courtkutchehry.com

Company: Sol Infotech Pvt. Ltd.
Website: www.courtkutchehry.com
Printed For:
Date: 11/12/2025

(1962) 07 KL CK 0023

High Court Of Kerala

Case No: Criminal Appeal No. 93 of 1961

Executive Authority, Wadakkancherry Panchayat		APPELLANT
	Vs	
Kuriyan		RESPONDENT

Date of Decision: July 12, 1962

Acts Referred:

- Travancore-Cochin Panchayat Act, 1950 - Section 104, 80

Citation: (1962) KLJ 1223

Hon'ble Judges: P. Govinda Menon, J

Bench: Single Bench

Advocate: C.S. Ananthakrishna Iyer, for the Appellant; K.V. Surianarayana Iyer, C.J. Antony and N.N. Venkitachalam and Advocate General, for the Respondent

Final Decision: Dismissed

Judgement

P. Govinda Menon, J.

The Executive Authority of the Wadakkancherry Panchayat has filed this appeal against the order of the Second Class Magistrate of Talapilly acquitting the accused who is the managing director of the Wadakkancherry Industrials (private) Ltd. He was prosecuted for an offence u/s 104 read with Section 80 of the Travancore-Cochin Panchayat Act (Act II of 1950) for failure to take out a licence for the year 1959-60 for using machinery for an industrial purpose, namely, manufacture and sale of tiles and bricks. Admittedly no license fee had been paid as demanded and no licence has been obtained. Section 80 of the Act provides that with the previous approval of the Director, the panchayat may notify that no place within the limits of the panchayat area shall be used for any of the purposes specified in the rules made in this behalf being purposes which, in the opinion of the Government, are likely to be offensive or dangerous to human life or health or property, without a licence from the executive authority and except in accordance with the conditions specified therein. Section 56(2) empowers the Panchayat to levy

a fee for the issue of the licence. The plea of the accused is that the panchayat has no right to levy a tax and if in the guise of collecting a licence fee, a demand is made for payment of a tax, the accused is not bound to pay the amount and obtain the licence and failure to take out a licence would not be an offence. The learned Magistrate accepted the contention and acquitted the accused on the ground that what was sought to be levied was really a tax and not a licence fee and the action of the Panchayat was, therefore, ultra vires and beyond their powers.

2. The first question that arises for decision is whether an accused who is prosecuted in a criminal court for failure to take out a licence for conducting a trade which requires a licence, can put forward the plea that the amount claimed is excessive and go on conducting the trade without a licence. The learned Advocate-General and the Learned Counsel for the appellant-panchayat have argued that whoever uses a place for a prohibited trade without a licence, contravenes the provisions of the Act and it is not open to him when he is prosecuted to contend that he is not guilty because the amount claimed by the Panchayat is excessive. The Learned Counsel for the accused, on the other hand would contend that no tax shall be levied or collected except by authority of law, that what is demanded in this case is tax, that for conducting a trade no tax could be levied and that they are bound to pay only a licence fee and that the action of the Panchayat in demanding a tax is ultra vires and illegal and the accused could ignore the demand and conduct his trade and it is open to the court when such a person is prosecuted to find out whether the order of the statutory Board demanding tax for conducting a trade is made with or without jurisdiction and whether on the face of it the demand is not illegal as violating the provisions of the Constitution which guarantees freedom to practise any profession or to carry on any occupation, trade or business. The Learned Counsel would argue that the action of the executive authority in this case was a wrong exercise of the power vested in him and therefore the order demanding the tax need not be taken note of and can be considered as non est. In such a case it is contended, it is not obligatory on the party to exhaust the remedies provided in the Act before transgressing the order, which, according to them, is wrong or illegal.

3. I have been referred to a few cases which have taken the view that the criminal court cannot go into the question whether refusal of licence is proper or not

In Krishnaswami In re (A. I. R. 1925 Mad. 476), where an accused was prosecuted for having contravened Section 166(1), Local Boards Act, for having plied his motor car without a licence, after the same was refused to him and the order of refusal was communicated, it was held that the fact that the person authorised to grant or refuse the licence did not exercise his discretion reasonably in refusing to grant the licence is not one that could afford an answer to a charge.

