued by the Government. CMDA may be a local authority within the provisions of the 1978 Act but it is an independent body. Prima facie, there is nothing to show that it has any statutory role to play in the functioning of the Sewerage Board. As a local authority, it has certain duties to perform. It, however, appears that the function relating to water supply and sewage services are vested in the Board itself. It was, therefore, the Board which could levy the charges. It had such a power in terms of Sections 45 and 54 of the Act. Our attention has been drawn to Section 78(b) of the Act to contend that the Government has power to issue orders and directions. Such orders and directions can be issued when the Government forms an opinion that the same are necessary or expedient for carrying out the purpose of the Act. Directions cannot be issued in respect of the matters which are beyond the provisions of the statute.

21. However, it appears that Section 81(2)(jj) which was inserted by Tamil Nadu Act 49 of 1988,

the Board has been empowered to frame regulations in relation to the `manner' and `basis' on which the IDC shall be collected. In terms of the aforementioned power, Regulation 4 has been made in terms whereof CMDA has been authorized to collect IDC. Thus, the matter providing for collection of IDC is a matter of procedure and not a substantive provision. It, in that view of the matter, is not a delegation of power. CMDA is not appropriating any fund collected on behalf of the Sewerage Board. It has no power to utilise any amount. The power of collection is merely an incidental power. They have no power to assess or appropriate the same; the rate having been fixed.

22. Although for different reasons, we, thus, uphold that part of the order of the High Court on this count.

QUID PRO QUO

23. State or the Board did not state as to on what basis the rate of Rs.64/- per square meter was fixed. What was the amount to be spent towards services to be rendered to the multi-storeyed and special buildings had not been spelt out. What had merely been stated was that the amount was necessary to be spent for overall development of the water supply and sewerage system. It is not contended before us that IDC is not a fee but a tax. If it is a fee, the principle of quid pro quo shall apply. Like a State, all other authorities who are statutorily empowered to levy the same must spell out as to on what basis, the same is charged. The State has not placed any material before the High Court. The High Court has also not addressed itself properly on the same issue. It failed to pose unto itself a relevant question. It proceeded on the basis as if over all development charges by itself is sufficient to levy a fee without spelling out how the services rendered will satisfy the equivalence doctrine for the purpose of levy and collection of fees.

24. In Sri Krishna Das v. Town Area Committee, Chirgaon [(1990) 3 SCC 645], this Court observed :

"22. A fee is paid for performing a function. A fee is not ordinarily considered to be a tax. If the fee is merely to compensate an authority for services performed or as compensation for the services rendered, it can hardly be called a tax. However, if the object of the fee is to provide general revenue of the authority rather than to compensate it, and the amount of the fee has no relation to the value of the services, the fee will amount to a tax. In the words of Cooley, "A charge fixed by statute for the service to be performed by an officer, where the charge has no relation to the value of the services performed and where the amount collected eventually finds its way into the treasury of the branch of the government whose officer or officers collect the charge is not a fee but a tax."

23. Under the Indian Constitution the State Government's power to levy a tax is not identical with

that of its power to levy a fee. While the powers to levy taxes is conferred on the State legislatures by the various entries in List II, in it there is Entry 66 relating to fees, empowering the State Government to levy fees "in respect of any of the matters in this list, but not including fees taken in any court". The result is that each State legislature has the power, to levy fees, which is co-extensive with its powers to legislate with respect to substantive matters and it may levy a fee with reference to the services that would be rendered by the State under such law. The State may also delegate such a power to a local authority. When a levy or an imposition is questioned, the court has to inquire into its real nature inasmuch as though an imposition is labelled as a fee, in reality it may not be a fee but a tax, and vice versa. The question to be determined is whether the power to levy the tax or fee is conferred on that authority and if it falls beyond, to declare it ultra vires.

24. We have seen that a fee is a payment levied by an authority in respect of services performed by it for the benefit of the payer, while a tax is payable for the common benefits conferred by the authority on all tax payers. A fee is a payment made for some special benefit enjoyed by the payer and the payment is proportional to such benefit. Money raised by fee is appropriated for the performance of the service and does not merge in the general revenue. Where, however, the service is indistinguishable from the public services and forms part of the latter it is necessary to inquire what is the primary object of the levy and the essential purpose which it is intended to achieve. While there is no quid pro quo between a tax payer and the authority in case of a tax, there is a necessary co-relation between fee collected and the service intended to be rendered. Of course the quid pro quo need not be understood in mathematical equivalence but only in a fair correspondence between the two. A broad co- relationship is all that is necessary."

