

(1995) 04 AHC CK 0020

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No"s. 35662 with 34440 and 39269 of 1994, 5418, 5419 and 9220 etc. of 1993 and 12375 of 1992 etc. etc.

Smt. Malti Kaul and another

APPELLANT

Vs

Allahabad Development Authority and another

RESPONDENT

Date of Decision : 21-04-1995

Acts Referred:

Constitution of India, 1950 — Article 14, 162, 265
Uttar Pradesh Nagar Mahapalika Water Supply Rules, 1968 — Rule 49
Uttar Pradesh Nagar Nigam Act, 1959 — Section 302
Uttar Pradesh Urban Planning and Development Act, 1973 — Section 14, 15, 20, 33, 33(4)
Uttar Pradesh Water Supply and Sewerage Act, 1975 — Section 59, 67

Citation : AIR 1995 All 397 : (1995) 2 UPLBEC 974

Hon'ble Judges : R.A. Sharma, J;N.L. Ganguly, J

Bench : Division Bench

Advocate : Umesh Narain Sharma, for the Appellant; J.N. Sharma, for the Respondent

Final Decision : Partly Allowed

Judgement

R. A. Sharma, J.—By these writ petitions levy of development fee, Malva fee, water charges and composition/compounding fee by Development Authorities constituted under U. P. Urban Planning and Development Act, 1973 (hereinafter referred to as the Act) has been challenged. Most of the writ petitioners are directed against Gorakhpur Development Authority, Gorakhpur and few writ petitions have been filed against imposition of such charges by the Allahabad Development, Allahabad. With the consent of the learned counsel for the parties Writ Petition No. 35662 of 1994, Smt. Malti Kaul v. Allahabad Development Authority has been made the leading case.

2. Petitioner"s application for amending the writ petition so as to enable him to challenge the Government order dated 12-8-1986 has already been allowed by this Court. Consequently the State of U.P. has now been impleaded as one of the

respondents.

3. We have heard learned counsel for the petitioner, Sri R.N. Singh, learned counsel for Allahabad Development Authority, Sri. U.N. Sharma, learned counsel for Gorakhpur Development Authority and the learned Standing counsel for the State of U.P.

4. Section 14 of the Act prohibits development of land which includes construction of building in development area without permission in writing from the Vice-Chairman of the Development Authority. Application for such permission has to be made u/s 15 and the Vice-Chairman can either grant the permission or refuse to grant it by a reasoned order after giving an opportunity to show cause to the applicant. Petitioners had applied for permission u/s 15 before the respective Development Authorities. They have either been granted permission subject to payment of development fee, Maivafee and water charges for they have been required to deposit the above charges the permission is granted. The impugned fee and the charges are thus being levied and collected from those, who applied for permission under the Act for construction of building.

5. Section 14 and 15 of the Act, which provide for development of land with the permission of the Vice-Chairman, do not provide for levy of development fee on those, who had applied for permission. On provisions, which deal with fee are Sections 20, 33, 35 and 39A of the Act. But these sections do not provide for development fee. they provide for different kinds of levy. Section 20 lays down that the Authority shall have and maintain its own fund to which shall be credited all fees, tolls and charges, received by it under the Act. Section 33 empowers the Authority to provide amenity or carry out development at the cost of the owner of the land, in the event of his default and recover all expenses incurred by it in providing the amenity or carrying out the development together with interest, Section 33 is reproduced below:

"33. Power of the Authority to provide amenity or carry out development at cost of owner in the event of his default and to levy cess in certain cases. -- (1) If the Authority, after holding a local inquiry or upon report from any of its officers or other information in its possession, is satisfied that any amenity in relation to any land in development area has not been provided in relation to that land which, in the opinion of the Authority, ought to have been or ought to be provided or that any development of the land for which permission approval or sanction had been obtained under this act or under any law in force before the coming into force of this Act has not been carried out, it may, after affording the owner of the land or the person providing or responsible for providing the amenity a reasonable opportunity to show cause, by order require him to provide the amenity or carry out the development within such time as may be specified in the order.

(2) If any amenity is not provided or any such development is not carried out within the time specified in the order, then the Authority may itself provide the

amenity or carry out the development or have it provided or carried out through such agency as it deems fit:

Provided that before taking any action under this sub-section, the Authority shall afford a reasonable opportunity to the owner of the land or to the person providing or responsible for providing the amenity to show cause as to why such action should not be taken.

