
(2010) 02 AHC CK 0274
In the Allahabad High Court

Subhash Tiwari

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 02-02-2010

Acts Referred:

Constitution of India, 1950 — Article 15, 16, 162, 166, 338
Electricity (Supply) Act, 1948 — Section 78A

Citation : (2010) 3 AWC 2821

Hon'ble Judges : Ram Autar Singh, J; Ashok Bhushan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ashok Bhushan, J.—Heard Sri W.H. Khan, Senior Advocate, assisted by Sri J.H. Khan for the petitioner and Sri Pankaj Saxena, learned Additional Chief Standing Counsel for the State-respondents.

2. Two supplementary counter affidavits and a second supplementary counter affidavit have been filed on behalf of the respondents to which rejoinder affidavit and supplementary rejoinder affidavit have also been filed by the petitioners. The parties were heard on 13th November, 2009, 18th November, 2009 and 15th December, 2009. Pleadings are complete between the parties and with the consent of the parties the writ petition is being finally decided.

3. Brief facts of the case necessary to be noted for deciding the writ petition are; the Zila Panchayat, Sonebhadra has framed bye-laws under Sub-section (2) of Section 239 of the Uttar Pradesh Kshetra Panchayat and Zila Panchayat, Adhiniyam, 1961 (hereinafter referred to as the 1961 Act) for collection of fee from the tractors and trucks carrying Gitti, Patthar, Boulder, Surkhi, Chuna, Koyala, Bhassi etc. from the mining area situate within the rural areas of Zila Panchayat, Sonebhadra. The petitioner being the highest bidder was awarded a contract for the period 12th December, 2008 to 31st March, 2010 for collection of fee from the above mentioned vehicles for an amount of Rs. 4,30,00,000/-. Under the contract dated 11th December, 2008 entered into between the

petitioner and Zila Panchayat, Sonebhadra, the contractor was entitled to realise fee at the rate mentioned in the agreement from tractors trucks (including the trucks having 10 wheels). The petitioner was also entitled to establish check post in the district for collection of fee. An order dated 6th July, 2009 was issued by the District Magistrate, Sonebhadra directing the Sub Divisional Officer, Robertsganj and Sub Divisional Officer, Duddhi to close barriers/check posts since the State Government has taken decision to close barriers and check posts looking to the difficulties of citizens, industrialists and traders due to establishment of barriers on national highways and main roads in the district. The order of the District Magistrate also referred to the Government order dated 2nd July, 2008 and 12th June, 2009. The petitioner has filed this writ petition challenging the order of the District Magistrate dated 6th July, 2009 and the Government orders dated 2nd July, 2008 and 12th June, 2009. By amendment the petitioner also was permitted to challenge the order dated 7th July, 2008 issued by the State Government. Following reliefs have been prayed for in this writ petition:

(i) issue a writ, order or direction in the nature of certiorari quashing the order dated 6th July, 2009 (Annexure-1) passed by respondent No. 2, Government order dated 2nd July, 2008 (Annexure-2) issued by respondent No. 1 and the Government order dated 12th June, 2009 (Annexure-3) and the letter dated 7th July, 2008 (Annexure-11) issued by Special Secretary, Government of U.P., Lucknow.

(ii) issue a writ, order or direction in the nature of mandamus commanding the respondents not to close/remove the barriers & check posts of Zila Panchayat Sonbhadra installed for collection of fee prescribed by bye-laws published in Gazette dated 10.12.1994 under Sub-section 2 of Section 239 of Zila Panchayat Act as amended in 1999 authorising the petitioner/contractor to collect the prescribed fee at the barriers & check posts installed by Zila Panchayat at Markundi, Teilgudwa, Murdahwa, Dudhi Chunna, Khadiya, Aaudi Mod and Sukrit.

4. A counter affidavit was filed by the respondents in which it was stated that by Government order dated 7th July, 2008 the State Government communicated to all the Commissioners of the State and Upper Mukhya Adhikari of Zila Panchayat that establishment of barriers for realisation of any fee, tax, royalty etc. has been prohibited by framing bye-laws. . The Government order further stated that if any complaint is received that in any of the Zila Panchayats fee is realised by establishing barrier, the Upper Mukhya Adhikari of Zila Panchayat shall be held liable. It was stated that Upper Mukhya Adhikari in contravention of the aforesaid Government order dated 7th July, 2008 issued the order dated 11th December, 2008 for realisation of fee by the petitioner. The letter of the Commissioner dated 5th February, 2009 addressed to the District Magistrate, Sonebhadra has also been filed as Annexure CA-1 to the counter affidavit referring to the Government order dated 7th July, 2008 of the State Government that if fee is realised by establishing a barrier, the Upper Mukhya Adhikari of Zila Panchayat concerned