In another case in Commissioner, Dindigul Municipality Vs. V. Rajamani Iyer, , Lakshmana Rao J. was of opinion that when the executive authority of a Municipality

declined to renew a licence it was not open to a criminal court to acquit the accused on the ground that the order of refusal was not valid and proper and what the court has to see is only whether the provisions of law have been complied with and the question that the person authorised to grant or refuse licence did not exercise his discretion reasonably in refusing to grant the licence cannot be the subject of scrutiny by the criminal court.

4. There is a large body of case laws which has taken the view that it is open to a criminal court under certain circumstances to enquire into and find out the correctness or legality of the order of the executive authority of the local body refusing to grant a licence.

As early as 1892, a similar question arose before Muthuswami Ayyar and Best JJ., in Queen Empress v. Veeramma (16 Mad. 230). In that case a land owner in a municipality, applied for a building licence. The Municipality had resolved that a portion of that land was required for widening the public road and therefore ordered the applicant not to build upon that portion of the land and granted the licence to build only on the remaining portion. He, however, ignored the order and put up the building even upon the interdicted portion of the land. The owner was prosecuted and the court held that the prosecution was unjustified because the order of the Municipal Council was illegal and consequently no offence is committed by the land owner for disobedience of the illegal order.

In the course of the judgment Best J. observed that the municipal council had no power conferred upon it of depriving an owner of the legitimate use of the land, and therefore the trial court should have considered the legality of the order passed by the municipal council and declined to convict the accused on the ground that the order is illegal and ultra vires the powers of the municipality.

Similar view had been taken in the cases in Subramania Aiyer v. Asirvadam Pillai (9 M. L. J. 337) In re Sesha Prabhu (A. I. R. 1921 Mad. 713) and in In Re: Ellammal and Others, .

5. In another case in Chairman, Municipal Council, Chidambaram v. Tirunarayana Ayyangar (A. I. R. 1928 Mad. 847) Devadoss J., had to consider an allied topic where a hotel keeper''s licence was cancelled. The entire case law on the subject was considered and it was laid down that where the act of the statutory body is ultra vires and the court is asked to convict a person for violation of such an order the court is not prevented from considering its legality, but where it is within the power of the statutory body or sanctioned by the rules, it is not open to the Magistrate or the court to go into the necessity or expediency or the reasonableness of the order.

6. Another case to which reference may be made is the case in Gopayya in re (1928 Mad. 682). There Gopayya had erected a pandal without obtaining a licence. The Board could have taken action u/s 219 of the Act which provided a penalty for omitting to take out a licence. But the Board agreed to license the pandal on

payment of the fee. The amount was not paid and he was prosecuted. Gopayya pleaded that no fee was payable as he had not erected a pandal in contravention of Section 163 of the Act. The Magistrate convicted the accused and when the matter came up to the High Court it was held :

There is no provision in the Act empowering the Local Board to fix a penalty for erecting a pandal without a licence as there is, for example, provision for levying a fine for unauthorised encroachment under S. 164 of the Act which may be recovered under S. 221. Nor can the Local Board levy fees without granting a licence.

The court found that the claim made by the Union Board did not arise under the Act.

7. In another case in Raheem Sahib In re (A. I. R. 1929 Mad. 600) the accused was prosecuted for non-payment of fees for keeping his buses in the stand provided by the Union Board. Before the Magistrate it was contended that the fee was not legally leviable. The Magistrate held that he had no jurisdiction to consider the legality of the fee, A Bench of the Madras High Court consisting of Waller and Pandalai JJ. held that he had jurisdiction. Section 184 of the Local Boards Act empowered a Board to construct or provide public landing places halting places and cart stands. The court found that the stand which the Union Board had set up was neither of these and so it was held that the amount claimed by the Board could not have been claimed under the Act at all.

