

(2005) 10 AHC CK 0043
In the Allahabad High Court
Case No : C.M.W.P. No. 46705 of 1999

Virendra Kumar Tyagi

APPELLANT

Vs

Ghaziabad Development Authority and Others

RESPONDENT

Date of Decision : 27-10-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 164
Electricity (Supply) Act, 1948 — Section 46(1), 79
Uttar Pradesh General Clauses Act, 1904 — Section 4(33A)
Uttar Pradesh Urban Planning and Development Act, 1973 — Section 15(2A), 19, 2, 41, 41(1)

Citation : (2006) 1 AWC 834

Hon'ble Judges : Saroj Bala, J; R.K. Agrawal, J

Bench : Division Bench

Advocate : N. Lal, for the Appellant; A.K. Misra, S.C., for the Respondent

Final Decision : Allowed

Judgement

R.K. Agrawal, J.—By means of the present writ petition filed under Article 226 of the Constitution of India, the petitioner Virendra Kumar Tyagi seeks the following reliefs :

(i) That a writ of certiorari or any other writ or order or direction may be issued for quashing the order dated 20.8.1999 issued by the O.P. No. 2 in so far as the same relates to the demand of a sum of Rs. 24,850 as mutation fee.

(ii) That a writ, order or direction in the nature of mandamus be issued commanding the O.P. Nos. 1 to 3 to show the authority under which the mutation charges have been demanded.

(iii) That a writ, order or direction in the nature of mandamus be issued commanding the O.P. Nos. 1 to 3 to mutate the name of the petitioner in respect of property No. K/H-1-, Kavi Nagar, Ghaziabad.

(iv) That any other writ, order or direction which the Hon''ble Court may deem fit and proper in the circumstances of the case be issued.

(v) Cost of the writ petition be awarded to the petitioner.

2. According to the petitioner the Ghaziabad Improvement Trust, a body corporate under the provisions of the Town Improvement Act, 1897 leased out Plot No. K/H-10, situated in Kavi Nagar, Ghaziabad to Smt. Rekha Kapoor, w/o Sri Prakash Kapoor vide registered lease dated 3rd January, 1967. After the enactment of the U. P. Urban Planning and Development Act, 1973 (hereinafter referred to as the Act), the Ghaziabad Improvement Trust became known as Ghaziabad Development Authority (hereinafter referred to as the Authority). Smt. Rekha Kapoor after obtaining permission from the Authority for sale of her leasehold interest in the aforesaid plot transferred it by way of registered sale deed dated 7th July, 1980 to Sri Sita Ram Jaipuria son of Sri Mangtu Ram Jaipuria. The name of Sri Sita Ram Jaipuria was mutated by the Authority and upon his death the name of Sri Ambrish Jaipuria was mutated by the said Authority. It is alleged that Sri Ambrish Jaipuria obtained permission for raising construction and also built a house on the said plot. He after obtaining permission from the Authority sold the leasehold rights in the plot including the constructions standing thereon in favour of the petitioner vide sale deed dated 19th August, 1997. The petitioner applied for mutation of his name by making an application on 19th March, 1998. The Officer on Special Duty-respondent No. 3 vide letter dated 15th May, 1998, demanded a sum of Rs. 24,850 as mutation fee calculated at the rate of 1% on sale consideration. The petitioner protested and also made inquiries from the office of the Authority as to on what basis the mutation fee is being demanded when he was informed that there is an office order dated 1st April, 1998, issued by the Vice Chairman of the Authority prescribing 1% of the sale consideration to be charged as mutation fee. The demand of mutation fee was reiterated by the respondent vide letter dated 20th August, 1999. The demand of mutation fee is under challenge in the present writ petition on the ground that even though u/s 15(2A) which was inserted by Act No. 3 of 1997 in the Act, mutation fee could be levied but in the absence of the same having been prescribed by Rules, the demand cannot be made.

