

(1999) 09 P&H CK 0024
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 7469 of 1999

Chhatwal Potteries

APPELLANT

Vs

State of Haryana and Others

RESPONDENT

Date of Decision : 28-09-1999

Acts Referred:

Haryana Municipal Act, 1973 — Section 208, 246

Citation : (2000) 124 PLR 388 : (2000) 1 RCR(Civil) 338

Hon'ble Judges : Mehtab S. Gill, J;G.S. Singhvi, J

Bench : Division Bench

Advocate : M.L. Sarin and Jaivir Yadav, for the Appellant; Jaswant Singh, D.A.G., for Respondent Nos. 1, 2 and 4 and Ramesh Hooda, for the Respondent

Judgement

G.S. Singhvi, J.—Whether the respondents can compel the petitioner to pay Rs. 3,14,50,000/- as additional composition fee in respect of the building constructed by it is the question which arises for consideration and decision by this Court in this second round of litigation which appears to have been forced upon it by the Deputy Commissioner, Gurgaon (respondent No. 2).

2. The facts relevant to the decision of the issue raised in the writ petition are that after obtaining sanction from the competent authority, the petitioner constructed building over land comprised in Khasra No. 1750 measuring 3 Bighas 3 Biswas, i.e. about 10355 square yards situated within the municipal limits of Gurgaon. After one year of the commencement of construction, respondent No. 2 passed an order dated 10.10.1996 (Annexure P.1) suspending the resolution passed by the Municipal Council-Gurgaon (respondent No. 3) vide which the building plan of the petitioner was sanctioned. This, respondent No. 2 did in the purported exercise of his power u/s 246 of the Haryana Municipal Act, 1973 (hereinafter referred to as "the Act"). In compliance of the order passed by respondent No. 2. Executive Officer of respondent No. 3 directed the petitioner to immediately stop construction of the building. The order passed by respondent No. 2 and the direction given by respondent No. 3 were challenged by the

petitioner in C.W.P. No. 16505 of 1996 - M/s Chhatwal Potteries v. State of Haryana and Ors., During the course of hearing of that petition on 7.11.1996, the learned Advocate General, Haryana candidly stated that he is unable to defend the order passed by respondent No. 2 because no notice or opportunity of hearing was given to the petitioner before the impugned decision was taken. After taking note of his statement, the Court quashed the impugned orders with liberty to respondent No. 2 to pass fresh order after giving notice and opportunity of hearing to the petitioner. The operative portion of the Court's order dated 7.11.1996 reads as under:

"Keeping in view the statement of the learned Advocate General and the admitted fact that no action-oriented notice or opportunity of hearing was given to the petitioner before the Deputy Commissioner, Gurgaon exercising his power u/s 246 of the Haryana Municipal Act, 1973 to pass the order dated 10.10.1996, we have no hesitation to quash order dated 10.10.1996 as well as order dated 14.10.1996 issued by the Executive Officer, Municipal Council, Gurgaon. Ordered accordingly.

We however, make it clear that quashing of the orders dated 10.10.1996 and 14.10.1996 will not prevent the Deputy Commissioner from passing a fresh order after giving notice and opportunity of hearing to the petitioner. We also make it clear that in case the Deputy Commissioner decides to initiate fresh action for cancellation of the sanction accorded to the building plan of the petitioner then he should decide the matter within one month of the service of notice upon the petitioner. We further make it clear that any further construction made by the petitioner shall remain subject to the final order which may be passed by the Deputy Commissioner and/or any other competent authority or a Court of law before which the petitioner may avail the remedy.

The writ petition is decided in the manner indicated above.

Copies of this order be given dasti to both the counsel on payment of requisite charges."

