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THE MUNICIPAL COUNCIL, MADURAI

v.

R. NARAYANAN ETC.

August 18, 1975

[A. N. RAY, C.J., K. K. MATHEW, V. R. KRISHNA IYER
B AND S. M. FAZAL ALI, JJ.]

Madras District Municipalities Act, 1920, *s.* 321(2)—*Licence fee on hoteliers—If can be treated as tax.*

The appellant increased the licence fee imposed on hoteliers respondents under s. 321(2), Madras District Municipalities Act, 1920, and they challenged the increase. The appellant justified the increase on the basis that the fee under the section is a tax and falls under "tax on land and building" in Entry 49, List
C II, VII Schedule of the Constitution. The High Court held in favour of the respondents.

Dismissing the appeal to this Court,

HELD : (1) The appellant would be competent to impose a property tax at any particular rate it chooses, the user of the land and building as a restaurant or hotel furnishing sufficient nexus for the legislature to impose a tax. [339H, 340A]

D *Ajoy Kumar* v. *Local Board* [1965] 3 S.C.R. 47, referred to.

(2) But the fee imposed under s. 321(2) in this case is not a tax. [336G]

(a) Section 321(2) authorises the collection of a *fee* in contradiction to *tax*. [335B]

(b) Section 321 is in a part of the Act different from the part dealing with taxation. While the nomenclature of the levy or the location of a section in the Act is not conclusive, they are relevant factors, for
E deciding whether the fee imposed is a tax or not. [335-CD]

Liberty Cinema Case [1965] 2 S.C.R. 477, referred to.

(c) Section 78(1A) authorises the levy of property tax. Section 78(3) contains the mandatory procedural prescriptions for imposing taxes. When the legislature has carefully provided in the sub-section for previous invitation and consideration of objections to enhancement of tax levies, resort to s. 321(2) to impose a tax as a fee would frus-
F trate the processual protection written into the law in regard to fiscal measures. [338 BCE]

(d) Schedule V with which s. 321 is directly linked sets out a number of petty occupations all of which, theoretically cannot be carried on except on land or in buildings. If the licence-fee in s. 321(2) is read as land tax the fee in relation to every item of activity set out in the Schedule would be tax on the basis of the trivial activity furnishing the legal nexus between the tax and the land. But, it
G would be straining the language to justify the imposition of a tax on the land, on the basis of such a flimsy or casual connection. [340C-E]

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 1656 to 1659 of 1973.

Appeal by special leave from the judgment and Order dated the
H 29th September, 1972 of the Madras High Court in Writ Appeals Nos. 191, 23, 24 & 190 of 1968 respectively.

S. Challaswamy and *K. Hingorani*, for the appellant.

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A. K. Sen, A. V. Rangam and *A. Subashini,* for the respondents.

The Judgment of the Court was delivered by

KRISHNA IYER, J.—The die-hard 'tax'-'fee' dilemma survives, as these appeals, by special leave, attest, long after this Court has dispelled the fiscal-legal confusion on the point in a series of rulings. The cases before us were provoked by a sudden escalation of licence 'fee' imposed on all hoteliers by the common appellant, the Madurai Municipal Council (now it is a Corporation, but that makes no difference) (Council, for short). The scale of fees which, perhaps, merely defrayed the cost of issuing the licence, was moderate to begin with and paid periodically by the respondents who run hotels within the municipal limits; but their present grievance is that the resolution of December 28, 1965, whereby a sharp spurt in the rates of fee was brought about, has been tainted with 'unconstitutionality'.

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The authority, to justify the levy *qua* fee, must render some special services to the category from whom the amount is exacted and the total sum so collected must have a reasonable correlation to the cost of such services. Where these dual basic features are absent, you cannot legally claim from the licensee under the label 'fee'.

