

(1982) 08 AHC CK 0033

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition Nos. 613 and 632 of 1981

Sharda Yadav and others

APPELLANT

Vs

Municipal Board, Gorakhpur and others

RESPONDENT

Date of Decision : 06-08-1982

Acts Referred:

Constitution of India, 1950 — Article 226

Uttar Pradesh Municipalities Act, 1916 — Section 116, 220, 293

Citation : (1982) 08 AHC CK 0033

Hon'ble Judges : H.N.Seth, J and R.R.Rastogi, J

Final Decision : Allowed

Judgement

H. N. Seth, J.

These two petitions under Article 226 of the Constitution of India can conveniently be dealt with and disposed of by a common judgment.

On 7th of September, 1981 Municipal Board, Gorakhpur got a notice published in newspaper "Aaj" informing the public that on 14th of September, 1981 it was going to auction the licence for realisation of Tahbazari from five Taxi and Private Bus Stands including that in respect of taxi and private bus stand located on the portion of Farra Road lying in between the eastern gate of Standard Hotel and the first gate of the Roadways Workshop. Sharda Yadav and 17 others claiming to be stage carriage and minibus operators, who stopped their vehicles on the aforementioned portion of Farra Road either for picking up and setting down passengers or for parking their vehicles during the night then filed Writ Petition No. 613 of 1981 on 14th of September 1981 and prayed that the proceedings for auction in pursuance of the notice published on 7th of September, 1981 be quashed and the Municipal Board, Gorakhpur be restrained from realising Tahbazari in pursuance of the said auction notice. However, as the Court did not grant any interim relief to Sharda Yadav and others, the proposed auction took place on 14th of September, 1981 and the highest bid of Rs. 87,500/ given by one Sri Pahalwan Singh was accepted and the right to realise tahbazari from

Farra Road taxi and private bus stand was settled with him. The petitioners thereafter moved an amendment application and got Sri Pahalwan Singh also impleaded as respondent No. 3. Similar interim order were also passed in Writ Petition No. 613/18 81 OH 2391981.

Rawail Singh and one another who also claimed to be bus operators, filed Writ Petition No. 632 of 1981 on 21st of September, 1981 and questioned the authority of the Municipal Board, Gorakhpur and its contractor Sri Pahalwan Singh to realise Tahbazari from them and various other operators who placed or parked their vehicles on the patri of Farra Road. This time the two petitioners succeeded in obtaining an interim order whereunder they were required to deposit the parking fees directly with the Municipal Board Gorakhpur. The order further provided that if the petitioners so deposited the fees, the contractor Sri Pahalwan Singh was not to realise the same from them. Subsequently at the instance of the respondents the interim order was modified and the contractor was permitted to realise the parking fees from the petitioners at the rate of Re. 1/ per trip or at the rate of Rs. 5/ in case their vehicles continued to stand for 12 hours in a day. This Court further directed the contractor Pahalwan Singh, respondent No. 2, to furnish security for an amount of Rs. 10,000/ with a view to safeguard the interest of the petitioners in the event of the petition being allowed.

The case of the petitioners in both these writ petitions is that Farra Road is owned by the State of Uttar Pradesh and is maintained by the public Works Department. It neither belongs to the Municipal Board Gorakhpur nor does the Municipal Board provide any facility to the taxi and private bus owners who park their vehicles on the patri of Farra Road. They claimed that attempt on the part of the Municipal Board to have the tahbazari in respect of parking of vehicles on any portion of Farra Road was absolutely without jurisdiction and outside the purview of the authority of the Municipal Board.

The respondents in their counter affidavits filed in both the petitions have made it clear that the said parking fees, right to realise which has been settled with Pahalwan Singh, was not being collected from any of the petitioners as a tax levied by the Municipal Board under Section 128 of the Municipalities Act. According to them Farra road is a public street which, under Section 116 (g) of the Municipalities Act, vests and belongs to the Municipal Board, Gorakhpur. Section 293 of the Municipalities Act enables the Board to charge fees for use and occupation (otherwise than under a lease) of any immovable property vested in, or entrusted to the management of the board, including any public street or place of which it allows the use or occupation. According to them such fees could, as has been done in the instant case, be fixed by means of an auction and it is not open to any one to raise any objection in case the Board instead of itself proceeding to collect the fees from individual users of the property vested in it, authorises, on the basis of an auction bid, some other person to collect the same.