3. Two months after the decision of the writ petition filed by the petitioner, respondent No. 2 issued notice dated 6.1.1997 requiring the petitioner to show cause as to why action may not be taken against it u/s 246 of the Act. In the reply dated 11.1.1997 filed on its behalf, the petitioner raised several objections to the validity of the notice but, at the same time, it requested that the violation, if any, may be compounded u/s 208 of the Act. Respondent No. 2 accepted the petitioner's request for compounding and vide order dated 5.2.1997 (Annexure P.6), he directed that maximum 15% composition fee be imposed upon it for constructing more area in Block "B" than the sanctioned plan. The relevant portion of this order is reproduced below:

"After discussion, it was found that M/s Chhatwal Potteries have covered more area than the sanctioned at site in Block B whereas less than the sanctioned area has been covered in Block A. But total covered area is not more than the

sanctioned area. Thus, after hearing the respondent M/s Chhatwal Potteries, I have come to the conclusion that maximum 15% compounding fee be imposed upon M/s Chhatwal Potteries for constructing more area in Block "B" than the sanctioned plan and internal charges as per Section 208 of the Haryana Municipal Act."

4. In furtherance of this decision, respondent No. 3 asked the petitioner to deposit Rs. 2,79,350/- as composition fee. The petitioner accepted this without any protest or reservation and deposited the amount indicated in the letter of respondent No. 3. Thereafter, revised plan submitted by it was sanctioned by respondent No. 3.

5. It appears that on the basis of some complaint received by him about the levy of less composition fee, respondent No. 2 directed the Additional Deputy Commissioner, Gurgaon (respondent No. 4) to enquire into the matter. After making some enquiry, in which the petitioner was not associated, respondent No. 4 sent reports dated 21.7.1998 and 6.8.1998 (Annexure R.1 and P. 12). In the first report, he indicated that the composition fee charged from the petitioner was wholly inadequate and loss of lacs of rupees appears to have been caused to the Municipal Council. In the second report, respondent No. 4 indicated that as per the cost of construction, composition fee amounting to Rs. 42,30,000/- was leviable on the petitioner and as per the market value, the composition fee amounting to Rs. 3,14,50,000/- should be charged. On receipt of the second report, respondent No. 2 directed respondent No. 3 to take action for recovery of the additional composition fee and in faithful compliance of the direction given by him, the Executive Officer of respondent No. 3 issued the impugned notice to the petitioner for deposit of Rs. 3,14,50,000/- as additional composition fee.

6. The petitioner has challenged the levy of additional composition fee mainly on the grounds of violation of the principles of natural justice, arbitrariness and mala fides. In the writ petition, it has been averred that respondent No. 4 did not give any notice or opportunity of hearing to the petitioner before he gave a finding adversely affecting it. It has been further averred that respondent No. 2 also did not give any notice and opportunity of hearing before he gave direction to respondent No. 3 to recover Rs. 3,14,50,000/- as additional composition fee. It has also been pleaded by the petitioner that the demand of exorbitant amount of Rs. 3,14,50,000/- should be declared to be wholly arbitrary, capricious, unreasonable, unconscionable and unjustified because there is no legal justification to levy composition fee on the basis of assumed market value of the construction.

7. In the written statement filed by respondent No. 2 on behalf of respondent Nos. 1, 2 and 4, it has been stated that on receipt of a complaint against the officers of respondent No. 3, an enquiry was got conducted through respondent No. 4 and on the basis of his reports, direction was issued to respondent No. 3 to recover the additional composition fee. Respondent No. 2 has further averred that Section 246 of the Act does not require issuance of notice in such matters,

and, therefore, the direction given for levy of additional composition fee cannot be invalidated on the ground of violation of the principles of natural justice. He has also controverted the petitioners allegation that the demand of additional composition fee is arbitrary and unconscionable.

8. In its written statement, respondent No. 3 has justified the impugned demand by stating that the impugned notice was sent to the petitioner in compliance of the direction given by respondent No. 2.