(3) All expenses incurred by the Authority for the agency employed by it in providing the amenity or carrying out the development together with interest at such rates as the State Government may by order fix from the date when a demand for the expenses is made until payment may be recovered by the Authority from the owner or the person providing or responsible for providing the amenity as arrears of land revenue, and no suit shall lie in the Civil Court for recovery of such expenses.

(4) Notwithstanding anything contained in the foregoing sub-sections where the Authority on the written representation by so many of the owners of any land in a development area as represent not less than one-half of the area, of that land, is satisfied that any amenity in relation to such land has not been provided which in the opinion of the Authority ought to have been or ought to be provided, or that any development of the land for which permission, approval or sanction had been obtained under this Act or under any law in force before the commencement of this Act has not been carried out, it may itself provide the amenity or carry out, the development or have it provided or carried out through such agency as it deems fit, and recover the expenses by levy of cess from all the owners of the said land:

Provided that if the owner making the said representation contend that the amenity had been agreed to be provided or the development had been agreed to be carried out by a coloniser or co-operative housing society through or from whom the land was acquired by them, they shall file with the Authority a copy of such agreement, or of the deed of transfer or of the bye-laws of the society incorporating such agreement, and no action shall be taken by the Authority under this sub-section unless notice has been given to the coloniser or the society, as the case may be, to show cause why such action should not be taken:

Provided further that where the Authority is satisfied that the coloniser or the society has become defunct or is not traceable, no notice under the last preceding proviso need be issued.

(5) The case referred to in sub-section (4) shall be equivalent to the expenses incurred by the Authority or the agency employed by it in providing the amenity or carrying out the development, together with interest at such rate as the State Government may by order fix, from the date of completion of the work until payment, and shall be assessed and levied on all the owners, of the land in proportion to the respective areas of land owned by them."

(6) The said cess shall be payable in such number of installments, and each installment shall be payable at such time and in such manner, as the Authority may fix, and arrear of cess shall be recoverable as arrears of land revenue, and no suit shall be in the civil court for recovery thereof.

(7) The expenses incurred by the Authority or the agency employed by it under this section shall be certified by the Authority and such certificate, as also the assessment of the cess, if any, under sub-section (5) shall be final.

(8) If under any agreement between the owners of the land and the coloniser or the society referred to in sub-section (4) the responsibility for providing the amenity or carrying out the development rested with such coloniser or society, the cess payable under that sub-section by the owners shall be recoverable by them from the coloniser or the society, as the case may be".

6. Under this section Authority can act only when it is satisfied that any amenity in relation to any land in development area has not been provided in relation to that land which, in the opinion of the Authority, ought to have been or ought to be provided or any development of the land for which permission has been obtained before coming into force of the Act should be carried out, if it was not carried out earlier. Under this section the Development Authority can charge the amount to meet expenses along with interest, which have been incurred either by it or by its agency in providing amenity or carrying out the development. It is based almost on the principle of quid pro quo. In the instant case, admittedly the conditions precedent for exercise of power u/s 33 do not exist. The Authority has neither provided any amenity nor has it carried out development of land as is contemplated u/s 33 of the Act. In fact the learned counsel for the Development Authorities have not justified the imposition of development fee under this section.

7. Section 35, which is reproduced below, empowers, the Development authority to levy betterment charges as a consequence of any development scheme executed by it in any development area resulting in increase in value of any property in that area.

"35. Power of Authority to levy betterment charges. (I) Where in the opinion of the Authority, as a consequence of any development scheme having been executed by the Authority in any development area, the value of any property in that area which has benefited by the development, has increased or will increase, the Authority shall be entitled to levy upon the owner of the property or any person having an interest therein a betterment charge in respect of the increase in value of the property resulting from the execution of the development.

Provided that no betterment charge shall be levied in respect of lands owned by Government:

Provided further that where any land belonging to Government has been granted by way of lease or licence by Government to any person, then that land and any

building situate thereon shall be subject to a betterment charge under this section.

(2) Such betterment charge shall be an amount-

(i) in respect of any property situate in the township or colony, if any, developed or in other area developed or redeveloped equal to one-third of the amount, and

(ii) in respect of property situated outside such township, colony, or other area, as aforesaid, not exceeding one-third of the amount.

by which the value of the property on the completion of the execution of the development scheme, estimated as if the property were clear of building exceeds the value of the property prior to such execution, estimated in like manner."