Section 293 (1) of the U. P. Municipalities Act 1916 runs thus:

"The board may charge fees to be fixed by byelaw or by public auction or by agreement for the use or occupation (otherwise than under a lease) of any immovable property vested in or entrusted to the management of the board including any public street or place of which it allows the use or occupation whether by allowing a projection thereon or otherwise."

This section authorises the Municipal Board to charge fees in a case where it allows the use or occupation of a public street. It further provides that the fees to be so charged by it has to be fixed either by byelaw or by public auction or by agreement. The petitioners in these two petitions do not dispute that Farra Road is a public street. Sri Naithani learned counsel for the petitioners, urged that as Farra road belonged to the State Government and was maintained by the Public Works Department, the Municipal Board was not concerned with allowing its use or occupation by any more. Moreover, for using a public street or a public highway, the petitioners did not require permission either of the Municipal Board or of any other authority. They could use the same in their own right and no question either of the Municipal Board or of any other authority allowing the petitioners to use the same and to charge fees from them could possibly arise. In support of this submission, learned counsel for the petitioners relied upon the decision of this Court in the case of Chaudhary Atar Singh v. State of U. P. and others(1970 A.L.J. 249) wherein while considering the import of Section 293 of the U. P. Municipalities Act, it was observed that in relation to a public street fees could be charged only on such use or occupation which the Board could allow i.e. the use or occupation was not generally premissible to the public at large but which under the provisions of U. P. Municipalities Act required a permission of the Board. The right of passing and repassing through a motor vehicle is a public right which vests in the public under the general law of the land is not a right which inheres in the public because the Municipal Board allows it. In this regard the learned Judge drew support from the provisions of Section 220 of the Municipalities Act which runs thus;

"Notwithstanding any right or privilege (previously) acquired, accrued, or enjoyed, in a municipality for which bye laws under subhead (b) of heading E of Section 298 have been made and are in force on it inerant vendor, or any other person, shall be entitled to use or occupy any public street or place for the sale of articles or for the exercise of any calling or for the setting up of any booth or stall without the permission of the board given in accordance with such byelaws."

And pointed out that the kind of user or occupation specified in Section 220 required permission of the Municipal Board. Such kind of user or occupation would fall within the ambit of Section 293 as well and for allowing such user or occupation the Board could charge fees. According to the learned Judge Section 220 contemplated the existence or enjoyment of rights and privileges in relation to public streets The enjoyment of riehts or privileges which were restricted were only like using the street for sale of articles or for setting up of booths of stalls etc. The other kinds of privileges like passing and repassing did not require any

permission by the Municipal Board and it was not open to the Board to contend that it allowed the use or occupation of a public street for passing and repassing over it and that the Board could not, under Section 293 of the Municipalities Act, charge any fees for such passing and repassing over it.

In the first place, we find that under Section 116 (g) of the U. P. Municipalities Act all public streets and the pavements vest in and belong to the Board and they along with other properties which may become vested in the Board are to be under its direct management and control. Accordingly notwithstanding the Farra road which, as admitted by the petitioners is a public street vests and belongs to the Municipal Board which has all the jurisdiction, subject to the provisions of the U. P. Municipalities Act. to manage and control the same. However, under Section 220 of the Municipalities Act the use or occupation of a public street by an itinerant vendor or any other person for the sale of articles or for the exercise of any calling or for the setting up of any booth or stall without the permission of the Board given in accordance with byelaws framed under subhead (b) of head "E" of Section 298 is barred. The section contemplates that it is open to the Board to permit the use of a public street by itinerant vendors or other persons in connection with their callings but then the permission has to be given only in accordance with byelaws framed under subhead (b) of head "E" of Section 298. This in our opinion necessarily implies that the itinerant vendors and other persons cannot use or occupy any public street for the sale of articles or for the exercise of any calling or for the setting up of any booth or stall without the permission of the Board. A fortiori the Municipal Board has the power to permit an itinerant vendor or any other person to use or occupy any public street for the exercise of any calling which, is without such permission is prohibited under the law. This Court has in the case of Chaudhari Atar Singh (supra) ruled that exercise of the right of passing and repassing over a public street or highway was not a right of the nature for which permission of the Board under Section 220 of the Municipalities Act was required but then in the instant case the fees which the Municipal Board seeks to recover is not for passing or repassing of the petitioners, vehicles over the public street but on the ground that the petitioners while parking their vehicles on the Farra Road use the same for the exercise of their calling and if this be so, parking of the vehicles by the petitioners on Farra Road for the aforesaid purposes would require the permission of the Board and the Board would, under Section 293 of the Municipalities Act be entitled to charge fees for permitting the petitioners to use Farra Road or any portion thereof for that purpose. However, it appears that all the necessary facts in this regard have neither been stated in the affidavits filed by the petitioners nor in those filed on behalf of the respondents and as such it is not possible for us to record definite finding on the question as to whether the parking of the motor vehicles by the petitioners on the Farra road for which the Municipal Board, Gorakhpur seeks to charge parking fees is or is not in connection with petitioner's calling. We are accordingly of opinion that the petitioners have failed to make out a case for the relief claimed by them on the