9. Shri M.L. Sarin, senior counsel appearing for the petitioner argued that the decision taken by respondent No. 2 levy additional composition fee should be declared as nullity because no notice or opportunity of hearing was given to the petitioner during the course of enquiry conducted by respondent No. 4 and before the issuance of direction by respondent No. 2 to respondent No. 3 to charge additional composition fee from the petitioner. Learned counsel submitted that a decision of this nature which resulted in imposition of heavy liability of unusual magnitude on the petitioner could not have been taken by the respondents without complying with the basis of natural justice. He further argued that no discernible criteria, yard-stick or formula was evolved by the respondents for calculating the price of construction. He read out the contents of Annexures R.1 and P. 12 (R.2) to show that respondent No. 4 determined the price of the construction made by the petitioner on pure conjectures, imagination and unfounded assumption and submitted that the reports submitted by him could not have been made basis for charging exorbitant additional composition fee from the petitioner. Shri Sarin also questioned the authority of respondent No. 2 to decide the issue relating to composition fee by arguing that this was within the exclusive domain of respondent No. 3 u/s 208 of the Act. On the other hand, Shri Jaswant Singh and Shri Ramesh Hooda, counsel for the respondents defended and justified the impugned recovery by arguing that u/s 246 of the Act, the Deputy Commissioner has supervisory control over the functioning of the Municipal Council and he, in exercise of that power, could suspend any nullify any resolution, decision of the Municipal Council. They further argued that the power exercisable by respondent No. 2 u/s 246 of the Act to suspend any resolution or order of the Municipal Council is purely administrative in nature and, therefore, he was not required to hear the petitioner before passing the impugned order. The learned Deputy Advocate General made serious endeavour to convince us that the action of respondent No. 3 to charge Rs. 2,79,350/- as composition fee was totally arbitrary and, therefore, after getting an enquiry made by a responsible officer of the district, respondent No. 2 rightly directed the imposition of additional composition fee.

10. In order to decide the crucial issue, i.e. whether respondent No. 2 is empowered to take a final decision on the issue of composition fee, it will be useful to take notice of Sections 208, 246, 247, 248 and 249 of the Act. The same read as under:

"208. Penalty for disobedience.- Should a building be begun, erected or re-

erected.

(a) without sanction as required by sub-section

(1) of Section 201; or

(b) without notice as required by sub-section

(2) of Section 201: or

(c) when sanction has been refused.

the committee may by notice delivered to the owner within six months from the completion of building, require the building to be altered or demolished as it may deem necessary within the period specified in such notice; and should it be begun or erected;

(d) in contravention of the terms of any sanction granted;

(e) when the sanction has lapsed; or

(f) in contravention of any bye-law made u/s 202; or, in the case of a building of which the erection has been deemed to be sanctioned under sub-section (5) of Section 205, if it contravenes any scheme sanctioned u/s 203;

the committee may by notice to be delivered to the owner within six months from the completion of the building, require the building to be altered in such manner as it may deem necessary, within the period specified in such notice;

Provided that the committee may, instead of requiring the alteration or demolition of any such building accept by way of composition a sum of not less than (Five per centum) (vide Haryana Act No. 12 of 1979) and more than (fifteen per centum) [vide Haryana Act No. 12 of 1979] of the value of such building to be determined in accordance with the rules;

Provided further that the committee shall require a building to be demolished or altered so far as is necessary to avoid contravention of a building scheme drawn up u/s 203;

Provided further that if any notice is issued by the Executive Officer under this Section on the ground that a building has been begun or has been erected in contravention of the terms of any sanction granted or in contravention of any bye-law made u/s 202 the person to whom the notice is issued may, within fifteen days from the date of service of such notice, appeal to the committee, and, subject to the provisions of Section 240, 246 and 252, the decision of the committee shall be final.

246. Powers to suspend any resolution or order of committee.- The Deputy Commissioner may, by order in writing, suspend the execution of any resolution or order of a committee, or joint committee or prohibit the doing of any act which is about to be done, or is being done in pursuance of or under cover of this

Act, or in pursuance of any sanction or permission granted by the committee in the exercise of its powers under this Act, if in his opinion the resolution, order or act is in excess of the powers conferred by law or contrary to the interests of the public or likely to cause waste or damage of municipal funds or property, or the execution of the resolution or order, or the doing of the act, is likely to lead to a breach of the peace, to encourage lawlessness, or it causes injury or annoyance to the public or to any class or body of persons.

247. Extraordinary powers of Deputy Commissioner in cases of emergency.- (1) In case of emergency the Deputy Commissioner may provide for the execution of any work, or the doing of any act which a committee is empowered to execute or do, and the immediate execution or doing of which is, in his opinion, necessary for the service or safety of the public and may, direct that the expense of executing the work or of doing the act shall be forthwith paid by the committee.