The effect of this section is that if the value of any property has gone up due to the development scheme of the Authority, it is entitled to share the increase in value of that property by living betterment charges in respect of the increase in value of the property resulting from the execution of the development. But before imposing betterment charges the Authority has to make assessment order after giving reasonable opportunity of being heard to the person concerned and if thereafter these charges are not paid, the Authority is free to recover them as arrears of land revenue. In the instant case neither conditions precedent of Section 35 exist nor is there any order of assessment of betterment charges in accordance with Sections 35 to 38. u/s 39A the Development Authority is also entitled to charge toll from the visitors for the use of approach road and other amenities to places of popular resort including ancient and historical monuments. These provisions do not cover the development fee. They cover different types of levy. There is no provision in the Act or the Rules framed thereunder authorising the Development Authority to levy and collect development fee. In the absence of any such provision the Development Authority cannot levy such a fee. In this connection reference may be made to Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others, wherein Hon'ble Supreme Court while striking down the levy of development fee has laid down as under (paras 6 and 7):

"After giving our anxious consideration to the contentions raised by Mr. Goswami, it appears to us that in a fiscal matter it will not be proper to hold that even in the absence of express provision, a delegated authority can impose tax or fee. In our view, such power of imposition of tax and/or fee by delegated authority must be very specific and there is no scope of implied authority for imposition of such tax or fee. It appears to us that delegated authority must act strictly within the parameters of the authority delegated to it under the Act and it will not be proper to bring the theory of implied intent or the concept of incident and ancillary power in the matter of exercise of fiscal power. The facts and circumstances in the case of District Council of the Jowai Autonomous Distt., Jowai and Others Vs. Dwet Singh Rymbai etc., are entirely different. The exercise of powers by the Autonomous Jantia Hills Districts are controlled by the constitutional provisions

and in the special facts of the case, this Court has indicated that the realisation of just fee for a specific purpose by the autonomous District was justified and such power was implied. The said decision cannot be made applicable to the facts of this case or the same should not be held to have laid down any legal proposition that in matter of imposition of tax or fees, the question of necessary intendment may be looked into when there is no express provision for imposition of fee or tax. The other decision in Khargram Panchayat Samiti and Another Vs. State of West Bengal and Others, also deals with the exercise of incidental and consequential power in the field of administrative law and the same does not deal with the power of imposing tax and fee.

The High Court has referred to the decision of this Court in The Hingir-rampur Coal Co. Ltd. and Others Vs. The State of Orissa and Others, and Mahant Sri Jagannath Ramanuj Das and Another Vs. The State of Orissa and Another, and Municipal Corporation of Delhi and Others Vs. Mohd. Yasin, . It has been consistently held by this Court that whenever there is compulsory exaction of any money, there should be specific provision for the same and there is no room for intendment. Nothing is to be read and nothing is to-be implied and one should look fairly to the language used. We are, therefore, unable to accept the contention of Mr. Goswami."

7A. Learned Counsel for the Development Authorities have, however, tried to justify the levy of development fee on the basis of the Government order dated 12-8-1986, copy of which has been filed as Annexure I to the supplementary affidavit filed on behalf of the respondents. Although there is no provision under the Act, authorising the Government to direct the Development Authorities to impose such a fee; but the order has been defended by the learned counsel on two grounds, namely, (i) executive power of the State; and (ii) Section 41(1) of the Act. These contentions cannot be accepted. Although, executive power of the State is coextensive with its legislative powers; but Article 265 of the Constitution prohibits the levy of tax, which includes the fee. except by authority of law, Law means legislative enactment and sub-ordinate legislation. The State in exercise of its executive power cannot impose any tax or fee in the absence of specific statutory provision authorising such a charge. In this connection reference may be made to Harivansh Lal Mehra Vs. State of Maharashtra, , Bimal Chandra Banerjee Vs. State of Madhya Pradesh etc., and Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others, .

8. Section 41 of the Act does not confer any such power on the Government to issue direction to the Development Authorities for imposing development fee. Under this section Government can issue direction "for the efficient administration of this Act" and such directions are to be carried out by the Development Authority, its Chairman and Vice-Chairman, By this section the Government is authorised to issue directions- of administrative nature to the Development Authorities. The Government cannot derive any power from Section 41 for directing the Authorities to levy the development fee. Supreme Court in

Ahmedabad Urban Development Authority Vs. Sharadkumar Jayantikumar Pasawalla and others, , wherein the levy of development fee was challenged has laid down that in the absence of any express statutory provision, it is not open to any Authority to impose any such fee. The plea of implied power to levy such a charge was also rejected. The imposition of development fee as such is without authority of law and, therefore, cannot be sustained.

