Indian Mica & Micanite Industries Ltd vs State Of Bihar & Ors on 2 April, 1971

Equivalent citations: 1971 AIR 1182, 1971 SCR 319, AIR 1971 SUPREME COURT 1182

Author: K.S. Hegde

Bench: K.S. Hegde, S.M. Sikri, G.K. Mitter, A.N. Grover, P. Jaganmohan Reddy

PETITIONER:
INDIAN MICA & MICANITE INDUSTRIES LTD.

Vs.

RESPONDENT:
STATE OF BIHAR & ORS

DATE OF JUDGMENT02/04/1971

BENCH:
HEGDE, K.S.
BENCH:
HEGDE, K.S.
SIKRI, S.M. (CJ)
MITTER, G.K.
GROVER, A.N.
REDDY, P. JAGANMOHAN

CITATION:
1971 AIR 1182 1971 SCR 319
CITATOR INFO :
R 1973 SC 724 (30)
AFR 1980 SC 1 (13)
R 1980 SC1008 (18)
R 1981 SC1863 (23,28)
RF 1990 SC1927 (41,67,68,74,88)
RF 1992 SC 165 (50)

ACT:
Bihar and Orissa Excise Act, 1915, s. 90 and rules made thereunder, r. 111-Levy of licence fee for possession of liquor-Whether fee commensurate with service rendered by State-Immunity from prosecution on payment of licence fee-If quid pro quo.

HEADNOTE:
The appellant was using denatured spirit in the manufacture of micanite. It challenged the vires of r. III- of the Rules framed under s. 90 of the Bihar and Orissa Excise Act, 1915, by which a fee for a licence to possess denatured spirit was imposed. The. High Court upheld the levy as a fee for services rendered by the Government.
In appeal to this Court,
HELD: (1) Denatured spirit being intoxicating liquor (though unfit for human consumption), the State Legislature has power to levy a fee. But, before the levy can be upheld as a fee it must be shown that the levy was a quid pro quo for services rendered by the Government. An arithmetic exactitude is not expected but correlationship of a general character must be established. [32ID-F]
in the present case, the only services rendered were that the Excise Department was maintaining an elaborate staff for the purpose of ensuring that denaturing was done properly by the manufacturer and for, the purpose of seeing that the subsequent possession of the denatured spirit was not misused by converting the denatured spirit into alcohol fit for human consumption. [326H; 327A-B]
(a) So far as the manufacturing process is concerned the appellant had nothing to do with it. It was only a purchaser of the denatured spirit and hence the cost of supervising the manufacturing process or any assistance rendered to the manufacturers could not be recovered from consumers like the appellant. Further, under, r. 9 the. actual cost of supervision of the manufacturing process was required to be born by the manufacturer and there could not be a double levy in that ergard [327B-C]
(b) Assuming that the possession of the denatured spirit in the hands of various persons required close and effective supervision because of the risk being converted into. potable liquor, in Providing against misuse the State was not rendering any service to the consumer. [327D]
(c) The appellant had alleged that the State was collecting the amount without rendering any service in return. The correlationship between the services rendered and the fee levied is essentially a question of act. Prima facie in the present case the levy was excessive, even if the state could be said to be rendering some service to the licensees. The State was in possession of material from which ' the correlationship between the levy and the services rendered could be, established at least in a general way, but the State had not placed' any material before the Court. Therefore, the levy under the impugned 'rule could not be justified, [327E-G]
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Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, [1954] S.C.R. 1005, Mahant Sri Jagannath Ramanuj Das & Anr. v.

State of Orissa & Anr., [1954] S.C.R.. 1046, Ratilal Panachand Gandhi v. State of Bombay & Ors., [1954] S.C.R. 1055, Hingir Rampur Coal Co. Ltd. v. State of Orissa & Ors., [1961] 2 S.C.R. 537, H. B. Sudhundra Thirtha Swamiar v. Commissioner of Hindi,(Religious and Charitable Endowments, Mysore, [1963] Supp, 2 S.C.R. 302. Corporation of Calcutta & Anr. v. Liberty Cinema, [1965] 2 S.C.R. 477 and Delhi Cloth JUDGMENT:

[1970] 2 S.C.R 348, followed.

(2) The High Court erred in observing that when the manufacturers wanted to keep in their possession a large quantity of denatured spirit for manufacturing purposes, they wanted a privilege and immunity from prosecution, that the payment of the requisite licence fee was for that purpose and that it operated as the quid pro quo. [325C-D]

(a) The granting of a license generally does not confer any privilege or benefit on anyone, except in those cases, where a permit or licence is granted to someone to exploit Government property. The requirement to take a licence is prescribed to safeguard public interest by regulating a trade,. business or profession and not as a source of revenue. [325F-G]

(b) What is made punishable is either a person's failure to take a licence or a breach of the conditions of the licence, and the Government could not barter away its duty to prosecute an offender for consideration.. Any fee levied could only be for services rendered. [325E-F] [Since the State may suffer considerable financial loss the matter was. remanded to the High Court with further opportunity to the State to place the necessary material and show the correlationship.] [328A] & CIVIL APPELLATE JURISDICTION : Civil Appeal No. 770 of 1967. Appeal from the judgment and order dated September 14, 1966 of the Patna High Court in Civil Writ Jurisdiction Case No- 887 of 1965.