(2) Should the expense be not so paid, the Deputy Commissioner may make an order directing the person having the custody of the balance of the municipal funds to pay the expense, or so much thereof as may from time to time be possible, from that balance, in priority to all other charges against the same.

248. Powers to provide for performance of duties in case of default of committee.-

(1) When the Deputy Commissioner after due enquiry is satisfied that a committee has made default in performing any duty imposed upon it by this Act, or by any order or rule under this Act, he may, by an order in writing, fix a period for the performance of that duty, and should it not be performed within the period so fixed, he may appoint some person to perform it, and may direct that the expense thereof shall be paid, within such time as he may fix, by the committee.

(2) Should the expense be not so paid, the Deputy Commissioner may make an order directing the person having the custody of the balance of the municipal fund to pay the expense, or so much thereof as may from time to time be possible, from that balance in priority to all other charges against the same.

249. Action of Deputy Commissioner to be immediately reported.- When the Deputy Commissioner makes any order u/s 246 or Section 247 or Section 248 he shall forthwith forward it to the Commissioner a copy thereof, with a statement of reasons for making it with such explanation, if any, as the committee of such municipality may wish to offer and the commissioner may thereupon confirm, modify or rescind the order.

Provided that if an officer subordinate to the Deputy Commissioner under the delegated powers makes an order u/s 248 in the case of a municipality, the power of confirmation modification or rescission of such order shall vest in the Deputy Commissioner, who shall, before exercising such power, consider the explanation of the Committee of such municipality which it may wish to offer and the Deputy Commissioner may thereupon confirm, modify or rescind the order.

11. An analysis of the provisions quoted above shows that u/s 208, only the Municipal Committee is empowered impose penalty for disobedience of the provisions relating to sanction of the building plan and also in the cases of erection of the building in contravention of the sanctioned building plan and the Deputy Commissioner is not empowered to take decision in such matters. Section 246 empowers the Deputy Commissioner to suspend the execution of any resolution or order of a committee or prohibit the doing of any act which is about to be done, if he is of the opinion that the resolution, order or act is in excess of the power conferred by law or contrary to the interest of the public or it is likely to cause waste or damage of municipal funds or property. But he does not have the power to pass final order. Rather, in terms of Section 249 he is required to forward a copy of the order passed u/s 246 to the Commissioner along with a statement of reasons and the explanation, if any, given by the municipality concerned and final decision has to be taken by the Commissioner who may confirm modify or rescind the order passed u/s 246 of the Act. Therefore, Shri Sarin is right in his submission that respondent No. 2 could not have taken decision to impose additional composition fee u/s 208 of the Act. A brief recapitulation of the facts of this case clearly show that after the petitioner had paid the composition fee amounting to Rs. 2,79,350/- in compliance of the direction given by the competent authority, respondent No. 2 took cognizance of some complaint received by him about the alleged loss caused to respondent No. 3 due to the charging of less composition fee and after getting an enquiry conducted at the back of the petitioner and without giving notice and opportunity of hearing, he passed the impugned order for levy of exorbitant additional composition fee. The record of the case does not show that respondent No. 2 had passed order u/s 246 and then made a reference to the Commissioner for appropriate decision u/s 249 of the Act. Therefore, the order dated 4.9.1998 passed by respondent No. 2 is liable to be nullified on the ground that he did not have the jurisdiction or authority to take final decision in the matter.

12. We are further of the view that even if it is assumed that respondent No. 2 had the jurisdiction and the authority to pass an order in the matter relating to compounding of violation of the sanctioned building plan, the impugned decision deserves to be invalidated on the ground of violation of the principles of natural justice and also on the ground that it is wholly arbitrary, unreasonable and unconscionable. There cannot be any doubt that by paying composition fee amounting to Rs. 2,79,350/- in pursuance of the order passed by respondent No. 2 and the direction given by respondent No. 3, the petitioner acquired a valuable right which could not have been trampled, violated or infringed by the respondents without complying with the fundamental principles of natural justice that no man can be condemned unheard because the rule of hearing i.e. audi alteram partem forms an integral part of the concept of rule of law embodied in our Constitution. The minimum which the respondents were required to do before imposing unusually heavy additional composition fee on the petitioner was to give a notice and reasonable opportunity of hearing to it. Admittedly, no notice

or opportunity of hearing was given to the petitioner before passing of the order dated 4.9.1998. Therefore, the same is liable to be declared as void.

