

(2011) 02 OHC CK 0033

In the Orissa High Court

Case No : Writ Petition (C) No. 13176 of 2010

Rourkela Development Authority, Shop Owners Association
and Others

APPELLANT

Vs

Rourkela Development Authority

RESPONDENT

Date of Decision : 17-02-2011

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 19(1), 21, 39

Finance Act, 1994 — Section 68

Orissa Development Authorities Rules, 1983 — Rule 54

Public Premises (Eviction of Unauthorised Occupants) Act, 1971 — Section 2

Citation : (2011) 02 OHC CK 0033

Hon'ble Judges : V. Gopala Gowda, C.J;B.N. Mahapatra, J

Bench : Division Bench

Judgement

V. Gopala Gowda, C.J.—These writ petitions are filed by the individuals of different market complexes as well as different members of shop owners Associations under Rourkela Development Authority in the district of Sundargarh seeking for a writ of Certiorari to quash the impugned enhancement of license fees under Annexures-4 and 4/1 so also sought for waiver of penalty and service tax.

2. The brief facts of these cases are stated hereunder to appreciate the rival legal contentions to answer the issues that would arise in these cases. Rourkela Development Authority (for short, "RDA") as well as Rourkela Municipality being State within the meaning of Article 12 of the Constitution of India, they have developed a number of market complexes at various localities of Rourkela town in the district of Sundargarh with the aim and objectives to achieve all round development of individuals and the locality as well. The shop rooms at different market complexes were having been leased out and the Petitioners herein being unemployed small shopkeepers are carrying on their petty business by running provisional stores of different dimensions since long on payment of usual license fee.

3. The RDA and the Rourkela Municipality being creatures of the Statute are governed by the Orissa Development Authorities Act, 1982 and Rules, 1983, Municipal Act, 1950 respectively and the Orissa Public Premises (Eviction of Unauthorised Occupants) Act, 1971 is also attracted to these cases.

4. This is the 2nd round of litigation; the first one being W.P.(C). No. 3953 of 2002 was disposed of on 18.07.2002 by this Court with the observation that the Development authority is bound to collect license fees at the rate prevailing in the market accompanied with reference to the Doctrine of the Public Trust and Rule-54 of the Rules, 1983. The license fee was originally fixed at Rs. 1.85 per sft. exclusive of service tax payable u/s 68 of the Finance Act, 1994, and subsequently the same was enhanced to Rs. 2.50 per sft. with effect from 01.01.2002 for which the first writ petition was preferred. Now, in the present writ petition Petitioners challenge the enhancement of licence fee from Rs. 2.50/- to Rs. 5/- per sft. in respect of R.C.C. roof shop and Rs. 4.50/- in respect of asbestos roof shop, which according to them is arbitrary and unreasonable being not in consonance with Rule-54 of Rules, 1983; and the said act of the RDA violates the mandate of Article 14 of the Constitution.

5. Learned Counsel for the Petitioners submitted that the Petitioners and their family members having no other alternative means of livelihood are earning their bread and butter out of the petty business. Therefore, revision of license fee at the rate of 130% is at the much higher side which would definitely throw them out of their business so also their livelihood and ultimately they would be deprived of fundamental rights guaranteed under Article 19(1)(g) and Article 21 of the Constitution.

Challenge is also made to the enhanced license fee for one more reason that for the reasons best known to the RDA, Municipality license fees in respect of shop rooms of different markets varying from Rs. 1.25/- to Rs. 2.50/- has been fixed in different locality. In this regard, reliance was placed on Annexure-6, the order dated 12.11.2007 passed by the Rourkela Municipality fixing license fee on a varying rate. It is stated that the premises owned by the RDA/Rourkela Municipality being public in nature therefore revision of license fee in exercise of power under Rule 54 of Rules, 1983 more than what was fixed by the Municipality in question is violative of Public Trust. It is not only discriminatory but also arbitrary exercise of power by the Development Authority.

6. At the time of argument, it is suggested by the Petitioners' counsel that the rate of license fee can be fixed at par with the license fee fixed by the Municipality taking into consideration the period of occupation vis-a-vis prevailing market value for the current year. In this way, the rate of license fee would only come to Rs. 4/- and Rs. 3.50 per sft. in respect of R.C.C. and asbestos roof shop respectively.