Sarjoo Pravad, K. K. Sinha and B. B. Sinha, for the appellant.

S. C. Agarwala, R. K. Garg, V.J. Francis, Narayana Netter and S. P. Singh, for the respondents.

The Judgment of the Court was delivered by Hegde J. In this appeal by certificate. the vires of Rule III of the Rules framed under Section 90 of the Bihar and Orissa Excise Act, 1915 is in issue. 'The. appellant, Indian Mica & Micanite Industries contends that the said Rule is ultra vires the Constitution. The High Court of Patna rejected that contention.

In the High Court various contentions came up for considera- tion. The High Court has come to the conclusion that the levy made under the impugned rule is a fee. That finding was not challenged before us by any of the parties. Therefore all that we have to see is whether the fee levied is, within the permissible limit. In other words whether there, is sufficient quid pro quo for the levy in question. The appellant is a consumer of denatured spirit. It purchases denatured spirit from the wholesalers or the manufacturers for the purpose of manufacturing micanite. The Bihar and Orissa Excise Act, 1915 (Bihar & Orissa Act 2 of 1915) came into force on January 19, 1916. In pursuance of

the provisions of that Act the impugned Rule was framed by the Board of Revenue for levying licence fee. The fee for the licence to possess denatured spirit in 1919 was only Rs. 2 per annum irrespective of the quantity in the possession of a person. This' rate continued to be in force till 1937. At this stage it may be remembered that under sub-section (2) of Section 143 of the Government of India Act, 1935, the Provinces were authorised to continue to levy tax, duties, cesses or fees which were being lawfully levied prior to the commencement of that Act. Under the 1935 Act as under our present Constitution, the power to levy duties on alcoholic liquor fit for human consumption was allocated to the Provincial Legislature whereas the power to levy duty on alcoholic liquor not fit for human consumption was allocated to the Central Legislature. Denatured spirit though an alcoholic liquor is not fit for human 'consumption. The power to levy duty on the same was and is given to the Central Legislature. But the same being intoxicating liquor, the Provincial Legislature under the 1935 Act and at present the State Legislature has power to levy fee. The power of- any Legislature to levy fee is conditioned by the fact that it must by and large a quid pro quo for the services rendered. If a levy purporting to be a fee is found to be an exaction without doing any service, or if it is found that the levy is wholly disproportionate to the services rendered then the levy becomes invalid. The distinction between fee and levy' came up for the first time for consideration by this Court in The Commissioner, Hindu Religious Endowments' Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt(1). Therein this Court speaking through Mukherjea, J. (as he then was) quoted with approval the definition of 'tax' given by Latham C. J. of the High Court of Australia in Matthews v. Chicory, Marketing Board.(2) In that case the learned Chief Justice observed :

> " "A tax" is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered."

(1) [1954] S.C.R. 1005. (2) 60 C.L.R. 263.

21-1 S. C. India/71 Dealing with the distinction between "tax" and "fee" Mukherjea J. observed thus in the above- mentioned case.

> "It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the tax-payer's consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said no element of quid pro quo between the tax payer and the public authority. Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the tax payer depends generally upon his capacity to pay.
>
> Coming now to fees, a "fee" is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the government in rendering the

> service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases.
>
> If, as we hold, a fee is regarded as a sort of return or 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."

The same view was reiterated by this Court in Mahant Sri Jagannath Ramanuj Das and anr. v. The State of Orissa and anr.0 and in Ratilal Panchand Gandhi v. The State of Bombay and ors. (2).

The nature of "a fee" again came up for consideration before this Court in The Hingir Rampur Coal Co. Ltd. and ors. v. The State of Orissa and ors.(3) Therein this Court observed that (1) [1954] S.C.R. 1046. (2) [1954] S.C.R. 1055. (3) [1961] 2 S.C.R. 537.

