
(1999) 11 AHC CK 0060
In the Allahabad High Court
Case No : C.M.W.P. No. 13554 of 1989

Maya and Co., Etah and another

APPELLANT

Vs

Commissioner, Agra Division, Agra and others

RESPONDENT

Date of Decision : 11-11-1999

Acts Referred:

Constitution of India, 1950 — Article 19(1)

Uttar Pradesh Municipalities Act, 1916 — Section 131, 135, 196, 294, 298

Citation : (2000) 2 AWC 999 : (2000) 1 UPLBEC 141

Hon'ble Judges : Lakshmi Bihari, J; Binod Kumar Roy, J

Bench : Division Bench

Advocate : N.S. Chaudhary, for the Appellant; Shashi Nandan, S.C., for the Respondent

Judgement

Binod Kumar Roy and Lakshmi Bihari, JJ.—By filing this writ petition on 3rd July, 1989, the petitioners, who are organised contractors taking contracts of various bodies including the Nagar Palika. Etah, for performing works entrusted to them in regard to construction of buildings, roads, drainage, etc. including repairs thereof have come up with following prayers (i) to quash the bye-laws of Etah Municipality framed u/s 298(2) List I J-Miscellaneous (d) of the Provincial Municipalities Act, 1916. (hereinafter referred to as the Act) published on 3rd September, 1988 (as contained in Annexure-1) and (ii) to command Etah Municipality (Respondent No. 2) to refund the amount taken or deducted from their Bills prepared under bye-law 10 of the impugned bye-laws.

2. On 4th July, 1989, the following interim order was passed by the Division Bench :

"Till further orders of Court opposite parties are directed not to refuse to entertain tender of petitioner only because they have not got themselves registered in accordance with the bye-laws, copy of which has been filed as Annexure-1 to writ petition."

The Facts Pleaded :

3. The petitioners have come with following pleadings-

Tenders were invited by the authority for performance of specified works within scheduled period. After scrutinising the tenders the authority accepts them in accordance with the quality of work performed by a particular contractor generally accepting the lowest one. On acceptance of the tender the contractor is entrusted the work. Presently the person filing the tender is required to purchase National Saving Certificate to the extent of 2% of the amount tendered for the purpose of earnest money and after acceptance of his tender submit N.S.C. worth further 3%. Thereby the total money which is taken as earnest money costs 5%. These certificates are, however, returned after six months, if the authority is satisfied with the work of the contractor. A list of the approved contractors is maintained by various authorities including the Etah Municipality. Black listed contractors by any department are not permitted to submit their tenders. The Etah Municipality framed bye-laws (which is being impugned) for regulating and controlling the contractors purported to have been framed u/s 298 (2) J (a) of the Act.

The impugned bye-laws provides as follows :

(i) For taking work of the Municipality no person will be eligible to put tenders unless he/it is registered as a contractor in the categories provided in Rule 6 (ii) vide Rule 10 the licence fee in the said categories will be as mentioned in the bye-laws (iii) under Rule 10 it has been provided that in the first week of April, it will be obligatory for the registered contractor to seek renewal of his registration on payment of requisite amount and for default thereto his registration will be deemed to have been cancelled and in the event of its renewal he shall have to deposit again the said amount as contemplated under Rule 10, which will be deemed to be either licenced money or tax and (iv) Rule 12 provides that the contractor will have to deposit earnest money in shape of National Saving Certificate apart from the licenced money of tax money. The Act nowhere provides for imposition of such tax or fee. It is not clear under what provision of law such taxes or levy in the nature of licence fee has been imposed. Section 293 (1) of the Act provides levy of licence fee on using immovable property vested in or entrusted to the Management of the Municipality. The contractors are neither occupying any property of the Municipality, nor are they using the property of the Municipality for any purpose. Section 294 empowers the power to charge fee to be fixed by the bye-laws for any licence, sanction or permission which it is entitled or required to be granted by or under the Act. The Act nowhere provided for grant of any licence, sanction or permission to the contractors, who are engaged in their activity of filing tenders whenever invited by a particular authority or by the Municipality for a particular work. Since the fee or tax imposed under the impugned bye-laws clearly imposes a restriction on the right of a person to carry on any occupation, trade or business thus it is an unreasonable restriction on their rights guaranteed under Article 19(1)(g) of the