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This Court has, as late as the *Salvation Army Case*(1) set out the tests beyond doubt. When the respondents (writ-petitioners) challenged the fee raise, the plea in defence first was that the impost was a fee strictly so called, that it was requited by adequate benefits and that the larger lay-out on the inspecting staff and allied items, both necessitated and validated the new increase. However, on later and better reflection, may be, the inspirational source for which was stated to be this Court's pronouncement in the *Liberty Cinema* Case(2), the Council rightly abandoned the *fee-cum-quid pro quo* formula and anchored itself on the right to exact the higher rate as a 'tax on land and building' under Entry 49 of List II, in the Seventh Schedule, read with s. 321(2) of the Madras District Municipalities Act, 1920 (for short, the Act). This *volte face* as it were, was not objected to by the opposite party and the writ petitions and writ appeals were disposed of on that footing. The learned Single Judge upheld the levy but the appellate Bench upset it. The appellant Council has journeyed to this Court to repair the blow on its revenue since there are 1,200 and odd hotel-keepers similarly situated in the Madurai Municipal limits, although only four have figured as respondents here. The financial dimension of the decision is, indeed, considerable.

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Shri Chellaswamy, counsel for the Council, has been refreshingly fair in his submissions and consistently with the case urged in the High Court to support the levy, has grounded his defence of the 'fee-hike' on the taxing power of the municipal body under the Act. The core of the matter, therefore, is whether the context and text of the statute and other surrounding circumstances warrant the validation of the levy as a tax in essence, be its name what it may.

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(1) [1975] 1. S. C. C. 509. (2) [1965] 2 S. C. R. 477.

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Let us formulate the problems for facility of logical handling. Agreed, as both parties now are, that this licence fee stands or falls *as a tax,* the principal question is whether the 'fee' provided for in s. 321(2) of the Act, under which it is collected, is a tax at all, having regard to the anatomy of the Act. If it can be so regarded, the next point is whether Entry 49 of List II can bring within its constitutional B compass the licence fee for running a hotel trade. Thirdly, if that is permissible, are there other incurable infirmities? These apart, some matters of subsidiary moment do arise and may be considered in the appropriate sequence.

The initial terminological hurdle in the way of the appellant is that s. 321(2) of the Act authorizes the collection of a licence *fee* in C contra-distinction to property tax in s. 78 of the Act. (cf. *Ajoy Kumar* v. *Local Board*(1). Naturally, Shri A. K. Sen, counsel for the contestants, insisted that the Act had made a deliberate dichotomy between the two types of levy, placed them subject-wise in different parts of the statute and meaningfully referred to them as 'tax' and 'fee' in ss. 78 and 321(2), respectively. Counsel for the appellant, relying on certain passages in *Liberty Cinema,* (supra) desired us to D slur over the verbal error. True, mere nomenclature cannot, without more, lead to rejection of the plea of tax, though it is a relevant factor, since, to some extent, *Liberty Cinema* (supra) has whittled down the efficacy of this circumstance. This Court there observed, at p. 483:

> "Now, on the first question, that is, whether the levy is E in return for services, it is said that it is so because s. 548 (of Calcutta Municipal Act 33 of 1951) uses the word 'fee'. But, surely, nothing turns on the words used. The word 'fee' cannot be said to have acquired a rigid technical meaning in the English language indicating only a levy in return for services. No authority for such a meaning of the word was cited. However that may be, *it is conceded by the respon-* F *dent that the Act uses the word 'fee' indiscriminately. It is admitted that some of the levies authorised are taxes though called fees.* Thus, for example, as Mitter J (in the High Court, Division Bench) pointed out, the levies authorised by ss. 218, 222 and 229 are really taxes though called fees, for no services are required to be rendered in respect of them. The Act, therefore, did not intend to use the word fee as G referring only to a levy in return for services."
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> (emphasis, ours)

We have therefore to have a view of the concerned parts of the Act with a comparative eye on the Calcutta Municipal Act which fell for decision in *Liberty Cinema* (supra). Every local authority, under the H relevant statute, has the power to tax, so as to finance the various welfare activities it is expected to fulfil. Similarly such local bodies also exercise the police powers of the State to the extent they are vested

(1) [1965] 3 S.C.R. 47.

in them by the State law for the purpose of controlling, regulating and proscribing operations of individuals which may need to be conditioned by licences and permissions or prohibited in public interest because they are noxious or dangerous. Towards these ends, licences and fees for services, if any, rendered may be prescribed. The Madras Act, like other similar statutes, embraces both types of activities in a systematized way. Thus Taxation and Finance are covered by Part III while Public Health—Safety and Convenience, comes under Part IV, Procedure and Miscellaneous, which include general provisions regarding licences and permissions, are clubbed together in Part VI. Section 78, empowering property tax levy, falls in Part III (Taxation and Finance), while s. 321, relating to licence fees, is located in Part VI. The scheme thus separates issue of licences and levy of licence fees from taxes on property and other items. *Prima facie,* in the absence of other compelling factors, to lug in a taxing provision into Part VI may, therefore, lead to obscruity and confusion.

