

ORISSA HIGH COURT

Anem Pedda Sivaparvatamma

Vs

Executive Officer

Second Appeal No. 377 of 1952

(Narasimham, C.J. and Mohapatra, J.)

18.04.1957

JUDGMENT

Narasimham, C.J.

1. This is an appeal by some of the rate-payers of Berhampur Municipality arising out of a suit for a declaration that the sudden enhancement of the encroachment license-fee from Rs. 2-4-0 to Rs. 18-0-0 for every encroachment ranging from 1 sq. fit. to 50 sq. fit., on public roads within the Municipality, in pursuance of its resolution No. C. B. VII (4) dated the 5th November, 1947, is ultra vires and as such inoperative.

2. The suit was instituted on the 5th April 1950. Prior to the 5th November, 1950, Berhampur Municipality was governed by the provisions of the Madras District Municipalities Act, 1920 (Madras Act 5 of 1920) which was in force in South Orissa. Section 183 (1) of that Act authorized the Municipal Council to grant a license to an owner or occupier of certain premises and to allow certain projections and erections on or over public streets. Section 323 (2) of the said Act empowered the Municipality to charge fees for the issue of licenses under the provisions of the Act, at such rates as may be fixed by the Municipal Council. For about twenty years prior to 1947, the fee fixed by the Municipality for granting licenses for Such encroachments or projections over public streets was Rs. 1-8-0 for every encroachment ranging from 1 SQ. fit. to 50 sq. fit. In 1947-48 the Municipality enhanced the fee to Rs. 2-4-0. On the 5th November, 1947 the Municipal council passed a resolution steeply enhancing the aforesaid license fee to Rs. 18-0-0. This resolution was given effect to from the 1st April, 1948 by a notification published by the Commissioner of the Municipality in the supplement to the Orissa Gazette dated the 2nd January, 1948. The reason for such enhancement was stated to be as follows : "whereas the Municipal Council Berhampur, in its Resolution C. R. No. vii (4) dated 5-11-1947 finally approved the rates appended to this notification - to Provide for taking steps for discouraging the innumerable encroachments on road margins specially on the main road and other important localities that are proving ineffective due to the existing low rates of encroachment l'cer-se fees, the public are hereby informed that enhanced rates appended below will come into force with effect from 1-4-48."

Some of the rate-payers protested against this enhancement and filed a petition before the

Collector of Ganiem who was then exercising the powers of the Inspection of Municipalities by Notification No. 320 dated the 19th January, 1937. The Collector declined to interfere saying that

"the object of the Municipal Council is to discourage "the encroachments. The rates of license fees have, therefore been enhanced by the Berhampur Municipality and these enhanced rates are proportionate to the cost of the administration. "As there was no evidence before the lower Court to support the statement of the Collector to the effect that "the enhanced rates were proportionate to the cost of administration" the case was remanded to the trial Court for a finding about the purpose for which the enhanced levy was either applied or intended to be applied. The Subordinate Judge, after remand, has given a finding to the effect that the enhanced fee was merged in the municipal funds and that it was not ear-marked for expenditure under any particular head.

He has also found that the total collections from this encroachment fee used to be about Rs. 2,500 in 1945-46, but from 1950-51 when the enhanced levy was given effect to, the income rose to about Rs. 12,000 and that in 1951-52 the income remained at about Rs. 11,000. For the year 1949-50 the actual collection of encroachment license fee was Rs. 8,075-12-0 whereas the expenditure under the head 'Land Development' which included expenditure under the sub-head 'encroachment' was only Rs. 816-5-6. He has, therefore, found that the fees collected in consequence of this enhancement have not been correlated to the expenses incurred by the Municipality for rendering services and that the levy is not commensurate with the services. I see no reason to disagree with this finding of the lower Court. The finding is based on the evidence of an employee of Berhampur Municipality and certain documents Exts., (G) and (H) of the Municipal Council proved by him. It may thus be taken as well-established that the income from encroachment license fee is not set apart for the purpose of regulating and checking encroachments on public roads, but that it is merged in the municipal funds, that the amount spent annually on land development which includes expenditure under the sub-head 'encroachment' was not even one-tenth of the total sum realized by the levy. Hence there seems no doubt that the levy was made primarily for the Purpose of increasing the revenues of the Municipality.

3. On these findings the main question for consideration is whether the levy is, in essence, a 'tax' and not a 'fee' and as such ultra vires the powers of the Municipality under Section 321 (2) of the Madras District Municipalities Act, 1920. That Act authorises the municipality to levy various kinds of imposts on the rate-payers. Chapter VI of Part III deals with Powers of Taxation. Chapter XII deals with issue of licenses on payment of fees for the purpose of keeping animals, running factories, and carrying on certain specified trades and other avocations.