Constitution. This licence fee or tax cannot be Justified on the basis of any valid law which the Etah Municipality has powers to frame under the Act and thus ultra vires. These two bye-laws are being challenged specifically on these two grounds :

(i) if it is a tax, in that event the procedure provided under the Act have not been followed. The Municipal authorities have not been empowered to impose such a tax on the persons who are engaged in the activities of taking contracts under the tenders invited by the Etah Municipality ; (ii) if it is a licence fee, then it has no sanction or authority under the Act as the Municipal Boards are not rendering any service to them thereby hit by the doctrine of quid-pro-quo. The impugned bye-laws do not mention that they were previously also published and objections were invited from the aggrieved persons about which they learnt in January, 1989. The petitioners apprised the authorities about the aforementioned aspect. The authorities realised that the bye-laws, apart from being illegal, have imposed an amount in the shape of licence fee or tax, which is unreasonable, and hence they passed a resolution in its meeting dated 16th January, 1989 resolving that the registration amount mentioned in Rule 10 be reduced to the amount of Rs. 500. Rs. 300 and Rs. 200 in regard to Class Ka-Kha and G a contractors respectively (copy of which appended as Annexure-2). The Executive Engineer of the Municipality, Etah, persuaded the petitioner to deposit the amount with an undertaking that it will be refunded. In the case of the petitioner No. 1 the amount was deducted from its Bill on 7th March, 1989 for a work which was undertaken by it and for which the Bill was to be paid (A copy of the receipt issued to the petitioner No. 1 has been filed as Annexure-3). Similarly, petitioner No. 2 was also called upon to deposit the amount in case it wants to participate in the tenders. The petitioners were waiting for refund of their said amount as assured by the appropriate authorities but instead of refunding they have been called upon to deposit the same amount under Rule 10 as they have failed to seek renewal of their registration in the first week of April, 1989. As they have been refused to fill in tenders and hence this writ petition.

4. In the counter-affidavit filed on behalf of respondent Nos. 2 and 3 in substance the following facts have been stated while denying the allegations : The petitioners have ceased to be recognised registered contractors by the Nagar Palika, Etah. who has admittedly framed bye-laws relating to the registration under the Act. The Board has been empowered to impose reasonable restrictions and regulate the grant of contract ; it is incorrect to allege the bye-laws ultra vires the Constitution of India, as per bye-laws a licensee is entitled to renewal of licence only if renewal fee is deposited within one week after expiry of his licence period and in case he fails to do so, he has to obtain a fresh licence after depositing fee fixed by the bye-laws ; the licence fee, which is being realised from the contractors is not in the nature of tax, it is actually in nature of fee realisable from the person who carries on the contract work for the purpose of regulating contract granted by the Board within the Nagar Palika and the notification issued u/s 298 (2) List IJ (d) of the Act is perfectly, in accordance

with its provisions ; proper publication, as contemplated by the Act, was made, objections were invited by publication in the newspaper Awaz dated 12.11.1986, pursuant thereto certain objections including one as contained in Annexure-1 were also filed, which were disposed of in accordance with law and thereafter the duly sanctioned bye-laws were published in official Gazette, as contemplated under the Act ; the claim of the petitioners that they came to know of the bye-laws for the first time in January. 1989 is false inasmuch as on 27.10.1988, necessary notices were issued to them by the Executive Officer (copies appended as Annexure-II and III to the counter-affidavit), which were also duly served on them on that very day, directing them to obtain their registration in accordance with the bye-laws : the petitioners had also submitted their applications on 1.12.1988 before the Executive Officer (copy appended as Annexure-IV to the counter-affidavit) agreeing to obtain necessary registration requesting that an amount of Rs. 2,000 towards fee be deducted from their Bills, which was also duly deducted, their request for return of the amount of fee was rejected by the Commissioner vide his order dated 14.6.1989 (copy appended as Annexure-5 to the counter-affidavit) and communicated by letter dated 28.6.1989 by the office of the District Magistrate, the petitioners are not entitled to refund of the amount of Rs. 2,000 as there is no such provision under the bye-laws : no illegality has been committed in refusing to grant licence to them, as admittedly application was filed after 7th April, 1989, which was the prescribed period for filing applications for obtaining renewal.