7. Mr. Mohapatra, learned Counsel for the RDA invited our attention to the counter affidavit filed by its Secretary and reliance is placed on paragraphs 7 and

12 of the said counter affidavit relevant portion of which reads thus:

7. Though Petitioner No. 2, in his individual capacity is a licensee under RDA, he has neither executed/renewed any license agreement nor paid the license fees regularly, as alleged. Petitioner No. 2 is a chronic defaulter. A shop room was allotted in his favour on 08.09.2000 with license fee " Rs. 3./- per sft... He, however defaulted in payment of security deposit in full in the year 2000 and paid the balance amount of Rs. 7000/- only in 2010. He defaulted in executing any license agreement from 2000 till date. He defaulted in paying monthly license fees from 01.01.2008 till 30.06.2010 for which his allotment of his shop room was cancelled. Only on payment of arrear outstanding and up to date license fee (in enhanced rate) with penalty and service tax and defaulted security deposit on his own volition and request for revocation of cancellation in represented dated 31.07.10...,his cancellation was revoked. As such, Petitioner No. 2 is estopped from challenging the rate of license fees, the penalty on default and service tax in this writ petition.

12. ...(a) Rourkela Municipality is receiving Govt. aid in different shape and nature, where as RDA maintain itself and its staff from its own resources. The occasional grants given by the State Govt. and meant for particular development propose and are spent for that purpose only.

(b) The decisions of Rourkela Municipality are taken by its (politically) elected councilor, where as the decisions of RDA are taken by its authority comprising of high level Govt. officials and chairpersons of different Municipalities under the territory of RDA (of course under the chairmanship of Urban Minister of the State).

(c) The 10% hike as stipulated under Annexure-5 makes the enhanced rate to Rs. 5.36 per sft. But keeping in view the earlier judgment of this Hon"ble Court the rate was fixed to Rs. 5/- per sft. (Rs. 4.50 per sft. For asbestos roofed shops).

(d) The Municipality rate is not the sole criteria for determining the market price. The market price in Rourkela, as per the information gathered by RDA, prior to its 12th Authority Meeting dated 01.05.2010 was Rs. 7.50 per sft.

(e) That it may be relevant for equitable consideration of fields other than license fee or rent of premises regarding enhanced price index. Viz:

(i) The staff of RDA is getting higher salaries, as per 6th Pay Commission at higher rate w.e.f. 01.01.2006.

(ii) The rate of common salt has been increased in the market between 2002 to 2010 from Rs. 0.50 to Rs. 5/- Rs. 6/-

(iii) The rate of gold has suffered a 100% increase between 2002 to 2010.

Mr. Mohapatra sought to justify revision of the license fee made by the RDA in exercise of its power under Rule 54 of the Rules, 1983. Ten percent hike in the license fee is based on the decision of this Court and it could have worked out at

Rs. 5.36 per sft. However, the authority has fixed at Rs. 5/- per sft. for R.C.C. roof shop and Rs. 4.50 per sft. for asbestos roof shop. Therefore, the allegation made as against action of the RDA is violative of either Article 14 or 19(1)(g) and 21 is untenable in law. Learned Counsel further submits that the revision of the license fee in respect of the shops in question was initiated to maintain its staff as they were required to be paid salary as per 6th Pay Commission with effect from 01.01.2006 and the rate of common salt has increased in the market between 2002 to 2010 from Rs. 0.50 to Rs. 5/-/Rs.6/-. Aforesaid materials facts are taken into consideration for the purpose of justifying the action of the RDA in increasing license fee while exercising power under Rule 54 of the Rules, 1983. Therefore, the same cannot either be termed as arbitrary or unreasonable or further comparison of license fee fixed by the Rourkela Municipality in respect of the premises which are public premises cannot be compared as the fixation of license fee of shop at Rs. 2.50 per sft. in respect of shops at similar places are concerned in the year 2007, but the fixation of the license fee in respect of these shops which are under occupation of the Petitioners since 2000-01, therefore, the ground urged that there is discrimination is not attracted to the facts of these case.