3. In the counter-affidavit affirmed by Sri U. N. Thakur, Secretary in the Office of the Authority filed on behalf of all the respondents it has been stated that the Act permits imposition of mutation fee which has been fixed at 1% and, therefore, the demand of Rs. 24,850 as mutation fee is legally valid and does not require interference. The demand is in accordance with the provisions of the Act, Rules, Government orders etc. and the matter has also been placed before the Board or the Authority which has been approved and in terms of the said approval the demand of mutation charges has been made. As the counter-affidavit, referred to above, did not meet the various averments made in the writ petition and it was also very sketchy and vague, this Court vide order dated 4th March, 2004, directed the respondents to produce the record as also to file a detailed counter-

affidavit. The order dated 4th March, 2004, is reproduced below :

Hon"ble V. M. Sahai, J.

Hon"ble Krishna Murari, J.

In the counter-affidavit filed by Ghaziabad Development Authority it has been stated that under the Act mutation fee has been filed at 1% but no material has been filed along with the counter-affidavit.

The respondents are directed to produce the entire record including the decision of the Board by which the mutation fee has been fixed at 1%, the provisions under which the mutation fee can be fixed and file a detailed counter-affidavit within three weeks from today.

List on 5.4.2004.

In case the records are not produced and a detailed counter-affidavit is not filed within the time allowed aforesaid, in that case respondent No. 3 shall personally appear before, this Court on 5.4.2004 and explain as to why a detailed counter-affidavit has not been filed.

4. Pursuant to the direction given by this Court in the order dated 4th March, 2004, the respondents have filed a detailed counter-affidavit affirmed by Sri Rajendra Kumar Tyagi, Legal Assistant in the office of the Authority on 5th April, 2004. In this counter-affidavit it has been stated by the respondents that by the Government order dated 6th February, 1997, the State Government permitted levy of mutation charges up to 1% of the value of the property in question and the Vice Chairman of the Authority issued the order dated 1st April, 1998, providing for levy of 1% as transfer charges as provided vide Government order dated 6th February, 1997, which was approved by the Board in its meeting dated 12th February, 1999. Reference has been made to the provisions of Sections 41 and 57 of the Act for having the jurisdiction to issue Government order dated 6th February, 1997 and the Board's resolution dated 12th February, 1999, fixing the rate of 1% has been justified.

5. In the rejoinder-affidavit filed by the petitioner to the counter-affidavit affirmed by Sri U. N. Thakur, it has been stated that the rate of mutation charges can be fixed only by making Rule providing for the rate of the charges in accordance with Section 55 of the Act and, therefore, the fixation of mutation charges as done by the Vice Chairman of the authority or by the State Government is wholly illegal. In the rejoinder-affidavit filed by Sri Devendra Kumar Tyagi, brother of the petitioner to the counter-affidavit filed by Sri Rajendra Kumar Tyagi the same plea which has been taken in the writ petition has been again taken.

6. We have heard Sri N. Lal, learned Counsel for the petitioner and Sri A. K. Misra, learned counsel appearing for the respondents.

7. Learned Counsel for the petitioner submitted that u/s 15(2A) read with

Section 2(ii) of the Act the Authority can levy mutation charges but it has to be at such rate as may be prescribed. The word "prescribed" has not been defined in the Act and, therefore one has to fall back on the definition of word "prescribed" as given in Section 4(33A) of the U. P. General Clauses Act, 1904. According to him in view of the provisions of Section 4(33A) of the General Clauses Act, 1904 "prescribed" has to be given the same meaning which means prescribed by Rules made in the Act in which the word occurs. According to him the rate of mutation charges has not been prescribed by any Rules framed under the Act but on the other hand it has been done by the Government order dated 6th February, 1997 followed by an order issued by the Vice Chairman on 1st April, 1998 and the resolution of the Board dated 12th February, 1999. This order/resolution does not partake the nature of a Rule and, therefore, the respondent cannot demand any amount as fee/charges towards mutation fee. He has relied upon a decision of this Court in *Shaukat Ali Vs. Allahabad Development Authority and Another*, wherein this Court has held that there should be a specific statutory provision empowering the authority to impose levy otherwise it will be illegal.