5. In their rejoinder-affidavit to the counter-affidavit, the petitioners stated, inter alia, that it has not been disclosed under what provisions of law powers have been conferred for framing bye-laws ; it is being admitted that the amount from the contractors are being realised as Fee but it is for the respondents to satisfy as to what service they are rendering to the contractors and thus the doctrine of quid pro quo is attracted ; the newspaper is merely a registered newspaper and is not published dally and has no circulation in the Etah city ; Annexure-A filed to the counter-affidavit is not a genuine document but has been manufactured only to meet the case set up in paragraph 13 of the writ petition ; it has not been disclosed as to which authority has decided the alleged objections and what orders were passed thereon which have also not been annexed ; the petitioners have challenged the bye-laws immediately after learning of them, which compelled the respondents to pass resolution, as contained in Annexure-2, amending bye-laws, which on face of it shows that the bye-laws have no sanctity in the eyes of law and the Board having realised that the bye-laws were illegally passed resulting in reducing the amount : since the petitioners are not liable to pay fee and thus the question of renewal of their licence or grant of fresh licence do not arise at all, who have been carrying on these work and have also not been stopped by the authorities ; proper stay order was passed by this Court protecting the rights of the petitioners which deserves to be confirmed.

The submissions :

6. Sri N. S. Chaudhary, learned counsel for the petitioners, contended as follows :

(i) The notification publishing the bye-laws bearing No. 868/23-2 (5) 86-87-Nagar Palika, Etah. In the U. P. Gazette dated 3rd September, 1988, shows that impugned bye-laws, were prepared u/s 298 (2) List IJ (d) of the Act, whereas the aforementioned provisions do not confer any authority in the Municipal Board, Etah to frame/enact them.

(ii) As no facility has been provided to the Contractors like the petitioners and thus, the doctrine quid pro quo has been breached.

His argument stand fully supported by a three Judges Division Bench pronouncement of the Supreme Court in Nagar Mahapalika Varanasi Vs. Durga Das Bhattacharya and Others,

(iii) It being unreasonable ultra vires Article 19(1)(g) of the Constitution.

(iv) The defence taken by respondent Nos. 2 and 3 that the bye-laws were made under its general power u/s 298 (1) of the Act is an after thought, besides inconsistent with the provisions of the Act and has nothing to do for the purpose of framing or maintaining health, safety and convenience of the inhabitants of the Municipality or in furtherance of the Municipal administration under the Act.

Accordingly, the reliefs prayed for by the petitioners be granted.

7. Sarvsn Jai Kishan Tiwari and Shashi Nandan, learned counsel appearing on behalf of respondent Nos. 2 and 3, on the other hand contended as follows :

(i) A bare perusal of Section 298 (2) List IJ-Miscellaneous (d) of the Act would show the authority of Municipal Board to frame the bye laws in question in imposing fee, which is not tax, inasmuch as the work "undertaking" mentioned in sub-clause (d) as per the pronouncement of the Supreme Court, through its three Judges Division Bench, in Secretary, Secretary, Madras Gymkhana Club Employees" Union Vs. Management of the Gymkhana Club, must be defined as "any business, or work or project which one engages in or attempts as an enterprise analogous to business or trade."