8. Practically to the same effect is the decision where Mockett J. in M.S. Ayyar and Co. by C.R.V. Das and Others Vs. G. Srinivasalu Naidu, took the view that when there is no provision in the District Municipalities Act either directly or by implication enabling the Municipality to levy a licence fees for advertisements, the council which has power to make bye-laws for prohibition and regulation of advertisements in public streets and parks, cannot levy a licence fee in respect of such advertisements and that the action of the Municipal council in enacting the bye-law was ultra vires and no offence is committed.

9. These decisions were considered again in the case in S. P. Thiruvengadasami Naidu v. Municipal Health Officer, Karaikudi (A. I. R. 1949 Mad. 547) where Govinda Menon J. delivering the judgment of the Full Bench stated:

To sum up the result of the above discussion of the case law, we think that in a case where a person is prosecuted for carrying on an industry or trade for which a licence to do so has been refused, it is open to the court to find out whether the order of the statutory body was made without jurisdiction; whether on the face of it the order is illegal or whether it is unreasonable revolting or repugnant to conscience. But where the order is in the legitimate exercise of jurisdiction vested in the statutory body and passed bona fide after considering the evidence before it, even if the order is wrong on merits, the court cannot hold that it is wrong. It is not the function of the court to substitute its judgment as an appellate authority for that of the statutory body. In cases where the party pleads that no licence is necessary, it is

one of jurisdiction. But where the plea is that even though a licence is necessary it has been refused on the merits, the plea cannot be considered as one involving jurisdiction at all.

10. I am in respectful agreement with the principles enunciated in these decisions and have followed the same in the case in Anjarakandy Panchayat Board v. P. K. Narayanan Nair (1961 K. L. T. 81).

The Learned Counsel for the appellant has not been able to persuade me that the view taken in all these cases is wrong or that it requires re-consideration. I, therefore hold that in a case where a question of jurisdiction is involved, where the action of the local body is challenged as being illegal and ultra vires, as in this case, the learned Magistrate can go into the question whether what is sought to be imposed is really a tax and not a licence fee.

11. The question, therefore, arises whether what is claimed by the Panchayat in this case is really a licence fee or a tax. Courts have often dealt with the question whether a particular fee claimed is reasonable or not and whether it could be said to be a licence fee. Though the decision in the cases must depend upon the particular facts of each case certain general tests have been formulated to decide whether a fee that is claimed is a licence fee or a tax. In laying down the general principles courts have always kept in view the essential difference between a licence fee and tax, namely, that in the case of licence fee, the imposition is intended to reimburse the authority in any amount expended by it in respect of a particular business or matter which it is intended to be regulated whereas, a tax is the recognised method of raising revenue for general purposes.

12. It is useful to refer to some of the decided cases on the point. I shall begin with the ruling of the Privy Council in AIR 1931 217 (Privy Council) . That was given on an appeal from the judgment of the Rangoon High Court reported in Municipal Corporation of Rangoon v. Pazundaung Bazaar Co. Ltd. (A. I. R. 1930 Rang. 282). Under the City of Rangoon Municipal Act the Corporation had power to charge licence fees for private markets. The question was whether the licence fee imposed was unreasonable. Heald, Offg. C. J. rejected the contention of the owners of the private markets who were protesting against the levy that the only charges recoverable by way of licence fees were the cost of the papers on which the licences and receipts were printed together with the costs of printing and writing thereon and the cost of such inspection as was directly connected with the licensees themselves. It was held that the licence fee may reasonably cover the cost of all special services necessitated by the duties and liabilities imposed on the corporation in respect of the supervision and regulation of private markets. The privy Council agreed with this statement of law.

13. In the case in The Corporation of Madras Vs. Spencer and Co., Ltd., it was held that a license fee imposed by the Corporation of Madras for storing spirits was

unreasonable because the imposition was not with a view to pay for the expenses in connection with the licences but was obviously done to increase the revenue of the Corporation from liquor. The learned Judges accepted the view of the trial Judge, Beasley J. that licence fees were leviable as compensation to the corporation for the expenses incurred in the issue of licences and the general regulation of the trades and other occupations which were licensed and that there must be some relation between these expenses and the amount of fees leviable.