8. Sri A. K. Misra had made a categorical statement that the mutation charges is being levied by the Authority pursuant to the Government order dated 6th February, 1997 and not under any Rules framed under the Act. He further submitted that under the Government order dated 6th February, 1997, order of the Vice Chairman dated 1st April, 1998 and the Board's resolution dated 12th February, 1999, the respondents were justified in demanding the payment of mutation charges for recording the name of the petitioner as owner/lessee of the plot in question. Deriving strength from the provisions of Section

2(ii) read with Sections 15(2A), 41 and 57 of the Act, he submitted that as the State Government had issued a direction to charge 1% as mutation charges, the Authority was under the obligation to carry out such directions. He further submitted that even though there is no Rule prescribing the rate of mutation charges the respondents are having the executive power and right to realise mutation charges. In support of the aforesaid submissions he has relied upon the following decisions :

(i) *U. P. State Electricity Board, Lucknow v. City Board, Mussoorie and Ors.* (1985) 2 SCC 19;

(ii) *Surinder Singh Vs. Central Government and Others*, and

(iii) *Orissa State (Prevention and Control of Pollution) Board Vs. Orient Paper Mills and Another*,

9. Having given our anxious consideration to the various pleas raised by the learned Counsel for the parties, we find that under the Act mutation charges can be levied and demanded as would be clear from the provisions of Sections 2(ii) and 15(2A) of the Act which are reproduced below for ready reference :

2 (ii) "mutation charges" means the charges levied u/s 15 upon the person seeking mutation in his name of a property allotted by the Authority to another person.

15(2A) The Authority shall be entitled to levy development fees, mutation charges, stacking fees and water fees in such manner and at such rates as may be prescribed.

10. From a reading of provisions of Section 15(2A) of the Act it is seen that the Authority is entitled to levy mutation charges in such manner and at such rate as may be prescribed. In the definition clause of Section 2 of the Act neither the word "prescribed" has been defined nor there is any other provision under Act which has defined the said word. Thus, the meaning to the word "prescribed" has to be given the same meaning which has been given under the provision of U. P. General Clauses Act, 1904. Sub-section (33A) of Section 4 of the U. P. General Clauses Act, 1904, defines the word "prescribed" as follows :

4 (33A) "Prescribed" shall mean prescribed by rules made under the Act in which the word occurs.

11. u/s 55 of the Act the State Government has been empowered to make Rules. Under Sub-section (1) of Section 55 of the Act the Rules can be made by the State Government by notification in the Gazette. In the present case, the order prescribing rate of mutation charges has not been gazetted which is also admitted by Sri A. K. Misra, learned Counsel for the respondents. It is simply an order issued by the State Government. It is well-settled that if a statute provides that an act that has to be done in a particular manner then it has to be done in that manner alone or not at all. The Apex Court in the case of *Dhanajaya Ready v. State of Karnataka* (2001) 4 SCC 9 ; *Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others*, ; *Mehsana District Central Cooperative Bank Ltd. and Others Vs. State of Gujarat and Others*, and *Ram Phal Kundu Vs. Kamal Sharma*, , has held that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. The Apex Court in the case of *Ram Phal Kundu* (supra) has held as follows :

The rule laid down in *Taylor v. Taylor* that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that other methods of performance are necessarily forbidden, was adopted for the first time in India by the Judicial Committee of the Privy Council in *Nazir Ahmad v. King Emperor*. The question for consideration was whether the oral evidence of a Magistrate regarding the confession made by an accused, which had not been recorded in accordance with the statutory provisions viz. Section 164, Cr. P.C. would be admissible. The First Class Magistrate made rough notes of the confessional statements of the accused which he made on the spot and thereafter he prepared a memo from the rough notes which was put in evidence. The Magistrate also gave oral evidence of the confession made to him by the accused. The procedure of recording confession in accordance with Section 164,

Cr. P.C. had not been followed. It was held that Section 164, Cr. P.C. having made specific provision for recording of the confession, oral evidence of the Magistrate and the memorandum made by him could not be taken into consideration and had to be rejected. In *State of U. P. v. Singhara Singh* a second class Magistrate not specifically empowered, had recorded confessional statement of the accused u/s 164, Cr. P.C. The said confession being impossible, the prosecution sought to prove the same by the oral evidence of the Magistrate, who deposed about the statement given by the accused. Relying upon the rule laid down in *Taylor v. Taylor* and *Nazir Ahmad v. King Emperor*, it was held that Section 164, Cr. P.C. which conferred on a Magistrate the power to record statements or confessions, by necessary Implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him. This principle has been approved by this Court in a series of decisions and the latest being by a Constitution Bench *C.I.T. v. Anjum M.H. Ghaswala* (SCC para 27) .