shall be personally responsible. The President of the Zila Panchayat also by order dated 22nd June, 2009 directed the Upper Mukhya Adhikari to order for stopping barriers and to get the order dated 7th July, 2008 complied with. In the supplementary counter affidavit dated 10th August, 2009 it has been stated that the Government orders dated 29th April, 2000 and 10th February, 2003 relate to prohibition of realisation of fee at Padao Adda. In the supplementary counter affidavit sworn on 29th October, 2009 by Lal Bihari, Special Secretary, Panchayati Raj it has been stated that a meeting was convened on 2nd July, 2008 in pursuance of which Government order dated 7th July, 2008 was issued in continuation of earlier Government orders dated 29th April, 2000 and 10th February, 2003 whereby Zila Panchayats were restrained from realising any fee by establishing barriers. The proceedings dated 2nd July, 2008 has been brought on the record by second supplementary counter affidavit dated 18th November, 2009 sworn by Bhupal Singh, Assistant Commissioner. The proceedings dated 2nd July, 2008 indicate that the said proceedings were attended by Minister of Panchayati Raj, Bhutatva Evam Khanikarm, Minister of Forest, Cabinet Secretary and Principal Secretaries of various departments in which decision was taken to abolish all check posts/barriers except certain check posts of Trade Tax Department.

5. Rejoinder and supplementary rejoinder affidavits have been filed by the petitioner referring to the earlier Government orders dated 29th April, 2000 and 10th February, 2003 stating that the said Government orders were with regard to Padao Adda fee. Copy of the bye-laws with regard to Padao Adda fee has also been filed. It has been pleaded that meeting dated 2nd July, 2008 was held at the State Government level and the same cannot be treated to be a decision taken under Articles 162 and 166 of the Constitution of India. It is stated that the decision dated 2nd July, 2008 cannot be said to be a policy decision taken by the State Government. The bye-laws in question permitting realisation of fee by the petitioner are delegated legislation, which cannot be overridden by any order of the State Government. The Government order dated 7th July, 2008 is not a Government order as contemplated under Articles 162 and 166 of the Constitution of India and the same is merely a circular addressed to the officers of the department and not of a binding nature.

6. Sri W.H. Khan, Senior Advocate, appearing for the petitioner in support of the writ petition, has made following submissions:

(i) The Government order dated 7th July, 2008 cannot override the statutory bye-laws framed by the Zila Panchayat, Sonebhadra u/s 142 read with Section 239(2) of the 1961 Act.

(ii) The Government order dated 7th July, 2008 cannot be said to be a Government order issued under Article 162 read with Article 166 of the Constitution of India.

(iii) The respondents cannot stop the petitioner from establishing check posts/

barriers for realisation of fee in pursuance of the contract awarded to the petitioner dated 11th December, 2008.

7. Learned Counsel for the petitioner in support of his submissions relied on various decisions of the Apex Court as well as this Court, which shall be referred to while considering the submissions in detail.

8. Learned Standing Counsel appearing for the respondents replying the submissions of petitioner's counsel submitted that the Government order dated 7th July, 2008 is a Government order within the meaning of Articles 162 and 166 of the Constitution of India, which has been issued in accordance with the Rules of Business of the State and by the said Government order check posts/barriers of all the departments except certain check posts of Trade Tax Department, have been directed to be abolished looking to the inconvenience and difficulties of the citizen, traders and businessmen caused due to establishment of check posts/barriers throughout the State. It is submitted that several Government orders were issued after the meeting dated 2nd July, 2008 and the Government order dated 7th July, 2008 was issued by the Panchayati Raj Department directing for stopping barriers, which have been established in accordance with any bye-laws framed by the Zila Panchayat. It is submitted that, in fact, the agreement between the petitioner and Zila Panchayat could not have been included any terms and conditions in violation of the Government order dated 7th July, 2008. It is submitted that what was prohibited was establishment of barriers/check posts and not prohibition for giving contract for realisation of any fee as permissible under the bye-laws framed under the 1961 Act. Learned Standing Counsel also submits that the Government order dated 7th July, 2008 having been issued after the approval of the Minister Panchayati Raj, the said decision is in accordance with the Rules of Business framed under Article 166 of the Constitution of India and it is a Government order having statutory force.

9. We have considered the submissions of learned Counsel for the parties and have perused the record.

10. Before we proceed to consider the rival submissions of learned Counsel for the parties, it is relevant to note the provisions of the 1961 Act under which the relevant bye-laws were framed for giving contract to the petitioner.

11. Section 239 of the 1961 Act provides for power of Zila Panchayat to make bye-laws. Sections 239(1) and 239(2) of the 1961 Act are quoted below:

239. Power of Zila Panchayat to make bye-laws. - A Zila Panchayat may, and where required by the State Government shall, make bye-laws for its own purposes and for the purposes of Kshettra Panchayats, applicable to the whole or any part of the rural area of the district, consistent with this Act and with any rule, in respect of matters required by this Act to be governed by bye-laws and for the purposes of promoting or maintaining the health, safety and convenience of the inhabitants of the rural area of the district and for the furtherance of the administration of this Act in the Khand and the district.

(2) In particular and without prejudice to the generality of the power conferred by Sub-section (1), a Zila Panchayat may, in the exercise of the said power, make any bye-laws described in the list below:

A - Building (a) (b) (c)

....

