

**Case Note:** Case dealing with the distinction between fee and tax. The court held that since the provision of drinking water comes within the statutory duties of the Zila Panchayat a fees cannot be charged for the same unless certain special arrangements are being made for a the group of people from whom the fees is being charged.

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AIR2003All230, 2003(2)AWC1011.

## **IN THE HIGH COURT OF ALLAHABAD**

Decided On: 07.02.2003

**U.P. Udyog Vyapar Pratinidhi Mandal and Ors.**

**v.**

**State of U.P. and Ors.**

**Hon'ble Judges:**

M. Katju and Prakash Krishna, JJ.

## **JUDGMENT**

**Prakash Krishna, J.**

1. These are four writ petitions. The controversy involved in all the above mentioned writ petitions is common and hence, they are being disposed of by the common judgment.

2. The petitioners have filed the writ petitions challenging the validity of the bye-laws, filed as Annexure-2 to the writ petition, framed by the Zila Panchayat, Agra. The said bye-laws were published in the official Gazette on 11th May, 2002. These bye-laws were framed for the purpose of regulation of transportation by vehicles from Agra District to outside and from outside districts to Agra of Gitti, Patthar, Boulder, Coal, Marble, Yamuna Sand and Balu, etc. Bye-law No. 19 provides the charges to be paid on every trip of the vehicle, namely, trolly, mini truck and truck. It further provides that the amount thus realised shall be utilised for providing drinking water facility to the vehicle owners and drivers and medical facilities shall also be provided at the point of loading or at any other specified place.

3. The petitioners have challenged the validity of the aforesaid bye-laws on a number of grounds. They have pleaded that the Zila Panchayat has no power to frame such bye-laws in view of provisions of Sections 142 to 145 of U. P. Kshetra Panchayats and Zila Panchayats Adhiniyam, 1961 (hereinafter referred to as the Act). They have further pleaded that the aforesaid Sections 142 to 145 contemplate imposition of certain fees and tolls but the impugned levy does not come within the ambit of aforesaid sections, namely, Sections 142 to 145. A plea has also been raised by the petitioners that the aforesaid bye-laws were never published in any reputed newspaper, such as 'Amar Ujala', 'Dainik

Jagran', Times of India', 'Hindustan Times', 'Rashtriya Sahara' etc., vide paragraph 14 of the writ petition. The petitioners or other persons were not made aware about any proceedings for framing of bye-laws by the Zila Panchayat, Agra. These bye-laws were never published as required by Section 239 read with Sub-section (2) of Section 242 of the Act, while previous publication is mandatory. In paragraph 17 of the writ petition, it has been mentioned that the fee which is being sought to be recovered by the respondents against the facility of drinking water and first-aid treatment at the places of loading and unloading are the statutory functions of the Kshetra Panchayats and Zila Panchayats. It is the duty of the Zila Panchayats to provide drinking water and medical facilities vide Part A of Schedule II, Clauses (xi) and (xxiii) of the Act. The respondents have failed to take any decision on the representations filed by the petitioners and other persons hence, the present writ petitions.

4. A counter-affidavit has been filed in writ petition No. 42320 of 2002 on behalf of respondent Nos. 3 and 4 by one Gaya Prasad Gupta, clerk in Zila Panchayat, Agra. The said counter-affidavit has been relied upon for the purpose of other writ petitions also as jointly agreed between counsel for parties. It has been stated that in the meeting dated 28.2.2001 vide Resolution No. 4, the Zila Panchayat, Agra decided to frame the said bye-laws. Proceedings of the meeting have been filed as Annexure-C.A. 1, The said resolution was published in the newspaper, namely, daily Hindi Dainik 'Aaj' dated 24.4.2001 filed as Annexure-C.A. 2. Thereafter the said bye-laws were submitted to the Commissioner of the Division and were published in the official Gazette. In paragraph 26 of the counter-affidavit, it has been stated that the objections were invited from the public and since no objections whatsoever were received, the bye-laws were sent for confirmation by the Prescribed Authority, that is the Commissioner, Agra Region, Agra. The impugned bye-laws fall under the provisions of Sections 142, 143, 144 and 145. In paragraph 29 of the counter-affidavit, it is stated that the respondents have provided medical facilities as well as drinking water and other facilities. One receipt issued by New Prince Medico dated 17.6.2002 in the name of one Ram Prakash had been filed as Annexure-C.A. 5 to the counter-affidavit to show that the Zila Panchayat is rendering medical service. The Zila Panchayat is suffering a loss of Rs. 50,000 per day on account of the stay order passed by this Court and the impugned levy is perfectly justified.