-although there can be no generic difference between a tax and a fee since both are compulsory exactions of money by public authorities, there is this distinction between them that whereas a tax is imposed for public purposes and requires no consideration to support it, a fee is levied essentially for services rendered and there must be an element of quid pro quo between the person who pays it and the public authority that imposes it. While a tax invariably goes into the consolidated fund, a fee is earmarked for the specified services in a fund created for the purpose. Whether a cess is one or the other would naturally depend on the facts of each case. If in the guise of a fee, the Legislature imposes a tax, it is for the Court on a scrutiny of the scheme of the levy, to determine its Teal character. The distinction is recognised by the Constitution which while empowering the appropriate Legislatures to levy taxes under the Entries in the three lists refers to their power to levy fees in respect of any such matters, except the fees taken in court, and tests have been laid down by this Court for determining the ,character of an impugned levy. In determining whether a levy is a fee the true test must be whether its primary and essential purpose is to render specific services to a specified area or class, it being of no consequence that the State may ultimately and indirectly be benefited by it. In H. H. Sudhundra Thirtha Swamiar v. Commissioner for ,Hindu Religious and Charitable Endowments, Mysore,(1) this Court was called upon to consider whether the levy impugned in that case could be justified as a fee. It upheld the levy which was an annual contribution levied under the amended Section 76(1) of the Madras Religious Endowments Act, 1951 on the ground that those contributions when collected went into a separate fund and not to the consolidated fund of the State and were earmarked for defraying the expenses for the services rendered. .Further they were not even payable to the government but payable to the Commissioner and were levied not as a tax but only as a fee. Therein this Court further observed that a fee does not cease to be of that character merely because there is an element of compulsion in it, nor is it a postulate of a fee that it must have direct relation to the actual service rendered. Absence of uniformity is not a criterion on which alone it can be said that the levy is of the nature of a tax.

In Corporation of Calcutta and anr. v. Liberty Cinema the validity of the levy made under Section 548 (2) of the Calcutta Municipal Act 1951 came up for consideration. Therein this ,Court held that the levy in question is not a "fee and return for services" as the Act does not provide for any services of a special (1) [1963] Supp. 2 S.C.R. 302. (2) [1965] 2 S.C.R. 477.

kind being rendered resulting in benefits to the person on whom it 'is imposed. Section 527 (43) permits by-laws to be framed for regulating the inspection, supervision and control, among others, of cinema houses but it is not obligatory to make such by-laws and therefore, there maybe no services to render. Even the bylaw made provides only, for inspection, and the work of inspection done by the appellant was only to see that the terms of the licence were observed by the licensee-, It was not a service to him,. and so, no question arises of correlating the, amount of levy to the costs. of any service. The levy therefore is not a fee and must be tax.

In Delhi Cloth & General Mills Co. Ltd. v. Chief Commis- sioner, Delhi and ors.,(1) the validity of a levy as a fee came up for consideration by this Court. Therein this Court speaking through Grover, J. (one of us) laid down that in each case when the question arises whether the levy is in the nature of a fee the entire scheme of the statutory provisions, the duties and obligations imposed on the inspecting staff and the nature of the work done by them will have to be examined for the purpose of determining the rendering of the services which would make the levy a fee. After examining the various provisions of the Factories Act, 1948 and the rules framed this Court came to the conclusion that a large number of provisions of the Act, particularly in the Chapters dealing with safety involve a good deal of technical knowledge and in the course of their discharge of duties and obligations the Inspectors are expected to give proper advice and guidance so that there may be due compliance with the provisions of the Act. On certain occasions the factory owners are bound to receive a good deal of benefit by being saved from the consequences. of the working of dangerous machines or employment of such processes as involve danger to human life by being warned at the proper time as to the defective nature of the machinery or of the taking of precautions which are enjoined under the Act. Similarly if a building or a machinery or plant is in such a condition that it is dangerous to human life or safety the Inspector by serving a timely notice on the manager saves the factory owner from all the consequences of proper repairs not being done in time to the building or machinery. In that case the High Court found that 60% of the amount of licence fees which were being realised was actually spent on services rendered to the factory owners. That finding was accepted by this Court and on the basis of that finding this Court upheld the validity of the levy. From the above discussion it is clear that before any levy can be upheld as a fee, it must be shown that the, levy has reasonable correlationship with the services rendered by the Government. In (1) [1970] 2 S.C.R. 348.

other words the levy must be proved to be, a quid pro quo for the services rendered. But in these matters it will be impossible to have an exact correlationship.The correlationship expected is one of a general character and not as of arithmetical exactitude.

Let us now proceed to consider whether the levy under the impugned rule can be justified as a fee on the basis of the law as enunciated by this Court.

But before doing so, it is necessary to dispose of one of the grounds on which the High Court upheld the levy. In paragraph 8 of the High Court's judgment, it is observed:

> "..... when a manufacturer wants to keep in his possession large quantity of denatured spirit for manufacturing purposes, he wants a special privilege or concession of immunity from prosecution. For that purpose he has to obtain a licence or a pass on payment of requisite fees. 'There is thus a quid pro quo element and the immunity from prosecution is in the nature of a special benefit or privilege."