....

12. In exercise of power u/s 239(2) of the 1961 Act bye-laws were framed for realisation of fee from the tractor, trucks etc. carrying Gitti, Patthar, Boulder, Surkhi, Chuna, Koyala and Bhassi out of the district. The said bye-laws were also amended on 3rd July, 1999. The amended bye-laws also provided that for effecting realisation of fee contractor will be entitled to establish check posts/barriers on National Highways and other roads. The State Government issued the Government order dated 7th July, 2008, as noticed above, stopping establishment of barriers and check posts for realisation of any fee, tax etc. The first issue, which has been much pressed by the petitioner, is that the Government order dated 7th July, 2008 is not a Government order issued in accordance with the provisions of Article 162 and 166 of the Constitution of India and the same is mere circular, which is not binding on the Zila Panchayat. It is thus necessary to find out the nature of the Government order dated 7th July, 2008 and as to whether the said Government order has been issued in accordance with Articles 162 and 166 of the Constitution of India.

13. Article 162 of the Constitution of India provides that subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws. Article 166 of the Constitution provides for the conduct of the business of the Government of State. Article 166 of the Constitution of India is quoted below:

166. (1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor.

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion.

14. Under Article 166(3) of the Constitution of India the Governor has framed the rules, namely, Uttar Pradesh Rules of Business, 1975. Rule 2 of the aforesaid Rules deals with disposal of business which provides that subject to the

provisions of the Rules in regard to consultation with other Department and submission of cases to the Chief Minister, the Cabinet and Governor of business allotted to a department under the U.P. (Allocation) Rules, 1975 shall be disposed of by or under the general or special direction of the Minister Incharge. In the present case, we are only concerned with the check posts and barriers established for realisation of fee under the bye-laws framed by the Zila Panchayat. The functioning of the Zila Panchayat including realisation of fee by contract to be granted by Zila Panchayat is under the Panchayati Raj Department of the State and all business with regard to Department of Panchayati Raj is to be regulated by general or special orders of the Minister Incharge of the Department. The proceedings dated 2nd July, 2008 have been brought on the record by second supplementary counter affidavit, which clearly indicates that the decision was taken with the approval of the Panchayati Raj Minister. With regard to check posts and barriers of other departments, which were also abolished concerned Ministers were present and we are not concerned with the check posts and barriers of other department in the present case.

15. Learned Counsel for the petitioner submits that according to the Rules of Business, 1975 any policy decision of the State requires approval of the Cabinet. One of the items, which is required to be brought before the Cabinet is, "proposal involving any important change of policy and practice". Learned Counsel for the petitioner sought to contend that since the consequence of the decision to abolish check posts and barriers shall result in prohibition of realisation of fee, which shall effect the revenue of the State, the said decision was required to be brought before the Cabinet. A perusal of the Government order dated 7th July, 2008 indicates that decision was not to stop realisation of fee, revenue, royalty, tax etc. by the State, rather decision was confined only to the effect that realisation of fee by establishing barriers in Zila Panchayat be prohibited. For the purposes of the present case, we are not satisfied that decision which was taken and communicated by the Government order dated 7th July, 2008, was such a decision which required approval of the Cabinet. As noted above, such business could have been transacted with the approval of the Minister Incharge of the Department and in the present case the decision dated 2nd July, 2008 stopping establishment of barriers in Zila Panchayat, Sonebhadra had the approval of the Minister Panchayati Raj. The said decision is clearly a Government order in accordance with Article 166(3) of the Constitution of India.

16. Learned Counsel for the petitioner has placed reliance on judgments of the Apex Court in the case of R. Chitralekha and Another Vs. State of Mysore and Others, and in the case of G.J. Fernandez Vs. State of Mysore and Others, The Apex Court in R. Chitralekha's case (supra) while considering Article 162 and 166 of the Constitution of India, laid down following in paragraph 4:

4. ...If the conditions laid down in this Article are complied with, the order cannot be called in question on the ground that it is not an order made by the Governor. It is contended that as the order in question was not issued in the name of the

Governor the order was void and no interviews could be held pursuant to that order. The law on the subject is well settled. In *Dattatreya Moreshwar Pangarkar Vs. The State of Bombay and Others*, Das, J., as he then was, observed:

Strict compliance with the requirements of Article 166 gives an immunity to the order in that it cannot be challenged on the ground that it is not an order made by the Governor. If, therefore, the requirements of that Article are not complied with, the resulting immunity cannot be claimed by the State. This, however, does not vitiate the order itself....

Article 166 directs all executive action to be expressed and authenticated in the manner therein laid down but an omission to comply with those provisions does not render the executive action a nullity. Therefore, all that the procedure established by law requires is that the appropriate Government must take a decision as to whether the detention order should be confirmed or not u/s 11(1).