5. We have heard counsel for parties and also Smt. Sadhna Upadhyay on behalf of contractors.

6. It has been submitted by the counsel for the petitioners that the respondents have got no power to frame such bye-laws under Sections 142 to 145 of the Act which contemplate imposition of certain fees and tolls. The impugned fee does not come within the ambit of Sections 142 to 145 of the Act. The impugned bye-laws impose different fee and the Zila Panchayat is not competent to do so. The further argument is that the said fee is in the nature of tax as the Zila Panchayat is not rendering any special service either directly or remotely to the persons from whom the aforesaid fee is being realised. There is a distinction between fee and tax. Since there is complete absence of quid pro quo in the present case, the impost is wholly illegal and invalid. It has further been submitted that fee can be imposed only for a specified purpose. It is the statutory duty of the Zila

Panchayat to provide drinking water and medical facility and for the said purposes the impost of the present levy cannot be Justified.

7. In this connection, it is relevant to quote relevant portions of paragraphs 21 and 29 of the counter-affidavit :

"Para 21. ....whereas the new bye-laws has been framed by the answering respondents under the provisions of the Act to provide facilities to the public of the district by enhancing its resource for meeting out the need of the public and for the purpose of providing at least there is no facilities for the people of Agra.

Para 29. ....that the answering respondents providing the medical facilities as well as drinking water and other facilities also either itself or through it's agents.....

The photographs containing the Medical facilities, drinking water being provided by the Zila Parishad to the public at large including the employees of trolleys. Mini Truck, Truck and Tractor, the photographs of the same is being filed herewith and is marked as Annexure-C.A. 6 to this affidavit."

From the above, it is crystal clear that the Zila Panchayat is using the money thus realised under the impugned bye-laws for the purposes of providing medical facilities and drinking water to the public at large.

8. The question arises whether in the facts of the present case, the impost is a fee or a tax. In *Nagar Palika Varanasi v. Durga Das Bhattacharya*, AIR 1968 SC 1119, while dealing with the provisions of U. P. Municipalities Act the Supreme Court held that there is generic difference between a tax and fee, both are compulsory exactions of money by public authorities, but whereas a tax is imposed for public purposes and is not supported by any service rendered in return, a fee is levied essentially for services rendered and as such, there is an element of quid pro quo between the person who pays the fee and the public authorities which impose it. In the aforesaid case, it has been further held :

"In this context it is important to notice that the power in the American Municipal Law. (Dillonon 'Municipal Corporation' Vol. IV, 5th Edn., p. 2400). It has been held that the police and taxing powers of the Legislature though co-existent, are distinct powers. Broadly speaking, the distinction is that the taxing power is exercised for the purpose of raising revenue and is subject to certain designated constitutional limitations, while the police power is exercised for the promotion of the public welfare by means of the regulation of dangerous or potentially, dangerous businesses, occupations, or activities, and is not subject to the constitutional restrictions applicable to the taxing power. 'It may consequently be said that if the primary purpose of a statute or Ordinance exacting an imposition of some kind is to raise revenue, it represents an exercise of the taxing power, while if the primary purpose of such an enactment is the regulation of some particular occupation, calling or activity, it is an exercise of the police power, even if it incidentally produces revenue'. (American Jurisprudence 2nd Edn. Vol. 16, p. 519)."

9. Learned counsel for the petitioner has placed reliance upon the judgments of the Supreme Court in the cases of *Hansraj and Sons v. State of Jammu and Kashmir*, (2002) 3 UPLBEC 2015 and *Okhla Sand Supply Company v. State of U. P. and Ors.*, (2001) 1 AWC 803. In the aforesaid judgments of the Supreme Court, it has been held that the expression 'toll' normally means a definite payment exacted by the State or the local authority by virtue of sovereignty or lordship or in return of protection, more especially, for doing some act, performing such functions. Another meaning attributed to the term is a charge for landing or shipping goods at a port. In *Okhla Sand Supply Company's* case, it was held that the mere purpose of imposition of toll tax is to recover the cost of construction and maintenance of a bridge. Tax can only be imposed in respect of items enumerated in Section 144 of the Act. Zila Panchayat is authorised to impose tax only in respect of items mentioned in Section 239 of the Act. Section 239 of the Act provides that a Parishad may make bye-laws in respect of the matters required by this Act to be governed by bye-laws and for the purposes of promoting or maintaining the health, safety and convenience of the inhabitants of the rural area of the district and for the furtherance of the administration of this Act. Sub-section (2) of Section 239 enumerates various subjects upon which bye-laws can be framed.