8. In view of the above rival contentions, the question falls for consideration of this Court is that as to whether the Petitioners are right in demanding quashing of revision of impugned license fee or the same is violative of Articles, 14, 19(1) (g) and 21 of the Constitution of India and what order.

9. As could be seen from Annexure-6, the order fixing license fee by the Rourkela Municipality, is no doubt allotment of shops for the year 2007 in respect of shops at similar places inside the Rourkela town at Rs. 2.50 and Rs. 2/- for RCC roof and asbestos roof shops respectively. Even assuming that 10% hike in respect of the shops in these cases from 2001-02 " Rs. 1.85 and Rs. 1.50 per sft. in respect of RCC roof and asbestos shops respectively if taken into consideration, no doubt 8 to 9 years have lapsed in the meantime; revision of license fee was necessary having regard to the price escalation in the country which was of relevant consideration for an Authority in exercise of Rule 54 of the Rules, 1983. While exercising power, learned Counsel for the RDA submitted that the Development Authority has taken into consideration the earlier judgment of this Court referred supra and enhanced the license fee at the rate of 10%. If 10% hike is taken into consideration, it would only come to Rs. 3.70 and Rs. 3/- per sft. in respect of RCC roof and asbestos shops. Ten percent cannot be taken for the purpose of arriving at the figure of Rs. 5.36 on the basis of adding the revision of license fee every year as has been done in the present cases.

10. Even accepting for the sake of argument, if Rs. 3/- per sft. license fee is fixed in the year 2000 in favour of some of the Petitioners, then 10% increase from the date of allotment of the shops in their favour after ten years would come to 100% which means double the amount, i.e., Rs. 6/- per sft. Whether 100% increase is justifiable or not is the question to be examined keeping in view the

nature of business which is being undertaken by these Petitioners-shop keepers vis-a-vis the market value prevailing in the Rourkela town. These materials were not verified while determining license fee by the Development Authority in exercise of Rule 54 of the rules. We feel determination of license fee on the basis of the criteria mentioned under clause (d) and sub Clause 1 to 3 of (e) of paragraph 12 of the counter affidavit. Development Authority being a statutory authority has to undertake all round development activities of a town and in that process construction of commercial shopping complexes is undertaken with a view to allot the same in favour of unemployed youths or persons with a view to see that they become self-employed. Generation of self-employment is one of the important functions of the State Government and the Statutory Authorities to mitigate the hardship of unemployment in the country. Therefore, this aspect of the matter is required to be taken into consideration by the Development Authority while revising the license fee under Clause (d) and Sub-clause 1 to 3 of (e) of paragraph 12 of the counter affidavit. Further, so far as letting out of public premises is concerned, the same is to be made in accordance with Rule 54 of the Rule, 1983. Keeping the aforesaid material fact in view public premises, which are material resources for generating funds for the Development Authority, are required to be auctioned and the highest bidder should be allotted the shop room having regard to the fact that the population of the town is increasing day-by-day and the commercial shops are to be let out commercially either by the Municipality or by the Development Authority; they are being statutory authority, duty is also cast upon them to undertake such governmental functions so as to mitigate hardships by providing residence so also assistance to unemployed youths of the town/locality which is of relevant consideration. It is to be ensured that the commercial shops constructed by the Development Authority are let out on public auction and highest bidders are offered shops which is the normal procedure and the same is required to be followed by the Development Authority to generate revenue but simultaneously it is not expected to make profit out of it under the guise of revision of license fee at an exorbitant rate. The argument of revision of license fee is required for maintaining its staff and meeting out other expenses of the Development Authority; no doubt this factor is of relevant consideration but simultaneously other relevant factors discussed supra are also required to be taken into consideration at the time of re-determination of license fees.

11. In view of the above vivid discussion, we are of the considered view that re-determination/revision of license fee as made by the Development Authority is on the higher side and the same requires reconsideration. Hence, we quash the impugned order Annexures-4 and 4/1; and while quashing the same we direct the shop owners (licensees) to pay Rs. 4/- and Rs. 3.50 per sft. in respect of RCC roof and asbestos roof shops respectively which is exclusive of service tax from the date of revision of license fee fixed, till finalization/re-determination of license fee by the RDA as directed in these petitions.

