
(2001) 07 AHC CK 0163
In the Allahabad High Court
Case No : C.M.W.P. No. 27549 of 2001

Chakresh Kumar Jain and Others

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 27-07-2001

Acts Referred:

Constitution of India, 1950 — Article 110, 19(1), 265
Uttar Pradesh Municipalities Act, 1916 — Section 294, 298, 298(1), 298(2)

Citation : AIR 2001 All 343 : (2001) 4 AWC 2676 : (2001) 3 UPLBEC 2483

Hon'ble Judges : V.M. Sahai, J;Sudhir Narain, J

Bench : Division Bench

Advocate : Siddhartha Varma and S.K. Varma, for the Appellant;

Final Decision : Dismissed

Judgement

Sudhir Narain, J.—The petitioner has sought to quash the bye-laws framed by Nagar Palika Parishad, Budaun whereby the owners of Nursing Homes, Clinics, etc- are required to obtain licence and pay fee for the same and the notices issued for realisation of fee.

2. The State Government issued a general direction on 27th April 1994 to the Nagar Palikas to frame bye-laws in respect of matters covered by Section 298 (2) of the U. P. Municipalities Act, 1916. The Nagar Palika Parishad, respondent No. 2, passed resolution on 23rd March, 1995, framing bye-laws. The resolution was affirmed in its meeting held on 11th November, 1995.

3. The bye-laws were published in the official gazette on 14th November, 1995. The bye-laws, inter alia, provided for obtaining licence and pay fee for the licence. The Nursing Homes, Private Clinics. Pathology Centres and Maternity Homes, etc. were required to pay licence fee as prescribed in the bye-laws. The validity of these bye-laws have been challenged in the present writ petition.

4. Similar bye-law framed by the Nagar Palika Parishad, Mirzapur, were challenged in this Court which provided for payment of licence fee on the Nursing

Home. Private Clinics, Pathology Centres. Maternity Homes, etc. A Division Bench of this Court upheld the bye-laws in *Doctor's Jan Kalyan Society v. State of U. P.*, 1999 ACJ 1016. The petitioners have challenged the similar bye-laws in this writ petition on various grounds.

5. The first point submitted by Sri S. K. Varma, learned counsel for the petitioners, is that the petitioners are registered Medical Practitioners under the Indian Medical Council Act, 1956 and Indian Medical Council Central Act, 1976. They have a right to practise anywhere at any place and the requirement of obtaining a licence amounts to impediment in carrying out their medical practice.

6. In *Corporation of Calcutta and Another Vs. Liberty Cinema*, , where the licence fee on the cinema houses was increased, the cinema owners challenged the levy of licence fee, inter alia on the ground that their right to carry on business was restricted and was violative of Article 19(1)(f) and (g) of the Constitution of India. The contention was repelled and it was held that the imposition of licence fee does not amount to any violation of fundamental rights to carry on business.

7. The mere fact that the Medical Practitioners are required to obtain licence and pay fee for it does not amount to any impediment in their right to practise. If they establish Nursing Homes, Private Clinics, Pathology Centres. Dental Clinics and Maternity Homes within any municipal area, such municipality can require them to pay licence fee as prescribed in the bye-laws. The bye-laws have not put any restriction in carrying on their medical practice.

8. The second submission is that the Nagar Palika Parishad has no power under the Act to levy any fee or impose tax for running a clinic or nursing home, etc. by the doctors. This question was considered in *Doctor's Jan Kalyan Society's* case (supra). The Court referred to Sections 294 and 298 of the Act which reads as under :

"294. Licence fees, etc.--The municipality may charge a fee to be fixed by bye-law for any licence, sanction or permission which it is entitled or required to grant by or under this Act.

298. Power of municipality to make bye-laws. -- (1) A municipality by special resolution may, and where required by the State Government shall, make bye-laws applicable to the whole or any part of the municipal area, consistent with this Act and with any rule, for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants of the municipal area and for the furtherance of municipal administration under this Act.

(2) In particular, and without prejudice to the generality of the power conferred by sub-section (1), the municipal area, wherever situated, may. In the exercise of the said power, make any bye-law described in list I below and the municipal area, wholly, or in part situated in a hilly tract may further make, in the exercise of the said power, any bye-law described in list II below."

"List I--I-Sanitation and Prevention of Disease.

(h) prohibiting or regulating with a view to sanitations or the prevention of disease any Act which occasions, or which is likely to occasion, a public nuisance and for the prohibition or regulation of which no provision is made under this heading."