The Calcutta Municipal Act, 1951, also has some scheme of sorts and deals with Finance in Part III, Taxation in Part IV and Public Health, Safety and Convenience in Part V. In the same Part, Chapter XXVI deals with a miscellany of matters like Inspection and Regulation of Premises, and of Factories, Trades and Places of Public Resort. Section 443 deals with licensing and control of theatres, circuses and places of public amusement. Strangely enough, s. 548(1) which relates to 'licence and written permission' also empowers *in addition to any other matter required to be specified under any other Section of this Act*—

(a) * * * *

(b) * * * *

(c) * * * *

(d) * * * *

(e) the tax or fee, if any, paid for the licence or written permission."

There is thus in s. 548 an extra power specifically conferred to levy tax or fee, which is significantly absent in the Madras Act (We are aware there is some obscurity here because cinema licensing is provided for earlier in s. 443).

It is this provision of the Calcutta Act (s. 548) which fell for construction before this Court in *Liberty Cinema* (supra). While one may discern a broad scheme in that Act, there is some wobbling in the sense that a power to tax is oddly placed in a Chapter primarily concerned with licences and permissions. The Madras Act, on the other hand, speaks with more precision and relegates licences and licence fees to a Part different from Taxation and Finance. The procedure for each is also delineated separately. For these reasons we refuse to aceede to the contention that 'fee' in s. 321 (2) is a tax.

Shri A. K. Sen has cited a catena of Madras cases, spread over several decades, where, under this very Act, fee has been interpreted as fee with a tag of special services in lieu of such payment. He has

A further pressed the drafting indifference while using the words 'fee' and 'tax' in s.548 of the Calcutta Act to repel the application of the observations in *Liberty Cinema* (earlier quoted) to the provisions of the Madras Act. In the latter, the contrast is boldly projected not only in the phraseology but in the chapter-wise dealing with the two topics. We feel the force of this submission.

B Shri Chellaswamy sought to counter the contention based on the location of s.321 in a Part which has nothing to do with taxation. In *Liberty Cinema* (supra) this Court had occasion to warn against reaching any conclusion, when there is a tax —fee conflict based on the collocation of subjects in a statute or the placement of a provision under a certain rubric as clinching. What is telling is the totality, not some isolated indicium. A short-cut is often a wrong-cut and a fuller study C of the statute to be construed cannot be avoided. Sarkar, J. (as he then was), in *Liberty Cinema* (supra), observed at p. 488:

> "It was also contended that the levy under s.548 (of the Calcutta Municipal Act) must be a fee and not a tax, for all provisions as to taxation are contained in Part IV of the Act, while this section occurred in Chapter XXXVI headed 'Pro-
> D cedure' in Part VIII whilch was without a heading. It was pointed out that Part V dealt with 'Public Health Safety and Convenience' and s. 443 which was included in Chapter XXVI contained in this Part was headed 'Inspection and Regulation of Premises, and of Factories, Trades and Places of Public Resort'. A cinema house, it is not disputed, is included in the words 'Places of public resort'. It was, therefore, contended
> E that a levy outside Part IV could not be a tax and hence must be a fee for services. This contention was sought to be supported by the argument that s.443 occurred in a Part concerning Public Health, Safety and Convenience and therefore the intention was that the levy authorised by the section would be in return for work done for securing public health, safety and convenience and was hence a fee. We are wholly unable to
> F accept this contention. Whether a particular levy is a fee or tax has to be decided only by reference to the terms of the section as we have earlier stated. Its position in the Act cannot determine its nature; an imposition which is by its terms a tax and not a fee, which in our opinion the present imposition is, cannot become a fee by reason of its having been placed in a certain part of the statute. The reference to the heading of
> G Part V can at most indicate that the provisions in it were for conferring benefit on the public at large. The cinema house owners paying the levy would not as such owners be getting that benefit. We are not concerned with the benefit, if any, received by them as members of the public for that is not special benefit meant for them. We are clear in our mind that if looking at the terms of the provision authorising the
> H levy, it appears that it is not for special services rendered to the person on whom the levy is imposed, it cannot be a fee wherever it may be placed in the statute. A consideration