The same view was reiterated by this Court in *The State of Bombay Vs. Purushottam Jog Naik*, where it was pointed out that though the order in question there was defective in form it was open to the State Government to prove by other means that such an order had been validly made. This view has been reaffirmed by this Court in subsequent decisions: see *Ghaio Mall and Sons Vs. The State of Delhi and Others*, and it is, therefore, settled law that provisions of Article 166 of the Constitution are only directory and not mandatory in character and, if they are not complied with, it can be established as a question of fact that the impugned order was issued in fact by the State Government or the Governor. The judgment of this Court in *Bachhittar Singh Vs. The State of Punjab*, does not help the appellants, for in that case the order signed by the Revenue Minister was not communicated to the party and, therefore, it was held that there was no effective order.

17. In the present case, as noticed above, the Government order dated 7th July, 2008 was in accordance with the Rules of Business as framed under Article 166 of Constitution of India and the mere fact that the said Government order was not expressed in the name of the Governor was not fatal when it is established that the said decision was taken with the approval of the Minister concerned.

18. Thus in view of the aforesaid discussions, it is held that the Government order dated 7th July, 2008 was issued in accordance with Article 166 of the Constitution of India and it cannot be termed as mere circular.

19. The submission, which has been pressed by the counsel for the petitioner, is that the said Government order in no manner can override the bye-laws framed by the Zila Panchayat u/s 239(2) of the 1961 Act. Learned Counsel for the petitioner submitted that the State Government had no jurisdiction or power to override the bye-laws framed by the Zila Panchayat. He has placed reliance on a judgment of the Apex Court in the case of *Indore Municipal Corporation Vs. Gujarat Co-operative Housing Society Ltd. and another*, and in the case of *Associated Cement Companies Ltd. Vs. State of Madhya Pradesh and Another*,

Referring to the provisions of the 1961 Act learned Counsel submitted that u/s 242 the 1961 Act power of confirmation of the bye-laws made by the Zila Panchayat is vested in the Prescribed Authority and not in the State Government, hence the State Government has no power with regard to bye-laws framed u/s 239(2) of the 1961 Act. Section 242 of the 1961 Act is quoted below:

242. Confirmation, etc. of regulations and bye-laws made by the Zila Panchayat.-
(1) The power of a Zila Panchayat to make regulations under Clauses (e) to (q) of Sub-section (1) of Section 238 shall be subject to the condition of the regulations not taking effect until they have been confirmed by the State Government.

(2) The power of a Zila Panchayat to make bye-laws shall be subject to the conditions of the bye-laws being made after previous publication and of their not taking effect until they have been confirmed by the Prescribed Authority and published in the Gazette.

(3) The Prescribed Authority in confirming a bye-law, or the State Government in confirming a regulation, may make any change in its form that appears necessary.

(4) No alteration or rescission of a regulation made under Clauses (e) to (q) of Sub-section (1) of Section 238 shall have effect unless and until it has been confirmed by the State Government and likewise to alteration or rescission of a bye-law by a Zila Panchayat shall have effect unless and until it has been confirmed by the Prescribed Authority.

(5) The State Government may, after previous publication of its intention, rescind any regulation or the Prescribed Authority may similarly rescind any bye-law, which it has confirmed; and thereupon, the regulation or bye-law shall cease to have effect.

20. Chapter XI of the 1961 Act deals with rules, regulations and bye-laws. Section 237 provides for power to make regulations and Section 239 provides for power of the Zila Panchayat to make bye-laws. The power to make rules is vested only with the State Government. u/s 238(1) power to make regulations is vested in the Zila Panchayat and the same is vested in the State Government u/s 238(2). According to Section 242 the regulations framed by Zila Panchayat require approval of the State Government. The power to frame bye-laws has been given to Zila Panchayat which according to Section 242(2) are subject to conditions of previous publication, confirmation by the Prescribed Authority and publication in the gazette. The Prescribed Authority has been defined in Section 2 Sub-section (20), which means any person or authority notified by the State Government in the Gazette as prescribed authority for any purpose under this Act. Petitioner's case is that it is Commissioner of the division who is the Prescribed Authority. The question to be answered is as to whether with regard to bye-laws framed by Zila Panchayat the State Government has no jurisdiction or power to give any direction to the Zila Panchayat. It is relevant to note that

Section 239(1) of the 1961 Act which is the source of power of Zila Panchayat to frame bye-laws provides, "a Zila Panchayat may, and where required by the State Government shall, make bye-laws...." Thus the very provision which enables Zila Panchayat to make bye-laws mandates the Zila Panchayat to make bye-laws where required by the State Government. The power of the State Government thus is clearly indicates in Section 239(1) itself to direct Zila Panchayat to frame bye-laws. The words "make bye-laws" are comprehensive enough to clothe the State Government to issue directions with regard to the bye-laws framed by Zila Panchayat. Thus the control of the State Government with regard to bye-laws to be framed by the Zila Panchayat is very much present in the very source of power i.e., Section 239(1) of the 1961 Act.