12. In course of argument, it was brought to our notice that the issue of revision/

payment of license fee of shops by the Development Authority in question had been challenged before the jurisdictional Civil Courts and some interim orders have been obtained for which the account of the Development Authority was attached to HUDCO for non-payment of the amount due for some time and subsequently the same has been paid and attachment of the account have got discharged by the Development Authority. Be that as it may, the Development Authority is at liberty to bring to the notice of the Civil Courts that wherever the cases of similar nature are pending and interim orders are still there, the same should be pressed for early disposal of such cases. If such an application is filed before the jurisdictional Civil Court, the said Court shall take into consideration that no licensee can be evicted except due process of law and dispose of the case keeping in view that the premises are public premises as held by the apex Court in *Ashoka Marketing Ltd. and another Vs. Punjab National Bank and others*, .

28. We are also unable to hold that the inclusion of premises used for commercial purposes within the ambit of the definition of public premises", would render the Public Premises Act as violative of the right to equality guaranteed under Article 14 of the Constitution or right to freedom to carry on any occupation, trade or business guaranteed under Article 19(1)(g) of the Constitution or the right to liberty guaranteed under Article 21 of the Constitution. It is difficult to appreciate how a person in unauthorised occupation of public premises used for commercial purposes, can invoke the Directive Principles under Articles 39 and 41 of the Constitution. As indicated in the Statement of Objects and Reasons the Public Premises Act has been enacted to provide for a speedy machinery for the eviction of unauthorised occupants of public premises. It serves a public purpose, viz. making available, for use, public premises after eviction of persons in unauthorised occupation. The need to provide speedy machinery for eviction of persons in unauthorised occupation cannot be confined to premises used for residential purposes. There is no reason to assume that such a need will not be there in respect of premises used for commercial purposes. No distinction can, therefore, be made between premises used for residential purposes and premises used for commercial purposes in the matter of eviction of unauthorised occupants of public premises and the considerations which necessitate providing a speedy machinery for eviction of persons in unauthorised occupation of public premises apply equally to both the types of public premises. We are, therefore, unable to accept the contention of Shri Yogeshwer Prasad that the definition of public premises contained in Section 2(e) of the Public Premises Act should be so construed as to exclude premises used for commercial purposes from its ambit.

In our opinion, the provisions of the Public Premises Act, to the extent they cover premises falling within the ambit of the Rent Control Act, by override the provisions of the Rent Control Act and a person in unauthorised occupation of public premises u/s 2(e) of the Act cannot invoke the protection of the Rent Control Act.

We are unable to cut down the scope of the provisions of the Public Premises Act on the basis of such an apprehension because as pointed out by this Court in *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, :

Every activity of public authority especially in the background of the assumption on which such authority enjoys immunity from the rigours of the Rent Act, must be informed by reason and guided by the public interest. All exercise of discretion or power by public authorities (like Bombay Port Trust), in respect of dealing with tenants in respect of which they have been treated separately and distinctly from other landlords on the assumption that they would not act as private landlords must be Judged by that standard.

When the State, the local bodies and public authorities which are "State" within the meaning of Article 12 are exempted from purview of Rent Control Legislation, the basis of exemption is that such bodies would not be actuated by any profit making motive so as to unduly enhance the rents or eject the tenants from their respective properties as private landlords are or are likely to be. They would not act for their own purpose as private landlords do but must act for public purpose. It, therefore, follows that the public authorities which enjoy this benefit without being hidebound by the requirements of the Rent Act must act for public benefit.

This observation is made to facilitate the Development authority to get the interim orders regarding revision/payment of license fee vacated and get the cases disposed of on the question of maintainability of such proceeding before the Civil Courts.

13. With the above direction to re-determine the license fee in accordance Rule 54 of the Rules, 1983 after taking into consideration all material aspects which are required to re-determine the license fee, it is open for the opp. party to fix just and reasonable license fee taking all relevant factors into consideration which shall be acceptable by each one of the shop owners.

This decision is rendered keeping in view the facts of these cases vis-a-vis nature of the business these Petitioners have undertaken. This decision shall not act as precedent in any other case.