12. As the rate of mutation charges under Sub-section (2A) of Section 15 of the Act has to be prescribed and the word "prescribed" means prescribed by Rules under the Act in view of the provisions of Sub-section (33A) of Section 4 of the General Clauses Act, 1904 and the Rules to be framed by the State Government u/s 55 of the Act has to be notified in the Gazette which has admittedly not been done in the present case, we are of considered opinion that any demand of mutation charges by the respondents for mutating the name of the petitioner in respect of the plot/ house in question is wholly illegal and without the authority of law.

13. So far as reliance placed on Section 41 of the Act to the effect that the respondents are bound to carry out such directions as may be issued to it from time to time by the State Government is concerned, Sub-section (1) of Section 41 of the Act provides that the directions which have to be issued by the State Government is for the efficient administration of the Act. For ready reference Sub-section (1) of Section 41 is reproduced below :

41(1) The Authority, the Chairman or the Vice Chairman shall carry out such directions as may be issued to it from time to time by the State Government for the efficient administration of this Act.

From a reading of the aforesaid provision it will be seen that only such direction which has been issued by the State Government for the efficient administration of the Act has to be carried by the Authority including its Chairman and Vice Chairman. Here the direction issued by the State Government vide Government order dated 6th February, 1997, cannot be said to have been issued for the efficient administration of the Act inasmuch as it has prescribed the mutation charges which, otherwise, is required to be prescribed by Rules to be duly notified in the Gazette in terms of Sections 15(2A) and 55(1) of the Act read with Section 4(33A) of the U. P. General Clauses Act, 1904. Likewise reliance placed by the learned Counsel for the respondent on the provisions of Section 57 of the Act which empowers the Authority to make bye-laws consistent with the Act and

the rules for carrying out the purposes of the Act is also misplaced. Under the aforesaid provisions there should be specific statutory provision empowering the authority to impose levy otherwise it will be illegal. The order dated 1st April, 1998 and Board's resolution dated 12th February, 1999, even though if they are treated to be bye-laws framed under the Statute the Authority cannot be said to have the authority to levy mutation charges for the simple reason that mutation charges can be prescribed only by making the Rule and not otherwise.

14. In the case of Shaukat Ali (*supra*) relied upon by the learned Counsel for the petitioner this Court has held that there should be a specific statutory provision empowering the authority to impose levy otherwise it will be illegal. In the present case we find that u/s 15(2A) of the Act the authority has the power to levy mutation charges. Thus, the aforesaid decision does not advance the case of the petitioner.

15. So far as the decisions relied upon by the learned Counsel for the respondents is concerned we find that in the case of U. P. State Electricity Board (*supra*) the Apex Court has considered the question as to whether the Board has the power to fix Grid Tariff u/s 46(1) of the Electricity (Supply) Act, 1948 or not when u/s 79(h) of the said Act the Regulations have not been framed by the Board. Provisions of Section 46(1) of the Electricity (Supply) Act, 1948, provides that the tariff to be known Grid Tariff shall in accordance with any Regulations made in this behalf be fixed from time to time by the Board in respect of each year for which the scheme is enforced and the tariff fixed may differ for different areas. u/s 79(h) of the said Act the Electricity Board has been authorised to make Regulations laying down the principle governing the fixing of Grid Tariff. The Apex Court has held that Section 46(1) of the said Act does say that no Grid Tariff can be fixed until such Regulations are made and it only provides that the Grid Tariff shall be in accordance with any Regulations made in this behalf which means that if there are Regulations, Grid Tariff should be fixed in accordance with such regulations and nothing more. The Apex Court has further held that framing of Regulations u/s 79(h) of the said Act is not a condition precedent for fixing Grid Tariff. Thus, the aforesaid decision of the Apex Court has no application in the facts and circumstances of the present case inasmuch as u/s 15(2A) of the Act the Authority has been empowered to levy mutation charges in such manner and at such rate as may be prescribed. The rate has to be prescribed in accordance with law before it can be levied.