14. Substantially similar principles have been laid down by the Supreme Court of the United States. It is sufficient to cite one instance, namely, the decision in Ingles v. Morf ((1937) 300 U. S. 290) in which a permit fee was held to be invalid because it bore no reasonable relation to the total cost of regulation to defray which it was collected.

15. All these decisions have been considered in the decision in Varadachari v. State of Madras (A. I. R. 1952 Mad 764) where the learned Chief Justice reviewed the entire case law on the subject and has delimited the boundary line between a licence fee and a tax. The learned Chief Justice points out:

It is now well established that there is a fundamental difference between a tax and a licence fee. The issue of licences to regulate particular branches of business or specified trades or occupation and other matters is part of what in American constitutional law is called the "police power" of the State. See S. Ananthakrishnan Vs. The State of Madras, . For the grant of a licence fee may be charged to cover probable expenses, which may have to be incurred for the regulation of the particular trade or business or calling in respect of which the licence is required. The licence fee is not intended to raise revenue for the general purpose of the authority levying the fee. For such purposes the levy should be in the shape of a tax. The licence fee must be reasonable, whereas a tax need not be.

16. This decision has been followed in another decision of the Madras High Court in Subbiah Maistry v. The Corporation of Madras (A. I. R. 1953 Mad. 532).

17. The distinction between tax and fee has been considered in three decisions of the Supreme Court in 1954.

In The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt., the vires of the Madras Hindu Religious and Charitable Endowments Act, 1951 came up to be examined. Amongst the sections challenged was Section 76(1). Under this section every religious institution had to pay to the Government annual contribution not exceeding 5% of its income for the services rendered to it by the said Government; and the argument was that the contribution thus exacted was not a fee but a tax and as such outside the competence of the State Legislature.

In dealing with this argument Mukherjea J. cited the definition of tax given by Latham C. J. of the High Court of Australlia in the case of Matthews v. Chicory Marketing Board (60 C. L. R. 263 at p. 276). ''A tax'' according to the learned Chief Justice ''is a compulsory exaction of money by public authority for public purposes enforceable by law, and is not payment for services rendered''.

His Lordship then stated that this definition brings out the essential characteristics of a tax as distinguished from other forms of imposition which, in a general sense, are included within it. The second characteristic of tax, His Lordship stated, 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 and that the levy of tax is for the purpose of general revenue, which when collected forms part of the public revenue of the State and that the object of a tax is not to confer any special benefit upon any particular individual and so there is no element of quid pro quo between the tax payer and the public authority. ''Fee'' is generally defined to be a charge for a special service rendered to individuals by some Governmental agency and it 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. In this view Section 76(1) of the Act was struck down as ultra vires.

18. The same point arose in respect of the Orissa Hindu Religious Endowments Act, 1939, as amended by amending Act II of 1952 in Mahant Sri Jagannath Ramanuj Das and Another Vs. The State of Orissa and Another, . Mukerjea J. who again spoke for the court upheld the validity of Section 49 which imposed the liability to pay the specified contribution on every Mutt or temple having an annual income exceeding Rs. 250/- for services rendered by the State Government. The Scheme of the impugned act was examined and it was noticed that the collections made, under it are not merged in the general public revenue and are not appropriated in the manner laid down for appropriation of expenses for other public purposes and that separate fund was constituted for this purpose. Mukerjea J. observed :

Thus, in fees there is always an element of ''quid pro quo'' which is absent in a tax. Two elements are thus essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly. But this by itself is not enough to make an imposition a fee, if the payments demanded for rendering of such services are not set apart or specifically appropriated for that purpose, but are merged in the general revenue of the State to be spent for general public purpose.