10. The question with regard to distinction between a fee and tax has been subject matter of debate since long. The Supreme Court in the case of *Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SC 282, examined the matter in detail. It also considered Article 110 of the Constitution and came to the conclusion that there is no generic difference between a tax and fee. Our Constitution has made a distinction between tax and a fee. The Court also pointed out that as indicated by Article 110 of the Constitution, ordinarily there are two classes of cases where the Government imposes fees upon persons. In the first class of cases, the Government simply grants a permit or privilege to a person to do something which that person would otherwise not be competent to do and extracts fee from that person in return for the privilege that is conferred. In other class of cases, the Government does some positive work for the benefit of persons and the money is taken as return for the work done or the services rendered. The Court also pointed out that in cases falling in the second category, that is, where the fee is being charged for the services rendered, it is absolutely necessary that the levy of the fee should, on the face of the legislative provision, be co-related to the expenses incurred by the Government in rendering of services. However, there are subsequent pronouncements by the Supreme Court wherein it has been held that the element of quid pro quo in strict sense is not otherwise a sine qua non of a fee. See AIR 1980 SC 1963. But the fact remains that the principal criterion for the purposes as propounded in the earlier cases of the Supreme Court that in order to qualify as a fee, the impost must have relation to services rendered or advantages conferred, however, still holds good. The communication need not be direct and mere actual relationship may be regarded as sufficient. In this background, we have to examine the facts of the present case.

11. As mentioned in earlier paragraphs of this judgment, the fee so realised is being utilised by the Zila Panchayat for the purposes of providing drinking water and medical facilities. Section 23 of the Act gives the general powers and functions of Zila

Panchayats. The powers and functions, in Part A of Schedule II, have been mentioned in Clause (v) of Section 33 (1). In the said Schedule, Entry (xi) reads as follows :

"Drinking water (a) Maintenance of drinking water of public use ; (ii) Plan and programme for drinking water ; and (c) Supervision and control of water pollution."

Entry (xxiii) Medical and Sanitation.

Thus, it is the statutory function of Zila Panchayat to provide drinking water and medical facilities, etc. The Supreme Court in the case of Nagar Mahapalika, Varanasi (supra) has held that for the expenditure incurred by the Municipal Board in the discharge of its statutory duties, the licence fee cannot be imposed for reimbursing the cost of statutory duties or ordinary medical services which the Municipal Board was bound under the statute to provide to the general public. Vide Paragraph 10 of the Judgment, in view of the Judgment of the Supreme Court rendered under Section 294 of the U. P. Municipalities Act, which is in part materia with the provisions of Kshetra Panchayats and Zila Panchayats Adhinlyam. The Zila Panchayat, Agra in its counter-affidavit has sought to Justify the impost on the basis that it is incurring expenditure towards its ordinary services which the Zila Panchayat was bound to provide under the statute to the general public. No attempt has been made in the counter-affidavit in any manner that as against the fee sought to be levied and recovered, the Zila Panchayat is going to render any special service to the persons from whom the fee is being raised. It has been stated in the counter-affidavit that it is incurring a loss of Rs. 50,000 per day on account of the stay order granted by this Court, but in the counter-affidavit, the Zila Panchayat ha's not given the details of any special services provided to the persons from whom the fee was realised. The power to impose tax under the Act has been given under Section 123. It also provides that a preliminary proposal for imposition of tax shall be framed which shall be passed by a special resolution. The Zila Panchayat in its counter-affidavit has sought to justify the action with reference to Sections 142 to 145. The counter-affidavit is silent as to under which section the aforesaid bye-laws were framed. The impugned fee does not come within the ambit of Sections 142 to 145 of the Act. To provide drinking water and first aid or medical facility is a statutory duty of Zila Panchayat as indicated above. Hence, no separate bye-laws can be framed and no separate fee can be charged for providing drinking water or medical facilities to the public at large. The respondents have realised fee till October, 2002, meaning thereby a sum of about Rs. 80,00,000 has been realised by them. It is strange that out of this huge sum, the Kshetra Panchayat has not been able to show that it has done some special service to the persons from whom money was realised. Along with counter-affidavit, a bill of Rs. 10,000 and odd, showing purchase of some medicines, has been filed. The petitioners have disputed the said purchase as the bill is not in the name of Zila Panchayat or its officers/ officials,

12. Thus, the Zila Panchayat has failed to establish that it is providing any service either directly or remotely to the persons from whom it is realising the impugned fee. There is total lack of element of quid pro quo. Hence, the levy in question is not a fee but tax in nature.

13. In view of the above, the impugned bye-laws, a copy of which has been filed as Annexure 2 to the writ petition, published in the official Gazette dated 11.5.2002 is quashed. The writ petition is allowed. No order as to costs.

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