(ii) Even assuming without conceding that the Municipal Board, Etah, lacked authority to make bye-laws u/s 298 (2) of the Act its power being traceable to Section 298 (1) mentioning of Section 298 (2) of the Act in the notification will not give a handle to the petitioners to challenge the very authority of the Municipal Board. Etah to frame them. A bare perusal of Section 298 (1) of the Act would show that in its generality the Municipal Board under its general powers could have framed the bye laws. Through a five Judges Bench the Supreme Court in Afzal Ullah Vs. The State of Uttar Pradesh, , laid down that even if the said clauses do not justify the making of the bye laws, there can be little doubt that the said bye-laws would be justified by the general power conferred on the Board by Section 298 (1) as it is now well-settled that specific provisions such as are contained in the several clauses of Section 298 (2) are

merely illustrative and they cannot be read as restrictive of the generality of powers prescribed by Section 298 [1]. The recent Division Bench decision of this Court in Mohammad Usuf Khan v. State of V. P. 1999 ACJ 1268 which had followed the judgment of the Supreme Court in Vam Organic Chemicals Ltd. and Another Vs. State of U.P. and Others, and P. Kannadasan etc, etc. Vs. State of Tamil Nadu and others [OVERRULED], , which wholly supports his contention.

(iii) The word "licence fee" has been explained by the Supreme Court through its Five Judges Bench decision in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, that "the licence fee which the State Government charges to the licence through auction or the fixed fee existence of quid pro quo is not necessary to the service rendered to the licensee ; by the licence fee or fixed fee is meant the price or consideration which the Government charges to the licence for parting with its privileges amounting them to the licensee, it is in the nature of the price or privilege which the purchaser has to pay in any trade, business and transactions. Accordingly, as held by Supreme Court in the Corporation of Calcutta and Another Vs. Liberty Cinema, , the provisions of imposition of licence fee does not unnecessarily lead to the conclusion that the fee must be only for the services rendered.

In the instant case through bye-laws regulatory fee has been imposed for regulating the contracts for the contractors, who may take part in the auction to be held for allotment of work of construction of houses, etc.

(iv) As the petitioners have not prayed for grant of a writ of certiorari quashing the order dated 14.6.1989 rejecting their prayer for reduction of the fee they are not entitled to grant of relief No. 2 prayed for by them.

(v) Since the petitioners have not come with a prayer to quash the order passed by the Commissioner and have made false statements in paragraph 14 of their writ petition, as pointed out in paragraph 13 of the counter-affidavit to which they have not filed any reply in their rejoinder-affidavit, in view of two pronouncements of the Supreme Court in Dhananjay Sharma Vs. State of Haryana and Others, and Panchugopal Barua and others Vs. Umesh Chandra Goswami and others, . (paragraph 60), and accordingly they are not entitled to any relief and the writ petition be dismissed with costs.

8. Mr. Chaudhary, in reply to the submissions made on behalf of respondent Nos. 2 and 3 contended as follows :

(i) The word "undertaking" as strenuously urged by Sri Tiwari, the learned counsel, has to be read along with other provisions and not in isolation by invoking the doctrine of "ejusdem generis".

(ii) The arguments made on behalf of the respondents are not sound thus be rejected.

Our Findings :

9. We first take up the last submission made by Mr. Tiwari.

9.1. According to the averments made in paragraph 13 of the counter-affidavit, the assertions of the petitioners that they learnt of the bye-laws for the first time in January, 1989 is false inasmuch as necessary notices were issued to them by the Executive Officer on 27.10.1988 which they had received on that very day. Respondent Nos. 2 and 3 to support their stand have also brought on the record the notices as Annexures-II and III to their counter-affidavit. They have also further pointed out that pursuant to the aforementioned notices, the petitioners submitted their applications before the Executive Officer on 1.12.88 agreeing to obtain their registration stating that the amount of Rs. 2,000 towards fee be deducted from their Bills, which was also realised. The petitioners had also made a prayer for reducing the quantum of fee which, however, was rejected by the Commissioner vide his order dated 14.6.1989 and communicated by the office of the District Magistrate vide letter dated 28.6.89.