9. In the said case, it was held that Section 294 read with Section 298 and List I-I (h), mentioned therein, confers power on the Municipal Board to make bye-laws in respect of Nursing Homes, Clinics, etc. Para 8 of the judgment reads as under:

"We have read the bye-laws. They are for providing and maintaining the safety and convenience of the inhabitants of the Nagar Palika. They can be framed u/s 298 (1) of the Act. They can also be framed under List I Section I item (h). This entry deals with prohibiting or regulating with view to sanitation or prevention of diseases. Nursing Homes, clinics etc. are places where diseases are cured. But unregulated or unchecked or uncared may spread infection. The Nagar Palika has power to frame the impugned bye-laws."

10. The third submission of the learned counsel for the petitioner is that the bye-laws are inconsistent with the provisions of the Act. We do not find there is inconsistency in the bye-laws with the provisions of the Act. Section 294 read with Section 298 of the Act confers power to make bye-laws in respect of the matters enumerated under List I referred to above.

11. The fourth submission of the learned counsel for the petitioner is that the licence fee sought to be realised under the impugned bye-laws amounts to tax inasmuch as the Nagar Patika Parishad does not render any service to the persons from whom fee is realised and unless there is an element of quid pro quo, the Board is not entitled to realise any licence fee.

12. The difference between tax and fee was considered by the Hon'ble Apex Court in its earliest decision in *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, wherein it was held that a tax is a compulsory exaction of money by the public authority for public purposes enforceable by law and it is not payment for service rendered. The Court took into consideration Articles 110(a) and 265 of the Constitution of India and relied upon the following observation of Latham C.J. of the High Court of Australia in *Matthews v. Chicory Marketing Board*, 60 CLR 263 at 276 (M):

"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".

Three essential characteristics were drawn. First, that it is imposed under statutory power without the taxpayer's consent, the second is that such imposition is made for public purposes without reference to any special benefit to be conferred on the payer of tax and the third that the tax is not to confer any special benefit upon any particular individual or in other words, there is no element of quid pro quo between the taxpayers and the public authority and the

another important feature of taxation is that it is a part of common burden and the quantum of imposition upon the taxpayer depends generally upon his capacity to pay.

In regard to fee, the Court observed as follows :

"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 to 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, vide Lutz on "Public Finance" P. 215. There 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."

13. The distinction between tax and fee was reiterated in *The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others*, ; *Jagannatri Ramanuf Das and Anr. v. State of Orissa*, AIR 1964 SC 400 and *Indian Mica Micanite Industries Vs. The State of Bihar and Others*,

14. The Apex Court in para 21 of the judgment in *Krishi Upaj Mandi Samiti and Others Vs. Orient Paper and Industries Ltd.*, culled out the distinguishing features between tax and fees.

15. There is one common feature that tax and fee both are compulsory exaction of money by public authority and the most distinguishable feature which was considered in the various decisions in respect of fee is that there should be an element of quid pro quo between the payer of fee and the services rendered to such person or class of persons. This distinguishing feature has, however, undergone sea change. This change was on the basis that some of the fees realised is regulatory. The fee was broadly classified in two categories--(i) compensatory fee, (ii) regulatory fee. In the cases of licence fee prescribed under any statute, rules or bye-laws for regulation of an activity has been held as regulatory fee and the condition of quid pro quo is not necessary.

16. In *Corporation of Calcutta and Another Vs. Liberty Cinema*, a distinction was made between fees, for services rendered and fees which are regulatory.

17. In *Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others*, , where the market fee was levied, it was emphasised that fees imposed have a direct relation to the actual service rendered by the authority to each individual who obtains benefit of service. It was observed :

Thus, the element of quid.pro quo in the strict sense is not always a sine qua non for a fee. However, cor relation ship between the levy and the services rendered or expected is one of general character and not of mathematical exactitude. All that is necessary is that there should be a "reasonable relationship" between the levy of the fee and the services rendered."

18. In *Kishan Lal Lakhmi Chand and Ors. v. State of Haryana and Ors.* JT 1993 (4) SC 426, the Court observed as under :

"the traditional view that there must be actual quid pro quo for a fee has undergone a sea change. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary purpose of regulation in public interest, if the element of revenue for general purpose of the State predominates the levy becomes a tax, in regard to fee, there is, and must always be, correlation between the fee collected and the service intended to be rendered. 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 may be of no consequence that the State may ultimately and indirectly be benefited by it. The power of any Legislature to levy a fee is conditioned by the fact that it must be "by and large" a quid pro quo for the services rendered. However, correlation ship between the levy and the services rendered/expected is one of general character and not of mathematical exactitude. All that is necessary is that there should be a "reasonable relationship" between the levy of the fee and the services rendered. There is no generic difference between a tax and a fee. Both are compulsory exactions of money by public authorities. Compulsion lies in the fact that payment is enforceable by law against a person in spite of his unwillingness or want of consent. A levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of fee that it must have direct relation to the actual service rendered by the authority to each individual nor that each should obtain the benefit of the service.