of where ss.443 and 548 are placed in the Act is irrelevant for determining whether the levy imposed by them is a fee or a tax."

So we do not rest our conclusion solely on the location of s. 321 in a different Part from Taxation, while we recognise it as an indicator, among a variety of considerations of course, when drafting precision is absent, judicial caution has to be alerted.

To recapitulate, in the Madras Act, Chapter VI of Part III is devoted to Taxation and Finance. Section 78(1)(a) authorizes levy of property tax. The section sets out the other taxes a Municipal Council may levy. Section 78(3) together with a proviso, contains the procedural prescriptions for imposing taxes. Admittedly, there has been no compliance with this procedure and, if such conformance is mandatory, as it is, the case of tax set up by the appellant collapses (Vide : *Atlas Cycle Industries* v. *Haryana*[1]). Whether some minor defect or deficiency will defeat the validity of the tax is moot but since here there is a total failure to adhere or advert to the procedure in s.78, we need not consider hypothetical shortfalls and their impacts.

Counsel for the appellant resourcefully urged that when two constructions are possible, we should opt in favour of validity since law leans towards life and must sustain, not stifle it. The statute, other things being equal, must be interpreted *ut res magis valeat quam pareat*[2] : see Broom's Legal Maxims (10 ed.) p. 361, Craies on Statutes (6th ed.) p. 95 and Maxwell on Statutes (11th ed.) p. 221. In his submission it is possible to uphold the 'levy', miscalled 'fee', on the basis that it is a tax. The argument is that ignoring the placement of s. 321 (2) in Part VI and blurring the precision of the word 'fee' used, we can still look at the pith and substance of the matter and regard it as a 'tax on land and buildings' provided for in Entry 49, List II of the Seventh Schedule. He relied on *Ajoy Kumar* (supra) where also a landholder who was holding a market on his land was directed to take out a licence and pay Rs. 600/- per year as licence fee, challenged the validity of the claim on the score that the State had no power to tax markets. Repelling this contention, this Court held that the use to which the land was put furnished sufficient nexus for the Legislature to impose a tax on land. In that connection, the following observations lay down the guide-lines :

"It is well-settled that the entries in the three legislative lists have to be interpreted in their widest amplitude and therefore if a tax can reasonably be held to be a tax on land it will come within entry 49. Further it is equally well-settled that tax on land may be based on the annual value of the land and would still be a tax on land and would not be beyond the competence of the State legislature on the ground that it is a tax on income : (See *Ralla Ram v. The Province of East Punjab* : (1948 FCR 207). It follows therefore that the use to which the land is put can be taken into account in imposing a tax

(1) [1972] 1 S. C. R. 127. (2) Quoted in *Liberty Cinema* : p. 484.

A on it within the meaning of entry 49 of List II, for the annual value of land which can certainly be taken into account in imposing a tax for the purpose of this entry would necessarily depend upon the use to which the land is put." (p. 49).