21. There is one more reason due to which the power of the State Government to issue appropriate direction to the Zila Panchayat regarding framing of the bye-laws has to be conceded, is the provisions of the Uttar Pradesh State Control Over the Public Corporation Act, 1975. The aforesaid Act was enacted by the State Legislature to provide for control of the State Government over statutory bodies established under any Uttar Pradesh Act except Universities governed by the U.P. State Universities Act. Section 2 of the said Act is as follows:

2. Power to issue directions to statutory bodies.-(1) Every statutory body (by whatever name called), established or constituted under any Uttar Pradesh Act, excepting Universities governed by the Uttar Pradesh State Universities Act, 1973 as re-enacted and amended by the Uttar Pradesh Universities (Re-enactment and Amendment) Act, 1974, shall, in the discharge of its functions, be guided by such directions on questions of policies, as may be given to it by the State Government, notwithstanding that no such power has expressly been conferred on the State Government under the law establishing or constituting such statutory body.

(2) If any question arises whether any matter is or is not a matter as respects which the State Government may issue a direction under Sub-section (1), the decision of the State Government shall be final.

22. The Zila Panchayat constituted under the 1961 Act is thus clearly contemplated to be guided by such directions as may be given by the State Government notwithstanding that no such power has been expressly conferred on the State Government under the law constituting such statutory body. The 1975 Act thus clearly contemplates control of the State Government on the Zila Panchayat and the State Government is fully competent to issue directions.

23. The counsel for the petitioner has relied on the judgment of the Apex Court in Indore Municipal Corporation's case (supra) where the Apex Court while considering the bye-laws framed under the M.P. Municipal Corporation Act, 1956 has laid down that bye-laws became part of the Act after being framed in accordance with the Act. In the present case there is no dispute that bye-laws in question were framed in accordance with the 1961 Act. In the aforesaid case the

Apex Court was considering the question of levy of tax from 1973 to 1976 on the basis of annual letting value determined under the M.P. Municipal Corporation Act. The bye-laws were published on 9th January, 1976 under which annual letting value was made basis of levy. The resolution of the Corporation which held the field in absence of bye-laws not gave option to Corporation to assess tax on the basis of annual letting value fixed by the State Government under the 1964 Adhiniyam. In above context following was laid down by the Apex Court in paragraphs 24 and 25 of the said judgment:

24. The bye-laws are framed u/s 427 of the Act and Section 431 provides that all bye-laws shall be published in the Gazette. The effect of these provisions is that the bye-laws become part of the Act. Thus the Corporation while providing the system of assessment for various taxes can propose a basis but after the bye-laws provided the system of assessment, the Corporation has to abide by that system of assessment.

25. So far as the drainage tax is concerned, there were no bye-laws till 12-2-1976. The resolutions of the Corporation could thus hold the field by providing a method of assessment till 12-2-1976. Similarly, the resolution in relation to general sanitary cess could also hold the field till the publication of bye-laws in relation thereto on 9-1-1976 and similarly for lighting rate till the publication of bye-laws in relation thereto on 24-5-1974. But the resolutions if they come in conflict with the method of assessment then the resolutions w.e.f. from which date the bye-laws come into force will become illegal and ineffective.

24. The judgment of the Apex Court in Indora Municipal Corporation's case (supra) thus was on different issue and it does not help the petitioner in the present case.

25. The next judgment relied by counsel for the petitioner is Associated Cement Companies' case (supra) where the Apex Court had occasion to consider Sections 127, 129 and 131 of the M.P. Municipalities Act, 1961. In the aforesaid case the company had challenged the notice requiring payment of export tax at the rate of 0.50 percent on the price of the cement as prescribed by notification dated 2nd May, 1991. The State Government had issued general circular dated 15.12.1995 prescribing 0.20 percent of the price of the cement. The Company was paying at the rate of 0.20 percent, hence it was directed by the Municipal Council to pay the differential amount. The writ petition was filed questioning the demand. Learned Single Judge held that Municipal Council cannot recover the tax at the old rate being of the view that when the State Government acted in terms of Section 167 and 129 of the Act, the Municipal Council had no option but to obey. The Division Bench, however, in a Letter Patent Appeal allowed the appeal, which decision was challenged by the Company in the Apex Court. The Apex Court in the said case considered the scheme of the M.P. Municipalities Act, 1961 and came to the conclusion that the State Government, which has power u/s 131 for reduction of the rate, having not exercised the power in the enumerated circumstances as provided u/s 131 and admittedly the State Government having

not acted in terms of Section 131, the Division Bench is right in its view that the circular of the State Government was really of no consequence. Following was laid down by the Apex Court in paragraphs 14 and 15 of the said judgment:

14. Though the Government Order refers Sections 127 and 129 of the Act, it is to be noted that there was no proposal by the Municipal Council for reduction of the rate of tax. In terms of Sub-section (1) of Section 127, the power to impose the tax has to be exercised by the Council which is of course subject to any general or special order of the State Government. The Municipal Council exercises the power as a delegatee and the power exercised u/s 127 as noted above is a delegated legislation. Since the Municipal Council has not proposed for any variation in the rate of tax the question of the State Government passing any general or special order in that regard is not contemplated. It is to be further noted that the Government Order treats the matter as instruction to all municipalities.