ground that user of Farra Road by the petitioners for parking their vehicles did not require permission of the Board and as such it was not open to the Municipal Board to realise any fees for permitting the petitioners to use the said road for the aforesaid purpose.

Learned counsel for the petitioners next submitted that before the Municipal Board can charge any fees from them under Section 293, it has necessarily to fix the same either (i) by framing a byelaw, or(ii)by public auction, or (iii) by entering into an agreement with the parson liable to pay the fees. He urged that in the instant case the fees which the Municipal Board seeks to recover through its contractor Sri Pahilwan Singh has not been fixed in any of the aforementioned three manners. Accordingly neither the Board nor its contractor have any right to charge any parking fees from the petitioners for parking their vehicles in Farra Road. We find that there is substance in this submission made by the learned counsel.

A perusal of Section 293 of the Municipalities Act leaves no manner of doubt that before the Board becomes entitled to charge fees for permitting the use of some immovable property vested in or entrusted to its management, it has to fix that fees by any one of following three methods:

- (1) By framing a byelaw, or
- (2) By public auction, or
- (3) By agreement.

In the case before us the respondents admit that no byelaws for the purposes of parking of motor vehicles on public streets or for charging fees, there for has been framed by the Municipal Board, Gorakhpur so far. They also do not claim that there has been any agreement between the petitioners and the Municipal Board for payment of any parking fees. The case of respondent is that the fees in the instant case has been fixed by following second of the three methods mentioned above, namely, by public auction, and we proceed to examine the validity of this submission made by learned counsel for the Municipal Board.

A copy of the auction notice dated 7th of September, 1981 issued by the Municipal Board, Gorakhpur has in this regard been filed as Annexure 3 to writ petition No. 632 of 1981. According to the said notice, the Municipal Board was going to auction the licence for realisation ofTahbazari from the taxi and private bus stands specified therein, on 14th of September, 1981 on conditions mentioned in the said notice. Condition no. 1 provided that the licence would enure for a period of one year and Condition No. 6 thereof specified that the licensee would be entitled to recover parking fees from each taxi bus at the rate of Re. 1/ per trip and Rs. 5/ in case the vehicle continued to be parked for 12 hours. The said notice read as a whole leaves no manner of doubt that what the Municipal Board was auctioning was right to collect the parking fees from bus operators at the rates specified therein and that it was not fixing any parking

fees payable by various bus operators by auction. The parking fees which the board seeks to realise from the petitioners i.e. Rs. 1/ per vehicle per trip or Rs. 5/ in case the vehicle continued to be parked for a period of 12 hours was fixed by it unilaterally and without inviting any bids for the same. As a matter of fact considering the nature of the charge, namely, payment of parking fees by individual bus operators when they park their vehicles on a public street, it is difficult to visualise that the same can be fixed by the public auction. We are accordingly of opinion that no parking fees in the instant case has been fixed in any of the three modes specified in Section 293 of U. P. Municipalities Act and as such no question either of the Municipal Board or the contractor appointed by it, realising the same from the petitioners, arises and any attempt on the part of the Municipal Board Gorakhpur or the contractor appointed by it in pursuance of the auction notice dated 7th of September, 1981 is without any authority of law.

In the result the petitions succeed and are allowed with costs. The respondents are restrained from realising and Tahbazari from the petitioners in respect of parking of their vehicles at the Farra Road Taxi and Private Bus Stand till such time as the parking fees has not been validly fixed in accordance with the provisions of the U. P. Municipalities Act. Further respondents are directed to refund the parking fees which had already been charged by them the petitioners in pursuance of various interim orders passed by this Court in these petitions forthwith.