9.2. The aforementioned statements have been answered by the petitioners in paragraph 13 of their rejoinder-affidavit, which reads thus :

"13. That paragraph 13 of the counter-affidavit as stated is denied. The petitioner learnt about the said bye-laws and immediately challenged the bye-laws. This compelled the opposite parties to pass a resolution which is annexed as Annexure-2 to the writ petition amending the bye-laws. This on the face of it shows that these bye-laws have no sanctity in the eyes of law and the Board having realised that the bye-laws are illegally passed resolution reducing the amount. Other illegalities have also been demonstrated in paragraphs 14 and 15 of the writ petition and the said illegalities are still continuing."

9.3. There is presumption of correctness of the official acts. The Commissioner has already rejected their objections. Their denial appears to be merely an eye-wash and not effective ones inasmuch as no clear cut answer has been given to the positive statements made in the counter-affidavit which stood supported by the production of relevant materials. We do not feel satisfied to place reliance on their self-serving statements. Annexure-4 to the counter-affidavit filed by petitioner No. 1 shows that it was prepared for registration under A category though on the condition that the registration amount be realised through its first Bill and that it is prepared to deposit the amount of Rs. 2,000 just now and thus orders for registration be passed. This writ petition was filed on 3rd July, 1989 after passing of the order dated 14.6.1989 by the Commissioner, Agra Division, which was communicated to the petitioners vide letter dated 18.6.1989. Thus, we hold that the petitioners were aware of the bye-laws as asserted by the respondents.

In Panchu Gopal Barua (supra), it was emphasised by the Supreme Court that a party must come to the Court with clean hands.

10. The petitioners have also not come with a prayer to quash the order dated 14.6.1989 passed by the Commissioner by grant of a writ of certiorari.

10.1. However, we also proceed to consider the case on merits.

11. Section 298 of the Act reads thus :

"298. Power of Board to make bye-laws.--(1) A board by special resolution may, and where required by the State Government shall make by-laws applicable to the whole or any part of the municipality, 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 municipality 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 board of a municipality, wherever situated, may in the exercise of the said power, make any bye-law described in List 1 below and the board of municipality, wholly, or in part, situated in a hilly tract may further make, in the exercise of the said power, and bye-law described in List II below."

11,1. List I attached with subsection (2) (relevant part only) reads thus :

"BYE-LAWS FOR ANY MUNICIPALITY

.....

J-Miscellaneous

(d) fixing any charges or fees, or any scale of charges or fees to be paid for house scavenging or the cleansing of latrines and privies u/s 196 (c) or for any other municipal service or undertaking or to be paid u/s 293 ID or Section 294 of the Act, and prescribing the times at which such charges or fees shall be payable, and designating the persons authorised to receive payment thereof."

11.2. A bare perusal of the aforementioned sub-clause (d) shows that the Municipal Board can fix any charge, or fee for any other Municipal service undertaking, various topics mentioned therein are merely illustrative as laid down by the Supreme Court in Afzal Ullah's case (supra) arising out of the Act itself. In this very case, the validity of certain bye-law was raised the preamble of which also referred to clauses (a), (b). (c) and J (d) of Section 298A of the Act. A contention made on similar lines, as made by Sri Chaudhary, was rejected holding as follows :

"(13) Even if the said clauses did not Justify the impugned bye-law, there can be little doubt that the said bye-laws would be justified by the general power conferred on the Board by Section 298 (1). It is now well-settled that the specific provisions such as are contained in the several clauses of Section 298 (2) are merely illustrative and they cannot be read as restrictive of the generality of powers prescribed by Section 298 (1) vide AIR 1945 156 (Privy Council) , if the powers specified by Section 298 (1) are very wide and they take in within their scope bye-laws like the ones with which we are concerned in the present appeal. It cannot be said that the powers enumerated u/s 298 (2) control the general words used by Section 298 (1). These latter clauses merely illustrate and do not

exhaust all the powers conferred on the Board, so that any cases not falling within the powers specified by Section 298 (1) provided, of course, the impugned bye-laws can be justified by reference to the requirements of Section 298 (1). There can be no doubt that the impugned bye-laws in regard to the markets framed by respondent No. 2 are for the furtherance of municipal administration under the Act and so, would attract the provisions of Section 298 (1). Therefore, we are satisfied that the High Court was right in coming to the conclusion that the impugned bye-laws are valid."