13. In *State of Orissa Vs. Dr. (Miss) Binapani Dei and Others*, ; *Sayedur Rehman Vs. The State of Bihar and Others*, ; *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, ; *S.L. Kapoor Vs. Jagmohan and Others*, ; *Swadeshi Cotton Mills Vs. Union of India (UOI)*, ; *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, and *S.N. Mukherjee Vs. Union of India*, , their Lordships of the Supreme Court have consistently held that no order prejudicially affecting the rights and interest of a person can be passed by the administrative authorities without complying with the basis basis of natural justice. The Apex Court has also held that the rule of fairness forms part of the doctrine of equality embodied in Article 14 of the Constitution of India and every State action must not only be fair but also free from arbitrariness and if the Court finds that such action is either arbitrary or unfair, then the same is liable to be voided on the ground of violation of Article 14 of the *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, and *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, .

14. We also agree with Shri Sarin that the impugned order should be declared as unconscionable and wholly unjust. A bare reading of the two reports submitted by respondent No. 4 shows that the officer concerned did not adopt any rational criteria or yardstick for the purpose of determining the cost of construction made by the petitioner. In the first report, the officer concerned simply recorded a bald conclusion that the Municipal Council has suffered loss due to charging of composition fee. In the second report, he suggested that the petitioner may be asked to pay composition fee on the basis of market value of the building. This is revealed from the following extracts of the report dated 6.8.1998 :

"As per reports taken from two different agencies the building has "A" class specifications and the cost of construction (Civil Work) is Rs. 600.00 per Sft. However, if we add other facilities like centrally air conditioning, generators and other modern gadgets the cost of construction would be Rs. 1000.00 per sft. but these facilities are irrelevant if the composite fee is to be calculated on the cost of construction of building. The additional covered area is 47000 sft. and the total value on which the composite fee is to be calculate is:

A. As per cost of construction :

(a) Area 47,000 sft. @ Rs. 600.00 per Sft. = Rs. 2,82,000.00 (b) Composite fee @ 15% of (a) = Rs. 42,30,000.00 (c) Less recovered from the party. = Rs. 2,75,000.00 Estimated loss to Govt. ----- = Rs. 39,55,000.00 Say Rs. 40.00 lacs ----- B. As per market value (the rate at which it is being sold in the market) of the building:

(a) Area 47,000.00 sft. = Rs. 21,15,000.00 (b) Composite fee @ 15% of (a) = Rs. 3,17,25,000.00 (c) Less recovered from party: = Rs. 2,75,000.00 Estimated loss to Govt. ----- = Rs. 3,14,50,000.00 ----- Say:

= Rs. 3.14 Crores. In this regard, we took the opinion of D.A. Gurgaon and in his opinion as per the Municipal Act the composition fee should be charged on the value of such building, not the cost of construction that is on correct value of asset. Therefore, the fee should be charged on its market value the current value of the assets"

15. A bare reading of the report makes it clear that respondent No. 4 did not give any reason for fixing the market value of the construction at the rate of Rs. 4500/- per square feet. On his part, respondent No. 2 did nothing more than to put the seal of his authority without the least application of mind.

16. We are rather amazed with the casual manner in which respondents No. 2 and 4 decided to burden the petitioner with the extra-ordinary liability of paying additional composition fee amounting to Rs. 3,14,50,000/-. Even before this court, the respondents have not placed any material to justify the determination of the price of the construction made by the petitioner at the rate of Rs. 4500/- per square feet. Thus, there is no escape from the conclusion that the impugned decision is arbitrary as well as unconsciousable.

17. Before concluding, we may mention that although the petitioner has prayed for quashing of Annexures P.6 and P.7, but during the course of hearing learned counsel did not advance any argument on this issue and, therefore, we have not considered it necessary to decide the same. 18. For the reasons mentioned above, the writ petition is allowed. Annexures P.8. P. 11 and P. 16 are quashed. However, it is made clear that the competent authority shall be free to take fresh decision in the matter after giving reasonable opportunity of hearing to the petitioner.