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B "It will be seen from the provisions of these three sub-sections (sub-ss. (1) to (3) of s. 62 of the Assam Local Self Government Act 1953—Act 25 of 1953) that power of the board to impose the tax arises on its passing a resolution that no land within its jurisdiction shall be used as a market. Such resolution clearly affects land within the jurisdiction of the board and on the passing of such a resolution the board gets the further power to issue licences for holding of markets on C lands within its jurisdiction by a resolution and also the power to impose an annual tax thereon." (p.49)

x x x x x

". . s. 62(2) which uses the words 'impose an annual tax thereon, clearly shows that the word 'thereon' refers to any land for which a licence is issued for use as a market and not D to the word 'market'. Thus the tax in the present case being on land would clearly be within the competence of the State legislature." (p.51)

Generously following the line of thinking presented by Shri Chellaswamy, based on *Ajoy Kumar* (supra) we find difficulty in applying its ratio to s. 321 (2). There the *tax* was on land and the expression E 'thereon' underscores this idea. Once the tax is on land, the link between the tax and the land-user like running a market or hotel based on the letting value is good, but in the present case there is nothing to indicate that it is a tax at all. Secondly, the phraseology does not suggest that it is a tax on the land or the building. On the other hand, it is on the licence-fee for plying a particular trade. It is not possible to blink at this vital distinction between *Ajoy Kumar* (supra) and the present case. F Maybe that the Madurai Municipality is perfectly within its competence in imposing a property tax at any particular rate it chooses. The user of the land or building as a restaurant or hotel being the link as explained above, the fact that there is a tax on all property within the municipality does not mean that this local body cannot levy an additional tax or surcharge on the land or building if put to a particular specialised use. We see no impediment in the municipal authority taxing hotels G at a certain rate exercising its power to impose property tax provided there are no other legal impediments in the way. We are not pursuing the existence or otherwise of other impediments because that does not fall for our consideration in this case.

Shri A. K. Sen is right is his submission that unlike in the Assam Act considered in *Ajoy Kumar* (supra) in the present case we do not H even find the expression 'tax' used.

The Municipal resolution might have been saved had we been able to spell out a taxing power on property from s.321 (2) of the Act. For, there is no gainsaying the State's right to tax land and buildings

and the nexus between the tax and the power may be land use. Since running a restaurant or cinema house is clearly a use of building, a tax *thereon*, based on such user, is constitutionally impeccable. Such is not the case here.

Thus the plea that s. 321 (2) lends itself to being regarded as a tax, indifferently described as fee, breaks down for two reasons. When the Legislature has carefully provided in s.78 (3) for previous invitation and consideration of objections to enhancement of tax levies, resort to the device of tax disguised as fee, under s.321 (2), may not require any such procedural fairness and discipline and thus will frustrate the processual protection written into the law in regard to fiscal measures. Secondly, Schedule V, with which s.321 is directly linked, sets out a host of petty and lucrative ventures all of which, theoretically, cannot be carried on except on land or buildings. Can it be that some flimsy or casual connection with *terra firma* will furnish the legal nexus between the tax imposed and the land on which the work is done ? For example, washing soiled clothes is an item in Schedule V. It is straining judicial credulity to snapping point to say that such trivial user justifies a tax on the land when washing is done. Running a hotel or market or permanent circus or theatre may stand on a different footing. The commonsense of the common man is the best legal consultant in many cases and eschewal of hyper-technical and over-sophisticated legal niceties helps the vision. We cannot list out what, in law, will serve as a nexus between land and tax thereon but, in a given case like in a hotel business, land-use may easily be discerned. The snag is that in the present appeals the levy is not on land but on the licence for business and bearing in mind the identity of the legal concept, we reject the contention that the impugned resolution was an innocent tax on property. The case falls between two stools. It is not a fee *ex concessionis* it is not a tax *ex facie*. We further repel the request to read licence-fee in s. 321 (2) as land tax into every item of activity set out in Schedule V, from washing soiled clothes on a broad stone to using a central place as a posh restaurant.

The cumulative result of the multiple submissions we have been addressed is that the impugned resolution is invalid. We do not bar the door for the Municipality or the State to pursue other ways to tax hotel-keepers, acting according to law and under the power to tax in Entry 49, List II, of the Seventh Schedule, while dismissing the appeals.

The legal controversy in this case is stricken with more than marginal obscurity and indeed, has exercised our minds on the diverse aspects of law considerably. Moreover, the battle is between a local authority which is in need of financial resources to fulfil its functions and a host of hoteliers who flourish in private business. Bearing in mind the conspectus of circumstances, we regard this case as one where the proper order will be that parties do bear their own costs throughout.

V.P.S. *Appeals dismissed.*