"(14) It is true that the preamble to the bye-laws refers to clauses (a), (b) and (c) and J (d) of Section 298 and these clauses undoubtedly are inapplicable ; but once it is shown that the impugned bye-laws are within the competence of respondent No. 2, the fact that the preamble to the bye-laws mentions clauses which are not relevant, would not affect the validity of the bye-laws. The validity of the bye-laws must be tested by reference to the question as to whether the Board had the power to make those bye-laws. If the power is otherwise established the fact that the source of the power has been incorrectly or inaccurately indicated in the preamble to the bye-laws would not make the bye-laws invalid."

11.3. The word "undertaking" as mentioned in sub-clause (d) has to be given the same meaning as given in the Secretary, Madras Gymkhana Club Union (supra) wherein it was held as follows :

"The word "undertaking" must be defined as any business or any work or project which one engages in or attempts as an enterprise analogous to business or trade."

11.4. Apparently the Municipal Board wanted to proceed with the constructions of the Building, etc. and for which the tenders were required to be invited. Thus, in order to regulate the same, their action was regulatory in nature as laid down by the Apex Court in Vam Organic Chemicals Limited (supra). As laid down by the Apex Court in the case of Corporation of Calcutta (supra), "the fee for licence for the service rendered as contemplated it amounts to levy fee for the service to be rendered as suitable of Article 102 and Article 119(2) of the Constitution. We both express our view indicating thereby that they are not the same ; it would, therefore, appear that the provisions of imposition of licence fee does not necessarily lead to the conclusion that the fee must be for the service rendered." In P. Kanna Dasan (supra), it was held by the Apex Court that "Even in the matter of fees. It is not necessary that element of quid pro quo case, for it is well settled that fee can be both regulatory and compensatory and in the case of regulatory fee, the element of quid pro quo is totally irrelevant." These judgments of the Apex Court have been relied upon in the Division Bench of this Court in Mohammad Yusuf Khan (supra) while upholding the validity of the bye-laws framed in regard to parking fee made by the Town Area Committee, Kamalgang, Farrukhabad, we do not find sufficient reasons to differ from the view taken by the Division Bench.

11.5. True it is that in Nagar Mahapalika, Varanasi case, strongly relied upon by Sri Chaudhary, the three Judges Division Bench of the Supreme Court had nullified the bye- laws framed by the Municipal Board, Varanasi u/s 298, List I-H- C and D of the Act, when it imposed fee for every licence granted to the proprietor of cycle, rickshaw itself and for hand driven rickshaw for the reasons mentioned therein, namely, that it was not permissible for the Municipal Board to impose tax under the guise of licence fee without following the mandatory procedure for imposition of tax prescribed by Sections 131 to 135 of the Act and that the theory of quid pro quo was not sufficiently established and thereby ultra vires and illegal, but having regard to the submissions made on behalf of respondent Nos. 2 and 3, which are supported by various pronouncements of the Supreme Court, including one in Afzal Ullah, which is earlier and of Five Judges Bench which was also not noticed in Nagar MahapaliKa. Varanasi which is by only three Judges.

11.6. The reduction of the fee amount by the Board itself as stated by the petitioner will give no handle to them to establish that it was in excess of jurisdiction rather strengthens the stand of the respondents.

12. The submissions made by Mr. Chaudhary that the bye-laws are unreasonable and violative of Article 19(1)(g) of the Constitution of India is also not accepted.

13. The submissions made on behalf of the respondent Nos. 2 and 3 being correct are thus accepted.

14. Accordingly, we hold that the bye-laws in question are not ultra vires the powers of the Municipal Board or of Article 19(1)(g) of the Constitution in regard to its framing.

The Result:

15. For the reasons aforementioned we dismiss this writ petition, but having regard to the peculiar facts and circumstances make no order as to cost.