15. So far as Section 129 is concerned, there is no question of any suo motu fixation of rate by the State Government. In fact while acting on the proposal by the Municipal Council, the State Government can direct modification affecting the substance of the proposal. But the same cannot be given effect to unless and until the modification has been accepted by the Council at a special meeting. In the instant case that contingency has not arisen. Though in terms of Section 131 the State Government can initiate the action for reduction in the rate that can only be done if the enumerated circumstances exist. That situation has also not arisen in the instant case and admittedly the State Government has not acted in terms of Section 131 of the Act. Therefore, the Division Bench is right in its view that the circular of the State Government dated 15.12.1995 is really of no consequence. Further changes u/s 127 can be introduced in terms of Sub-section (2) of Section 127 by framing rules. In the instant case, the rules were framed in March 1997 and did not have any retrospective effect.

26. In the above case, there was specific provision empowering the State Government to modify the levy and the State Government had not followed the procedure and the conditions for modification. The present is a case where the State Government had chosen to rescind the bye-laws empowering realisation of fee by establishment of barriers. The present is a case where the State Government has only directed that for realisation of fee barriers and check posts be not established. As noticed above, the State Government is empowered u/s 239(1) of the 1961 Act to issue direction to the Zila Panchayat regarding framing of the bye-laws and further under the 1975 Act the State Government is also empowered to issue directions to the Zila Panchayat. In the present case the challenge is to the Government order dated 7th July, 2008 which provided for abolition of barriers and check posts only. Thus the judgment in *Associated Cement Companies"* case (supra) is distinguishable.

27. Learned Counsel for the petitioner has also relied on the latest judgment of the Apex Court in the case of *Subhash Chandra and Anr. v. Delhi Subordinate*

Services Selection Board and Ors. reported in JT 2009(10) SC 645. In the aforesaid case the question was as to whether a member of scheduled caste or scheduled tribe of other State can claim benefit of scheduled caste or scheduled tribe in the Union territory of Delhi. By circular dated 8th April, 1994 issued by National Capital Territory of Delhi certain clarification was issued which provided that for issuance of other backward certificate to a person who has migrated from another State. The State Subordinate Selection Board issued advertisement for appointment as teacher. Certain candidates, who were applicants, filed writ petition praying for their consideration as scheduled caste candidate on the basis of scheduled caste certificates. Learned Single Judge interpreted the circular dated 2nd May, 1975 and took the view that the benefit may be denied to the first generation migrant on the basis of the said circular but the same cannot be denied to his progenies who are born and brought up in the migrated State. The writ petition was allowed with regard to those candidates who were born and brought up in the migrated State and their caste was directed to be notified as reserved caste in Delhi. The Division Bench dismissed the intra Court appeal. In the aforesaid context the matter was taken in the Apex Court. Following was laid down in paragraphs 38.1, 41, 41.3 and 41.5:

38.1 By virtue of Article 341, the Presidential orders made under Clause (1) thereof acquire an overriding status. But for Article 341 and 342 of the Constitution, it would have been possible for both the Union and the States, to legislate upon, or frame policies, concerning the subject of reservation, vis-a-vis inclusion of Castes/Tribes. The present of Article 338, 338A, 341 and 342 in the Constitution clearly preclude that.

....

41. It is well known that what cannot be done directly cannot be done indirectly. (See Ramdev Food Products Pvt. Ltd. Vs. Arvindbhai Rambhai Patel and Others, When an amendment or alteration is to be brought about by a Parliamentary Legislation, the same purpose cannot be achieved by taking recourse to circular letters.

....

41.3 Indisputably, the classes contemplated by Article 16(4) may be wider than those contemplated by Article 15(4). If they are backward classes for the purpose of Article 16(1) and 16(4) and not Scheduled Castes and Scheduled Tribes, they will come within the purview of the reservation for backwards classes and not the one which is exclusively meant for Scheduled Castes and Scheduled Tribes within the purview of reservation policy of the State.

....

41.5 Furthermore, a circular letter does not have the force of law [See Punjab Water Supply and Sewerage Board, Hoshiarpur Vs. Ranjodh Singh and Others,

28. In the aforesaid case circulars issued by the National Capital Territory of

Delhi were held to be mere circular, which cannot have any effect on the Constitution (Schedule Castes) Orders issued under Article 341 of the Constitution of India. The judgment in Subhash Chandra's case (supra) is clearly distinguishable since the said case was with regard to interpretation of Article 341 of Constitution of India and circulars issued by the National Capital Territory of Delhi with regard to the certificates to be issued to reserve category. The constitutional scheme as provided under Article 341 of Constitution of India cannot be in any manner effected by any circular of National Capital Territory of Delhi and in view of the aforesaid, the above observations were made by the Apex Court in the said judgment. Present is a case where power in the State Government to issue direction with regard to bye-laws has been specifically provided in the Statute and exercise of the said power does not contravene any constitutional power.