16. In the case of Surinder Singh (*supra*) the Apex Court has held that where an authority is empowered by statute to exercise power subject to any Rules but Rules not made, the authority has jurisdiction to exercise that power by issuing administrative instructions subject to any statutory provision to the contrary. In the aforesaid case the Apex Court was considering the question as to whether in the absence of the Rules framed under the provisions of the Displaced Persons (Compensation and Rehabilitation) Act, 1954, the Central Government had an authority in law to provide for disposal of urban agricultural land by auction sale.

Section 8 of the said Act provided that a displaced person shall be paid compensation as determined u/s 7 subject to any Rules that may be made under this Act. The Apex Court has held that where a statute confers powers on an authority to do certain acts or exercise power in respect of certain matters, subject to Rules, the exercise of power conferred by the statute does not depend on the existence of Rules unless the statute expressly provides for the same. It has been further held that in other words framing of the Rules is not a condition precedent to the exercise of the power expressly and unconditionally conferred by the statute. The expression "subject to the Rules" only means, in accordance with the Rules, if any. If Rules are framed, the powers so conferred on authority could be exercised In, accordance with these Rules but If no Rules are framed there is no void and the authority is not precluded from exercising the power conferred by the statute. The principle laid down in this case by the Apex Court is not applicable in the facts and circumstances of the present case as the language of Section 15(2A) of the Act is very clear as the rate of mutation charges are to be prescribed. The word "prescribed" has to be done by making Rules in accordance with the provisions of Section 4(33A) of the U. P. General Clauses Act, 1904 read with Section 55 of the Act.

17. In the case of Orissa State (Prevention and Control of Pollution) Board (supra) the Apex Court has held that once the manner is prescribed under the Rules, undoubtedly, the declaration of the area has to be only in accordance with the manner prescribed but absence of Rules will not render the Act inoperative. The power vested u/s 19 of the Environment Protection and Pollution Control-Air (Prevention and Control of Pollution) Act, 1981 would still be exercisable as provided under the provision, i.e., by declaring an area as air pollution control area by publication of notification in the Official Gazette. Non-framing of Rules does not curtail the power of the State Government to declare any area as air pollution control area by means of a notification published in the Official Gazette. The area was notified as air pollution control area by the State Government as authorized and provided by virtue of the powers conferred u/s 19 of the said Act. The declaration is provided to be made by means of a notification published in the official Gazette. No other manner is prescribed nor exists. The relevant notification issued by the Government cannot be said to be contrary to any Rules in existence as framed by the Government. The aforesaid decision is not applicable in the facts and circumstances of the case as the language of Section 15(2A) is very clear as the rate of mutation charges are to be prescribed. The word "prescribed" has to be done by making Rules in accordance with the provisions of Section 4(33A) of the U. P. General Clauses Act, 1904 read with Section 55 of the Act.

18. In view of the foregoing discussions we are of the considered opinion that as the rate of mutation charges have not been prescribed by any Rules framed u/s 55(1) of the Act as required by the provisions of Section 4(33A) of the U. P. General Clauses Act, 1904, the demand of mutation charges by means of letter dated 20th August, 1999, is wholly illegal and without authority of law. The said

demand is liable to be and is hereby quashed. As the demand of mutation charges has been quashed, the respondents are directed to mutate the name of the petitioner in respect of the House No. K/H-10, Kavi Nagar, Ghaziabad, provided there is no other impediment, within one month from the date a certified copy of this order is produced before the respondent No. 1.

19. In the result, the writ petition succeeds and is allowed with costs which we assess at Rs. 2,500.