In Jindal Stainless Ltd. (2) & Anr. v. State of Haryana & Ors. [(2006) 7 SCC 241], a Constitution Bench of this Court stated:

"40. Tax is levied as a part of common burden. The basis of a tax is the ability or the capacity of the taxpayer to pay. The principle behind the levy of a tax is the principle of ability or capacity. In the case of a tax, there is no identification of a specific benefit and even if such identification is there, it is not capable of direct measurement. In the case of a tax, a particular advantage, if it exists at all, is incidental to the State's action. It is assessed on certain elements of business, such as, manufacture, purchase, sale, consumption, use, capital, etc. but its payment is not a condition precedent. It is not a term or condition of a licence. A fee is generally a term of a licence. A tax is a payment where the special benefit, if any, is converted into common burden.

41. On the other hand, a fee is based on the "principle of equivalence". This principle is the converse of the "principle of ability" to pay. In the case of a fee or compensatory tax, the "principle of equivalence" applies. The basis of a fee or a compensatory tax is the same. The main basis of a fee or a compensatory tax is the quantifiable and measurable benefit. In the case of a tax, even if there is any benefit, the same is incidental to the government action and even if such benefit results from the government action, the same is not measurable. Under the principle of equivalence, as

applicable to a fee or a compensatory tax, there is an indication of a quantifiable data, namely, a benefit which is measurable."

In Mumbai Agricultural Produce Market Committee & Anr. v. Hindustan Lever Ltd. & Ors. [(2008) SCC 575], this Court observed :

"14. The quantum of recovery, however, need not be based on mathematical exactitude as such cost is levied having regard to the liability of all the licensees or a section of them. It would, however, require some calculation."

It was further stated :

"18. Cost of supervision, if borne by the State has to be recovered by it. The burden was, therefore, on the State to justify the levy. Even the general or special order, if any, purported to have been issued by the State has not been brought on record. On what basis, the supervision charges were being calculated is not known. The premise for levy or recovery of the amount of supervisory charges is not founded on any factual matrix. Only the source of the power has been stated but the basis for exercise of the power has not been disclosed."

Recently, in Mohan Meakin Ltd. v. State of H.P. & Ors. [2009 (1) SCALE 510], this Court opined that the jurisdiction of the State to impose such a levy is limited. When a fee is levied, the question as regards `aspects of power to levy fee vis-`-vis tax' must be borne in mind.

25. Furthermore, it was held in A.P. Paper Mills Ltd. v. Govt. of A.P. and Another [(2000) 8 SCC 167] that even if a fee is levied for issuance of permit, it was only for the purpose of recovering the administrative charges. [See also Ashok Lanka and Another v. Rishi Dixit and Others (2005) 5 SCC 598].

This Court in Kerala Samsthana Chethu Thozhilali Union v. State of Kerala and Others [(2006) 4 SCC 327], upon noticing State of Kerala and Others v. Maharashtra Distilleries Ltd. and Others [(2005) 11 SCC 1], opined:

"39. In State of Kerala v. Maharashtra Distilleries Ltd. this Court took notice of the provisions of Section 18-A of the Act. It was held that the State had no jurisdiction to realise the turnover tax

from the manufacturers in the garb of exercising its monopoly power. It was held that turnover tax cannot be directed to be paid either by way of excise duty or as a price of privilege."

26. Even while levying a fee, a quantum jump is deprecated. In Indian Mica Micanite Industries v. The State of Bihar and Others [(1971) 2 SCC 236], it has been held:

"17... There cannot be a double levy in that regard. In the opinion of the High Court the subsequent transfer of denatured spirit and possession of the same in the hands of various persons such as wholesale dealer, retail dealer or other manufacturers also requires close and effective supervision because of the risk of the denatured spirit being converted into palatable liquor and thus evading heavy duty. Assuming this conclusion to be correct, by doing so, the State is rendering no service to the consumer. It is merely protecting its own rights. Further in this case, the State which was in a position to place material before the Court to show what services had been rendered by it to the appellant and other similar licensees, the costs or at any rate the probable costs that can be said to have been incurred for rendering those services and the amount realized as fees has failed to do so. On the side of the appellant, it is alleged that the State is collecting huge amount as fees and that it is rendering little or no service in return. The co-relationship between the services rendered and the fee levied is essentially a question of fact. Prima facie, the levy appears to be excessive even if the State can be said to be rendering some service to the licensees. The State ought to be in possession of the material from which the co-relationship between the levy and the services rendered can be established at least in a general way. But the State has not chosen to place those materials before the Court. Therefore the levy under the impugned Rule cannot be justified."

In this case, the State in fact has not produced any material whatsoever before the High Court, which it was required for meeting the challenge on imposition of fee by it.

27. As in the case of Mohan Meakin Ltd., in this case also no justification for levy of fee has been placed before the High Court, we are of the opinion that the matter should be remitted to the High Court for consideration of the matter afresh.

In the writ petition, State of Tamil Nadu may be impleaded as a party. The parties shall be at liberty to produce such material before the High Court for justification for levy of fee. The State of Tamil Nadu is directed to file an affidavit before the High Court to justify the levy of fee. The affidavit should be filed within four weeks.

28. The impugned order is set aside. The appeals are allowed. The High Court is requested to dispose of the matter as expeditiously as possible. No costs.