29. Learned Counsel for the petitioner has also relied on a Division Bench judgment of this Court in the case of Ram Gopal, Chairman, U.P. and Higher Education Services Commission, Allahabad and others Vs. State of U.P. and another, In the said case the Division Bench was considering the provisions of U.P. Higher Education Services Commission Act, 1980 and the U.P. State Control Over Public Corporation Act, 1975. In the said case the State Government has issued a direction restraining the Commission from making selection. The question arose as to whether the State in exercise of power under the 1975 Act can issue such direction. The Division Bench held that the Commission being a statutory body the State Government in discharge of its function can issue direction on question of policy but the Division Bench also held that the Statute, namely, U.P. Higher Education Services Commission Act, 1980 has delegated statutory power, which power assumes a legislative or delegated legislative functions and the same cannot be compelled to desist from performing such a legislative policy. Following was laid down in paragraphs 57 and 65 of the said judgment:

57. We have confined this discussion to the provisions of Section 78A of the Electricity Supply Act and have not adverted to refer to analogous of other Acts for the reason that it would unnecessarily drag the discussion. There appears to be no necessity for this Court to multiply the precedent of the High Courts as well as the Supreme Court on this question. Suffice to say that when any statute delegates to a particular authority certain statutory powers, such a power assumes a legislative or delegated legislative functions, which are quasi-legislative in nature, which such an authority is entitled to perform such powers in accordance with the legislative policy contained in such a statute, and it cannot be compelled to desist from performing such a legislative policy.

....

65. In view of the aforesaid reasons, we are of the view that the directions issued by the State Government to the Commission to stop the selection or not to make selection, was against the legislative policy contained in Sections 11 to

14 of the Commission Act, 1980. We are also of the view that Section 6(3) of the Commission Act, 1980, in respect of whom any action was contemplated under this section, but by means of the aforesaid notifications, the entire Commission was desisted from performing its legislative policy.

30. In the present case the direction of the State Government cannot be said to be against any legislative policy contained in any Section of the 1961 act. The judgement in Ram Gopal's case (supra) is, thus, clearly distinguishable.

31. Sri W.H. Khan, learned Counsel for the petitioner submitted that the bye-laws framed u/s 239 of the 1961 Act are law, which cannot be cancelled by a Government order. It is further contended that the correctness of the bye-laws, which were challenged before this Court, have already been upheld by Full Bench of this Court in the case of B. Agarwal Stone Product Ltd. v. State of U.P. and Ors. reported in 2007(68) A.L.R. 688. In the aforesaid Full Bench judgment the validity of the bye-laws were challenged on the ground that State legislature has no competence to frame any legislation with regard to levy of fee/toll tax on Gitti, Stones, Boulders, Surkhi, Coal and coal dust from the mining area. It was contended before the Full Bench that the field relating to regulation and development of mines and mineral is clearly covered by the parliamentary legislation Mines and Minerals Development and Regulation Act, 1957, therefore, the State legislature is denuded from enacting any Act for regulation and control of minerals. The said argument was repelled by the Full Bench holding that Section 142 read with Section 239 of the 1961 Act empower the Zila Panchayat to frame bye-laws and for levy of the aforesaid fee. The issue, which was raised before the Full Bench, was completely different. The challenge in the writ petition was very competence of the State Legislature to make any law under which the the bye-laws were framed for collecting fee from the boulders, gitti etc. in the present case neither the competence of the legislature nor bye-laws framed thereunder are under challenge. The issue in the writ petition is as to whether the State is competent to issue Government order dated 7th July, 2008 prohibiting all Zila Panchayat from establishing a barrier for collecting the fee from the tractors and trucks carrying Stone, Gitti, Boulder etc. Thus the Full Bench judgment in B. Agarwal's case (supra) does not help the petitioner in any manner.

32. Learned Counsel for the petitioner has further submitted that Government order dated 7th July, 2008 refers to two earlier Government orders dated 29th April, 2000 and 10th February, 2003, hence the Government order in question can at best relate to subject matter which was covered by the Government orders dated 29th April, 2000 and 10th February, 2003 referred therein. The copies of the Government orders dated 29th April, 2000 and 10th February, 2003 have been brought on the record as Annexure-2 and 3 along with the application dated 24th July, 2009 filed by the petitioner. The Government order dated 29th April, 2000 was issued on the subject matter of realisation in the name of "Padao Adda Sulk". It was mentioned in the said Government order that by framing bye-

laws u/s 239-Cha of the 1961 Act realisation of Padao Adda Sulk is being done from several years. The Government order further mentioned that complaints were being regularly received by the State Government with regard to misuse of the bye-laws and misbehaviour with the public. By the said Government order the Government decided to prohibit the above realisation (Padao Adda Sulk) and the Government order was issued for the aforesaid purpose. The subsequent Government order dated 10th February, 2003 was issued in continuation of the Government order dated 29th April, 2000 reiterating prohibition of Padao Adda Sulk and calling reports from the Divisional Commissioners.