19. The same view was taken by the Supreme Court in regard to Section 58 of the Bombay Public Trust Act 1950 which imposed a similar contribution for a similar purpose in Ratilal Panachand Gandhi Vs. The State of Bombay and Others, and their Lordships emphasised that in fees there is always an element of quid pro quo which is absent in tax and in order that the collections made by the Government can rank as fees, there must be correlation between the levy imposed and the expenses

incurred by the State for the purpose of rendering such services.

20. The principles laid down in these decisions have been followed in a Division Bench ruling of this Court in Kathayee Cotton Mills (Private) Ltd. v. Chairman, Municipal Council, Alwaye (1961 K. L. J. 1187) That was a case where four traders of the Alwaye Municipality sought to quash by writs of certiorari the amended bye-laws of the Municipality increasing the rates of licence fees in the trades, in which they were engaged. In the light of the tests laid down by the Supreme Court it was held that the licence fee collected by the Municipality was really not licence fee but tax.

21. There is another recent decision of the Supreme Court in The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others, in which the validity of the Orissa Mining Areas Development Fund Act 1952 was challenged. The earlier decisions were considered and it was stated :

It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not be, supported by any consideration of 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 authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into consolidated fund which ultimately is utilised for all public purposes, whereas a cess levied by way of fee is not intended to be, and does not become a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied. There is however, an element of compulsion in the imposition of both tax and fee. When the Legislature decides to render a specific service to any area or to any class of persons, it is not open to the said area or to the said class of persons to plead that they do not want the service and therefore they should be exampted from the payment of the cess. Though there is an element of Quid pro quo between the tax-payer and the public authority there is no option to the tax-payer in the matter of receiving the service determined by public authority. In regard to fees there is, and must always be, co-relation between the fee collected and the service intended to be rendered. Cases may arise where under the guise of levying a fee Legislature may attempt to impose a tax; and in the case of such a colourable exercise of legislative power courts would have to scrutinize the scheme of the levy very carefully and determine whether in fact there is a co-relation between the service and the levy, or whether the levy is either not co-related with service or is levied to such an excessive extent as to be a pretence of a fee and not a fee in reality. In other words, whether or not a particular cess levied by a statute amounts to a fee or tax would always be a question of fact to be

determined in the circumstances of each case.

22. Reference has been made in that case to the Privy Council case of Attrorney General for British Columbia v. Esquimalt and Nanaimo Ry. Co. (1950 A. C. 87). There the Privy Council had to deal with the validity of the Forest Protection impost levied by the relevant section of the Forest Act R. S. B. C. 1936. The lands in question were statutorily exempted from taxation and it was urged against the validity of the impost that the levy of the said impost was not a service charge but a tax and since it contravened the exemption from taxation granted to the land it was invalid. This plea was upheld by the Privy Council.

23. Another case referred to is the case in Parton v. Milk Board, Victoria ((1949)80 C. L. R. 229). In that case the validity of the levy imposed on dairymen and owners of milk depots by Section 30 of the Milk Board Act of 1933 as amended by subsequent Acts of 1936-39 was challenged, and it was held by Dixon J. that the levy of the said contribution amounted to the imposition of a duty of excise. This decision was substantially based on the ground that the statutory board "performs no particular service for the dairymen or the owner of a milk depot for which his contribution may be considered as a fee or recompense", that is to say the element of quid pro quo was absent quo ad the persons on whom the levy had been imposed. It, therefore, follows that unless the Panchayat or the Municipality renders some service, licence fees cannot be collected and the fee that is sought to be collected must bear some proportion to the services rendered. In this case P. Ws. 1 and 2 had clearly stated that no special service has been done by the Panchayat and that no amount has been set apart for the expenses in connection with such services and therefore the essential element of "quid pro quo" is absent in the levy. Therefore, the Magistrate was correct in holding that the fee that is claimed cannot be said to be a licence fee and that the Panchayat has no right to claim the amount and the accused''s failure to pay the amount and take out a licence cannot be said to be a contravention of the provisions of the Act and that the accused is not guilty. No grounds exist for interference with the order of acquittal. The appeal is dismissed.