The implication of this observation is somewhat astounding. These observations imply that the government can barter away its duty to prosecute an offender for consideration. The requirement to take a licence is prescribed to safeguard public interest and not as a source to gather revenue. What is made punishable is either a person's failure to take the required licence ,or the breach of the conditions of the licence; Otherwise there would be no sanction behind the rule requiring to take a licence. Generally speaking by granting a licence the State does not confer any privilege or benefit on any one. All that it does is to regulate a trade, business or profession in public interest. There may be cases where a government which is the owner of a particular property may grant permit or licence to someone to exploit that property for his benefit. Such a right may be given for consideration. It is only in those cases that a licence or a permit is a conferment of a benefit or a privilege and not in the case of grant of a licence for carrying on any ordinary trade, business or profession. If it is otherwise the State can sell the right to practice the profession of law in courts or to practice the profession of medicine or any of the other numerous professions, at exorbitant prices or may even put up those rights for auction to be given to the highest bidder. Nothing so bad can be within the contemplation of our laws. We are inclined to think that the learned Judges of the High Court have misunderstood the observations of Seligman quoted in the Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt(1) to the effect that it is a special benefit accuring to the individual which is the reason for the payment of fee.

Let us now consider whether in the present case the State is proved to have been rendering any service to the appellant in lieu of the fee levied and further whether if it does render any service whether there is reasonable correlationship between the services rendered and the fee levied. In other words whether the fee levied can be considered as a quid pro quo for the services rendered. The averments of the respondents in their counter-affidavit that are relevant on this aspect of the case are those found in paragraph 10 of the counter-affidavit. They read :

> " To denature spirit and issue it to Licensees, proper supervision and control is needed vide Board's rules 63 to 68 at page 177 to 181 of Excise Manual Volume 11. There is every risk that any person may attempt to render denatured spirit fit for human consumption which is punishable under section 49 of the Excise Act.
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> Besides the above rules of the Board certain instructions have been issued in paragraph 187 to 196 of the Excise Manual, Volume III (page 67-71) for the process of denaturing and issue of denatured spirit to the licensees. State Government have to employ supervisory staff and chemical examiner to carry out these obligations of

> Supervision and control. It may be added that Excise Department does not only supervise and control these intoxicating liquors in the interest of public policy but renders services to the petitioner by getting alcohol manufactured at the distillery by supplying raw materials like molasses and coal to these distilles at controlled cheap rates. This is the only reason of getting spirit distillery at a very cheap cost by the licensees including the petitioner. And hence levy of fee by the Excise authorities is not a duty or tax but it is clearly fee in return for services rendered as well as for proper supervision, control and regulation of an activity which the legislature desires to control."

According to the finding of the High Court the only services rendered by the Government to the appellant and to other similar licensees is that the Excise Department have to maintain an elaborate staff not only for the purposes of ensuring that denaturing (1) [1954] S.C.R. 1005.

is done properly by the manufacturer but also for the purpose of seeing that the subsequent possession of denatured spirit in the hands either of a wholesale dealer or retail seller or any other licensee or permit-holder is not misused by converting the denatured spirit into alcohol fit for human consumption and thereby evade payment of heavy duty. So far as the manufacturing process is concerned, the appellant or other similar licensees have nothing to do with it. They are only the purchasers of manufactured denatured spirit. Hence the cost of supervising the manufacturing process or any assistance rendered to the manufacturers can- not be recovered from the consumers like the appellant. Further under rule 9 of the Board' rules, the actual cost of supervision of the manufacturing process by the Excise Department is required to be home by the manufacturer. 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 whole-sale dealer, retail dealer or other manufacturers also requires close and effective supervision because of the risk of the denatured spirit being converted into potable liquor and thus evading heavy duy. 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 realised 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 correlationship 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 correlationship 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 Court Counsel for the State prayed for an opportunity to place material to show that the levy in question is not disproportionate to the value of the services rendered by the State. Ordinarily we would not have acceded to that request coming at such a late stage, particularly in view of fact that the legal position had been clarified by a long chain of decisions of this Court. There is no doubt that

the State has failed to place the necessary material before the Court to justify the levy. But the fact remains that because of the negligence of those in-charge of the defence of the State, the State may suffer considerable, financial loss, if we hold that the impugned Rule is void. Hence we are constrained to give the State a further chance to prove its case.

In the result we allow the appeal, sat aside the order of the High Court and remit the case to the High Court for disposal according to law in the light of this decision. A further opportunity be given to the State to place material before that court to show that the value of the services rendered by the State has reasonable correlationship with the fee charged. If the State adduces additional evidence, the appellant be given an opportunity to rebut the same. As the further enquiry is necessitated because of the negligence of the State, it should pay the costs of the appellant both in this Court and in the High Court and bear its own costs up to this stage.

V.P.S. Appeal allowed.