
(2013) 6 ADJ 1

Allahabad High Court (Lucknow Bench)

Case No: Writ Petition No"s. 657, 367, 388, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 695 (MB) of 2002, 2354, 2493, 2510 (MB) and 2511 of 2004 and 693 (MB) of 2002

Anoop Kumar Jaiswal
and Another

APPELLANT

Vs

State of U.P. and
Others

RESPONDENT

Date of Decision: May 29, 2013

Acts Referred:

Constitution of India, 1950 " Article 14, 19(1)(g)#Uttar Pradesh General Clauses Act, 1904 " Section 21#Uttar Pradesh Municipalities Act, 1916 " Section 298(1)

Citation: (2013) 6 ADJ 1

Hon'ble Judges: Vishnu Chandra Gupta, J; Rajiv Sharma, J

Bench: Division Bench

Advocate: appoli Srivastva, for the Appellant; Namit Sharma, R.K. Singh, Shailendra Singh Chauhan and Shashi Prakash, for the Respondent

Judgement

1. In the afore-captioned batch of writ petitions, the cause of action for filing writ petitions and the relief sought are identical in nature and as such

all the writ petitions are being decided by a common judgment. Heard Sri S.K. Srivastava, Ms. Appoli Srivastava, Sri Amitabh Rai, Ms. Sujata

Srivastava, Mr. Manish Kumar, Mr. Ahilesh Kalra and Mr. Shailendra Kumar Singh, learned Counsel for the petitioners and Sri Namit Sharma,

Sri R.K. Singh, Sri Shailendra Singh Chauhan, Sri Shashi Prakash Singh and Sri Shafiq Mirza, learned Counsel for the respective opposite parties

and Sri H.P. Srivastava, learned Additional Chief Standing Counsel.

2. All the petitioners, except the petitioners of Writ Petition No. 2493 (MB) of 2004, Writ Petition No. 2511 (MB) of 2004, writ petition No.

2510 (MB) of 2004 and writ petition No. 2354 (MB) of 2004, are holders of excise licenses for selling Indian Made Foreign Liquor in sealed

bottles for which licences were granted to them as per provisions of The U.P. Excise Act, on payment of license fee for financial year 2001-2002

by the Collector, Lucknow. They have questioned the bye-laws framed by Nagar Nigam, Lucknow, which enjoins upon the petitioners to take

licence, in view of clauses 5 and 7 of the Bye-laws, from Nagar Nigam for selling Indian Made Foreign Liquor (IMFL) and pay Rs. 12,000/- per

annum as licence fee.

3. According to petitioners, Nagar Nigam does not have any power to impose a license on the petitioners when they have already obtained a

license from the Excise Department under the U.P. Excise Act. It has been contended on behalf of the petitioners that U.P. Excise Act and the

Rules framed thereunder fully cover all aspects incidental to the excise business. Also, the license granted to them lays down very strict conditions

for a liquor shop to operate. The conditions include the location of the shops, its opening and closing time, the premises at which the shop is

located can be searched any time not only by the excise inspector but even by the police officers. Therefore, petitioners argue that there is nothing

left for the Nagar Nigam to regulate upon.

4. According to petitioners, the U.P. Excise Act has been enacted by the State Government under Entries 8 and 51 of List II, Schedule VII of the

Constitution and therefore, the bye-laws cannot have an overriding effect upon a constitutionally valid Act. Further, a local body cannot

superimpose its authority over that of the State body as the excise business is already controlled by the State through the Excise Commissioner.

The license to the petitioners have been granted by the Excise Department but if the Nagar Nigam also starts granting license this will lead to

conflict as denial of license by the Nagar Nigam will render the license granted by the Excise department ineffective or useless.

5. The principle of taking license fee requires providing of certain services in lieu of it but bye-laws formulated by the Nagar Nigam does not

prescribe or lay down the type of services, which they will render to an Excise licensee. Lucknow Nagar Nigam has sought to justify the said bye-

laws on the basis of Section 541(20) read with Section 438 of U.P. Nagar Nigam Adhiniyam. Sections 541 and 438 of U.P. Nagar Nigam

Adhiniyam speaks about the premises where any trade is to be done and details of premises can be prescribed. The bye-law is silent on this point.

Similarly, Section 438(1)(d) provides for taking licence for doing trade. In fact, if entire section is perused, it would reflect that. it intends to control

the dangerous trade. The word "trade" used in this section would not be so called trade of liquor. The reason that there are certain trades on

account of their pernicious nature cannot be called trade as is commonly understood. In such alleged trades, like Excise, gambling, lottery etc, it is

only the privilege of the State to exploit the earnings of money. It may do itself or through its agency under its strict control. The State only sells

its privilege to an Excise licensee as held in Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, . In ordinary trade,

there is a fundamental right under Article 19(1)(g) of the Constitution, but in Excise Trade there is no fundamental right as held by the Apex Court

in number of cases. The Apex Court in the case of Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, , has held that the

Excise Trade is ""Res Extra Commercian"" that is non-commercial i.e. trade of no commerce, Therefore, selling of liquor is not covered by Section

541 and 438 of the Nagar Nigam Adhiniyam.

6. It has also been vehemently contended that prior to formulating bye laws by the Nagar Nigam, its proposal has to be published in the

Government Gazette u/s 543 of the said Adhiniyam, inviting objections from public, which is lacking in the instant case and as such bye-laws

enacted by the Nagar Nigam suffers from procedural defect. Moreover, there is no notification of the State Government for imposing licence fee

contained in the bye-laws. It was through Government order dated 27.10.1994 that licence fee was imposed on IMFL which was a new item and

imposing licence fee on new item was in breach of Section 543 of the Act.