Doubtless, Section 183 which deals with issue of licenses for encroachments on public roads is neither in Chapter XII nor in Chapter VI but the power to levy fees for such encroachments is conferred by Section 321 (2) which contains a general provision authorising the levy of fees for the purpose of granting licenses under the Act. An ingenious argument was advanced by Mr. Das Gupta on behalf of the Municipality to the effect that the 'fees' levied under the provisions of Chan. XII stand on a different footing from 'fees' levied for the purpose of licensing encroachments under Section 183 (1) read with Section 321 (2) of the Act and that the latter class of 'fees' is essentially in the nature of 'rent'. He urged that fees under Chap.-XII are levied for

licenses granted for the purpose of carrying on a trade or occupation within a municipal area whereas licenses for encroachments under Section 183 (1) are granted for the use and occupation of a portion of a street which vests in the Municipality or a portion of the space above it, and as the Municipality is the owner of such streets the fees levied for its use and occupation would be in the nature of 'rent'. Where leases are contemplated of property vesting in the Municipality, the Act expressly says so. Thus, in sub-section (3) of Section 183 the council is given power to lease roadsides and street margins, but sub-section (1) of that section speaks only of the grant of licenses permitting encroachments on or over the streets. The use of two different expressions, namely, 'lease' and 'license' in the two sub-sections of the same section clearly shows that the framers of the Act did not contemplate leases for encroachments, and consequently the fees paid for the grant of licenses in respect of such encroachments cannot, by any stretch of imagination, be termed 'rent'. Moreover even under Chap. XII licenses were not restricted only to the carrying on of trades or occupations. On the other hand. Section 270-B licenses were required to be taken for the use of a municipal cart-stand by a cartman. There seems to be no distinction in principle between 'fees' levied from a cartman who obtains a license for the use of the municipal cart-stand, on the one hand, and the 'fees' levied on an owner for encroachment on a portion of the municipal street adjacent to his house. Hence, following the well-known rule that word's and expressions occurring in a statute must be given the same meaning throughout the statute unless there is something repugnant in the subject or context, I must hold that that the expressions 'tax' and 'fee' occurring in the various sections of the Madras District Municipalities Act have different meanings and that the expression 'fee' in Section 321 (2) of the Act has the same meaning as is given to that expression in Chap. XII of Part IV.

4. The broad distinction between a 'tax' and a 'fee' is well known. It is unnecessary to cite several authorities on this point and I would content myself with quoting the following passage in recent decision of the Supreme Court reported in *Commissioner, Hindu Religious Endowments v. Lakshmindra Tirtha Swamiar*¹,

"The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is payment for a special benefit or privilege. Fees confer a special capacity, although the special advantage, as for example in the case of registration fees for documents or marriage licenses, is secondary to the primary motive of regulation in the public interest If . . a fee is regarded as a sort of return of consideration for services rendered, it is absolutely necessary that the levy of fees should, on the face of the legislative provision, be correlated to the expenses incurred by Government in rendering the services."

Hence a fee levied for the purpose of controlling encroachments on public streets within a municipality by the issue of licenses, should not be merged in the general revenues of the municipality but must be correlated to the expenses incurred by the Municipality for the purpose of regulating such encroachments. On the facts found, however, there is absolutely no correlation between the two, and it seems clear that under the guise of levying fees the Municipality is levying a tax for the purpose of augmenting its revenues. Such a power of taxation is not derived from Section 321 of the Act and the impugned notification of the Municipality should therefore be declared ultra vires.

5. I may also refer to some previous decisions of the Madras High Court where that High Court had interfered and pronounced the levy of unreasonable fees as ultra vires the powers of the municipality. In *Corporation of Madras v. Spencer and Co. Ltd.*², where the Corporation of Madras enhanced the license fee, for storing spirits, from Rs. 25/- to Rs. 200/- solely for the purpose of raising revenue such levy was declared to be in excess of its powers, as amounting to an attempt at taxation. In *Municipal Council, Kumbakonam v. Ralli Bros*³, where the license fee for possessing a godown within the limits of Kumabakonam Municipality was raised without reference to the expenses of collection or regulation, it was held that the levy was ultra vires. In that decision Section 321 (2) of the Madras District Municipalities Act, came for construction and it was held that the fee referred to in that Sub-section, should be commensurate with the extra cost entailed in granting the license and exercising such supervision as was necessary to see that its terms were complied with Again, in *India Sugars and Refineries, Ltd. v. Hospet, Municipal Council*⁴, the same principle was reiterated in the following terms :

"The license fee should bear as nearly as possible a relation to the cost of issuing the license.... and the cost of supervising the trade or of any special measures rendered necessary by the cha racter of the trade".

I may also refer to recent decision of the Allahabad High Court reported in, *Lala Raj Kishore v. District Board of Seharanpur*⁵, where the levy of a license fee with a view to enhance the general revenues of a District Board and not for the purpose of meeting the ex penses of regulating the trade was held to be ultra vires.

6. Again, in a recent decision of a Division Bench of this Court reported in *Chintamoni Sahu v. Cuttack Municipality*⁶, it was held that the power to charge license fees under the Orissa Mu nicipal Act 1950 cannot be misused for the purpose of taxation.

7. I would, therefore, allow the appeal, set aside the judgment of the lower appellate Court, and restore the judgment and decree of the Munsif. The appellants should get their costs throughout.

Mohapatra, J.

8. I agree.
Appeal allowed.

Cases Referred.

¹ AIR 1954 SC 282 (at P 295) (A)

² AIR 1930 Mad 55

³ AIR 1931 Mad 497

⁴ AIR 1943 Mad 191

⁵ AIR 1954 All 675

⁶ ILR 1955 Cut 181