9. The position as regards the Malva Charge (stacking fee) is different. Section 302 of the U.P. Nagar Mahapalika Adhiniyam, 1959 prohibits deposit of building material in any street or open space vested in the Mahapalika without permission of the prescribed authority. Relevant extract of Section 302 is quoted below:

"302. Streets not to be opened or broken up and building materials not to be deposited thereon without permission, -- (1) No person other than the Mukhya Nagar Adhikari or a Mahapalika Officer or servant as such shall, without the written permission of the Mukhya. Nagar Adhikari or without other lawful authority:-- (a) open, break up, displace, take up or make any alternation, in or cause any injury to, the soil or pavement, or any wall, fence, post, chain or other material or thing forming part of any street or in any open space vested in the Mahapalika:

(b) deposit any building materials in any street or open space vested in the Mahapalika;

(c) set up in any street or open space vested in the Mahapalika any scaffold or any temporary erection for the purpose of any work whatever, or any posts, bars, rails bounds or other things by way of enclosure, for the purpose of making mortar or depositing bricks, lime, rubbish or other materials. While granting such a permission the authority would be competent to charge the fee for use of the land or street vested in the Mahapalika for deposit of building material, if so authorised by the statutory provisions. But power to impose fee for stacking building material can only be exercised and such a levy can only be imposed when the building material is placed or will be placed on any street or land vested in the Mahapalika. If a person neither applies for such a permission nor is using any property or the land of the Mahapatika for depositing the building material, Development Authority cannot levy the stacking charges (Malva fee). In every case it is a question of fact, which has to be decided by the authority itself after giving a reasonable opportunity of hearing to the person on whom such a levy is to be imposed. No such opportunity was given by the respective Development Authorities to the petitioners before imposing this fee, rather it has been charged as a condition for sanction of map for construction of building irrespective of the fact whether street or other property belonging to the local body has been or will be used.

10. The position of water charges is also similar. u/s 59 of U.P. Water Supply and Severage Act, 1975, the cost of the water to be supplied can be realised from the consumer. u/s 67 of the same Act use of the water for any purpose other than

domestic consumption, has been prohibited. Rule 49 of the U.P. Nagar Mahapalika Water Supply Rules, 1968, which is reproduced below, provides for the permission of the Mukhya Nagar Adhikari for use of water for construction of a building from a nearby stand posts subject to payment of charges.

"49. Supply of water from standposts for non-domestic purpose.-- Where a person requires water for constructing a building or for any other similar purpose be supplied to him from a nearby standposts, he shall to the Mukhya Nagar Adhikari for the purpose, who may give the necessary permission after realising the charges according to the rates fixed."

If the water is used for the purpose of making construction the Authority is fully justified to charge for it; but such a charge can be imposed on a person, who uses water for the construction of the building. If the person concerned does not use the water from the nearby standposts and has supply of water from his own sources, the water charges cannot be levied and collected from him. This again is a question of fact, which can only be decided by the appropriate authority after giving reasonable opportunity of being heard to the petitioners. Such an opportunity has also not been given to the petitioners before levying the water charges. But in the instant case like the other charges the water charge has also been imposed and is sought to be realised as a condition for grant of permission. This again is not sustainable.

11. Learned Counsel for the respondents have stated that the Development Authorities are imposing Malva fee and water charges on behalf of the Corporations and Jail Sansthan respectively and as such, no direction can be issued to them for not realising those charges. This contention cannot be accepted. Both the charges have been levied and are being collected by the Development Authorities and, therefore, writ and directions have to go to them.

12. In view of Sections 14 and 15 of the Act no person can make any construction on any land within the development area unless he gets approval of the map for the construction from the Vice-Chairman of Development Authority. Construction of the building without such approval is an offence u/s 26, which can be compounded u/s 32 of the Act on such terms including the terms of as regards payment of composition fee, as the authority may think fit. Therefore, there is specific provision for imposing composition fee, and no exception can be taken to it. In case there is any grievance to the person aggrieved by such fee, it is open to him to challenge it before the appropriate forum.

13. These writ petitions are partly allowed. The levy of development fee and the Government order dated 12-8-1986, so far as it has authorised the Development Authority to impose and collect development fee are quashed. The levy of Malva fee and water charges are also quashed. The respondents, Development Authorities are directed to determine the imposition of Malva fee and water charges afresh after giving a reasonable opportunity of being heard to the petitioners. As regards the composition fee, the writ petitions are dismissed. In

view of the facts and circumstances of the case, there shall be no order as to costs.

14. Petitions partly allowed.