19. The distinction between regulatory and compensatory fee was again considered in *P. Kannadasan etc, etc. Vs. State of Tamil Nadu and others* [OVERRULED], where the Court observed :

"Even in the matter of fees, it is not necessary that element of quid pro quo should be established in each and every case, for it is well-settled that fees can be both regulatory and compensatory and that in the case of regulatory fees, the element of quid pro quo is totally irrelevant. (See *Corporation of Calcutta v. Liberty Cinema.*) Taxes are raised for augmenting the general revenues of the State and not for any particular purpose--much less for rendering a particular service.

20. In *State of Tripura and others Vs. Sudhir Ranjan Nath, ,* where the validity of the rule prescribing licence fee for removal of timber or firewood from within the Sate to any place outside the State was challenged on the ground that such licence fee was invalid in absence of any element of quid pro quo. The Court repelled the contention holding that it was regulatory fee and not compensatory fee and in case of regulatory fee no quid pro quo need be established.

21. These decisions were again considered at length in *Secunderabad Hyderabad Hotel Owners Association and Others Vs. Hyderabad Municipal Corporation, Hyderabad and Another*, it was held that it was not necessary to establish that the authority realising the amount as fees should prove that it is rendering specific services to the person or class of persons from whom fee is being realised. In this case, the petitioners therein challenged an increase in the licence fee for a trade licence for running Lodging House, Hotel, Restaurant, Coffee House, Tea Stall, etc. levied u/s 622 of the Hyderabad Municipal Corporation Act, 1955. The Apex Court upheld such fee with the following observation :

"It is, by now, well-settled that a licence fee may be either regulatory or compensatory. When a fee is charged for rendering specific services, a certain element of quid pro quo must be there between the service rendered and the fee charged so that the licence fee is commensurate with the cost of rendering the service although exact arithmetical equivalence is not expected. However, this is not the only kind of fee which can be charged. Licence fees can also be regulatory when the activities for which a licence is given require to be regulated or controlled. The fee which is charged for regulation for such activity would be validly classifiable as a fee and not a tax although no service is rendered. An element of quid pro quo for the levy of such fees is not required although such fees cannot be excessive."

22. The broad distinguishing features between compensatory and regulatory fee are :

(1) in compensatory fee, the element of quid pro quo is necessary while in regulatory fee it is not necessary :

(2) In compensatory fee the amount realised is to be spent for the services to be rendered for which the fee has been realised but this is not necessary in the case of regulatory fee :

(3) The regulatory fee is realised to regulate the activities of the persons who are to obtain licence under a bye-law, rules, regulations or statute. The amount realised as regulatory fee is to be spent for regulating their activities.

23. The impugned bye-laws are regulatory in nature. The bye-laws have laid down certain conditions which are to be observed by such persons who are running Nursing Homes, Maternity Homes, etc. Bye-law No. 28 provides that such Nursing Homes shall have to provide proper beds, airy rooms and making necessary facilities for electricity and water. Bye-law No. 31 provides that D.D.T., Phenyl, etc. shall be used at least once a week. Bye-law No. 35 provides that Nursing Homes, Maternity Homes shall have to place fire extinguishing apparatus. The Board is to keep the staff for inspecting the premises of the Nursing Homes, Maternity Homes, Clinics, etc., in order to ensure that the conditions are complied with. The respondent is also required to ensure cleanliness. The amount of fee is also reasonable. The annual licence fee is as follows :

Nursing Home up to 20 beds

Rs. 2,000.00

Nursing Home above to 20 beds

Rs. 50.00 per bed in Additional to Rs. 2.000

Maternity Home up to 20 beds

Rs. 4.000.00

Maternity Home above to 20 beds

Rs. 5.000.00

Private Hospital

Rs. 5.000.00

Pathology Centre

Rs. 1.000.00

X-ray Clinic

Rs. 2.000.00

Dental Clinic

Rs. 2.000.00

Private Clinic

Rs. 1.000.00

24. Learned counsel for the petitioner contended that the amount sought to be realised is a tax and unless the procedure prescribed for imposition of tax under the Municipalities Act is followed, such tax cannot be imposed. As we have held that the amount prescribed in the bye-laws is regulatory licence fee and is not tax, the procedure prescribed under the Municipalities Act for imposition of tax is not applicable.

25. In the result, we do not find any merit in the writ petition. It is accordingly dismissed.