33. The Government order dated 7th July, 2008 although refers to the aforesaid Government order dated 29th April, 2000 and 10th February, 2003 but subject matter of the Government order dated 7th July, 2008 is entirely different. The subject matter of the Government order dated 7th July, 2008 is prohibition of barriers for realisation of any kind of fee, revenue, tax, royalty etc. by the Zila Panchayats of the State. The substance of the Government order is thus prohibition of establishment of barriers for realisation of fee. The Government order does not prohibit realisation of fee, revenue, tax, royalty etc. but the sole object and purpose of the Government order is prohibition of barriers. In the second supplementary counter affidavit filed by the State the proceedings dated 2nd July, 2008 have been brought on the record as Annexure SCA-1. The decision taken in meeting dated 2nd July, 2008, which was attended by the Panchayati Raj Minister and the Principal Secretary, Panchayati Raj along with other Ministers and Secretaries of other departments. The said proceedings reveal that decision was taken to abolish the check posts and barriers of all departments except 37 identified barriers of the Trade Tax Department. It has been pleaded by the State in the second supplementary counter affidavit that the Government order dated 7th July, 2008 has been issued in pursuance of the decision taken by the Government on 2nd July, 2008. The Government order dated 7th July, 2008 has to be read in the light of the proceedings dated 2nd July, 2008. The petitioner himself has brought on the record copy of the Government order dated 2nd July, 2008 issued by the Principal Secretary, which was sent to the Conservator of Forest and other officers of the Forest Department. From the above, it is clear that various departments issued Government order relating to their department after the decision dated 2nd July, 2008 of the State Government. From the aforesaid, it is clear that the order dated 6th July, 2009 issued by the Collector, Sonbhadra directing the Sub Divisional Magistrate, Robertsganj and Duddhi to stop operating of barriers/check posts was clearly in accordance with the Government order dated 7th July, 2008 and could not be faulted with.

34. The submission of learned Counsel for the petitioner that the Government order dated 7th July, 2008 is confined to the subject matter of Government orders dated 29th April, 2000 and 10th February, 2003 thus also can not be accepted. The Government orders dated 29th April, 2000 and 10th February, 2003 were with regard to Padao Adda Sulk only. The Government order dated

29th April, 2000 was referred in the Government order dated 7th July, 2008 to indicate that earlier similarly the Padao Adda Sulk was prohibited which was being realised by framing bye-laws likewise the establishment of barriers for realisation of fee by Zila Panchayat by establishing barriers has been prohibited. It is also relevant to note that Government order dated 7th July, 2008 and the decision dated 2nd July, 2008 of the Government does not prohibit realisation of fee, tax, revenue, royalty etc. but it prohibits establishment of barriers for realisation of above fee.

35. The last submission of learned Counsel for the petitioner that had the petitioner was made aware that he would not be permitted to establish barriers for realisation of fee, he would not have given the offer of such an amount. He further contends that after issuance of the order dated 6th July, 2009 by the Collector the petitioner has suffered loss insofar as he is not permitted realisation by establishing barriers. Learned Counsel for the petitioner has further referred to the letter of the State Government dated 4th April, 2008 by which the State Government has directed for settling the Theka for the year 2008-09 by auction for realisation of fee from Morum, Gitti, Boulder etc. He submits that Theka was granted to the petitioner on 11th December, 2008, i.e., subsequent to the Government order dated 7th July, 2008. The petitioner realised the fee through check posts/barriers till 6th July, 2009 and it was only after 6th July, 2009 that certain interference is caused. The Government order dated 4th April, 2008 does not help the petitioner in any manner since the said Government order at best was confined to settle the Theka by auction for the year 2008-09. The said Government order was not with regard to realisation of fee by establishing barriers or check posts and in any view of the matter the Government order came on 7th July, 2008 prohibiting establishment of barriers after 7th July, 2008 and after 7th July, 2008 realisation of fee by establishing barriers was not permissible.

36. In facts of the present case the petitioner has made out a case for giving liberty to the petitioner to represent the matter to the Zila Panchayat for proportionate remission in the Theka amount subsequent to 7th July, 2009. We, however, make it clear that while considering any such representation the Zila Panchayat shall take into consideration that what has been prohibited is realisation through establishment of barriers and there has been no prohibition for realisation of fee by the Government order dated 7th July, 2008. The Zila Panchayat while considering the application shall also take into consideration the actual realisation made by the petitioner after 7th July, 2009.

37. In the result, the prayer of the petitioner for quashing the Government order dated 7th July, 2008 as well as letter of the Collector dated 6th July, 2009 and the letter dated 7th July, 2008 issued by the Special Secretary is refused. The Government orders dated 6th July, 2009 and 12th June, 2009 relate to check posts and barriers of various departments with regard to which the petitioner has no concern, hence the prayer of the petitioner for quashing said Government

orders cannot be granted. The petitioner, however, shall be at liberty to represent the matter to the Zila Panchayat, Sonebhadra for remission in the contract amount for the period subsequent to 6th July, 2009, which application if made within two weeks from today, shall be considered and appropriate decision be taken by the Zila Panchayat within a period of two weeks thereafter.

38. Subject to direction, as aforesaid, the writ petition is dismissed.