7. Lastly, it has been argued on behalf of petitioners that there is vast distinction between "fee" and "tax". The Tax is revenue for the State as well

as for the Corporation to meet its obligations. Fee is usually charged for rendering some service, which cannot be source of income. Lucknow

Nagar Nigam in its counter-affidavit has admitted that it is regulatory as well as compensatory and it has filed its budget but no expenditure has

been shown in it for regulating Excise Trade. Under the garb of taking "Anugya Patra" as provided in the Bye-laws, the Nagar Nigam is granting

licences, which is to be taken by the licencees of IMFL shop and imposing licence fee upon it, as would be clear from clauses 5 and 7 of the Bye

Laws which provides for obtaining licence from Nagar Nigam. The end result would be that there will be dual control on excise business of both

Nagar Nigam & Excise Department, and if no permission or licence is granted by Nagar Nigam, then the same would nullify the Excise licence

granted by the Collector, Lucknow.

8. Petitioners of Writ Petition No. 2354 (MB) of 2004, Writ Petition No. 2510 (MB) of 2004 and writ petition No. 2511 (MB) of 2004 were

granted licence by the Excise Collector for running Indian Made Foreign Liquor or country liquor shop in district Unnao and petitioners of Writ

Petition No. 2493 (MB) of 2004 were granted Excise License to run English Wine Shop and country liquor shop in District Rae Bareli.

9. In Writ Petition No. 2493 (MB) of 2004, petitioner No. 1 was granted licence to run an English Wine Shop at Rae Bareli for the Excise Year

2003-2004, whereas petitioner No. 2 was granted licence to run a country liquor shop by the Collector, Rae Bareli for the Excise Year 2003-04.

10. Petitioners of Writ Petition No. 2493 (MB) of 2004, Writ Petition No. 2354 (MB) of 2004, Writ Petition No. 2510 (MB) of 2004 and Writ

Petition No. 2511 (MB) of 2004 have questioned the bye-laws framed by the respective Nagar Palikas in purported exercise of powers u/s 298

of the Uttar Pradesh Municipalities Act, 1916 whereby licence fee is recoverable by the Nagar Palika from the persons running the excise shops.

According to petitioners, u/s 298(1) of the U.P. Municipalities Act, the Nagar Palika Parishad has got powers to make bye-laws for the purpose

of promoting or maintaining the health, safety and convenience of inhabitants of the municipal area of the district and for the furtherance of the

Municipal Administration under the Act, in the district. However, this Section does not empower the Nagar Palika to charge any licence fee on

excise shops which are exclusively covered by the provisions of the Uttar Pradesh Excise Act. It has been contended that licence fee is being

charged from the petitioners for the alleged purpose of regulating the excise business of the petitioners. When the licence of the petitioners is

already being regulated under the provisions of the Excise Act and Rules framed thereunder for which the State Government has already provided

separate mechanism under the Excise Act. Therefore, no restrictions or conditions can be imposed by the Nagar Palika Parishad, on the business

of the petitioners or for that matter any regulatory fee can be charged by the Nagar Palika Parishad.

11. In contrast, Counsel for the respondents have argued that the contesting respondents were much within their power in formulating the

impugned bye laws. Clarifying the position, it has been submitted that u/s 541 of the Nagar Nigam Act, the Nagar Nigam and u/s 298(1) of the

U.P. Municipalities Act, the Nagar Palika Parishad is vested with the power to frame bye-laws. from time to time in respect of the matters

envisaged in different sub-section of Section 541, so long as the bye-laws are not inconsistent with the Nagar Nigam Adhiniyam. Further, a reading

of Sections 541(2), (36) and (41) together with Section 438(1)(a) and (d), trade in country liquor as well as IMFL liquor has been regulated by

the Nagar Nigam in its bye-laws, hence it cannot be said that the Nagar Nigam is incompetent to frame the bye-laws in exercise of the power

vested in it under the Act.

12. Inviting our attention towards Uttar Pradesh Number and Location of Excise Shop Rules, 1968 framed in exercise of the powers vested under

Clause (e) and (f) of sub-section (2) of Section 40 of the Uttar Pradesh Excise Act, 1910 read with Section 21 of the U.P. General Clauses Act,

1904, and in supersession of all rules and orders on the subject, made by the Governor, learned Counsel for the Nagar Nigam submitted that Rule

5(8) enshrines that in urban areas, no new shop shall be opened without notice to the Nagar Mahapalika, Town area or notified area, as the case

may be.

13. Section 114 of the Nagar Nigam Adhiniyam provides for obligatory duties of the Corporation. Sub section (46) of Section 2 of the Nagar

Nigam Adhiniyam defines ""nuisance"" to include any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance or

offence to the sense of sight, smell or hearing or which is or more may be dangerous to life or injurious to health or property. Thus, it is evident that

for carrying out the obligatory duties, huge amount of money is required, which is recovered by way of municipal taxes/fees.

14. Moreover, as far as notification pertaining to bye-law is concerned, it has been pointed out that the impugned bye-law was duly notified in the

U.P. Gazette dated 29.3.1997 and public notice was also given through leading newspaper in the year 2000. Therefore, there is no procedural

defect as asserted by petitioners. According to him, u/s 541, the Nagar Nigam is fully competent to pass such laws in matters envisaged in different

sub-sections of Section 541, so long as bye-laws are not inconsistent with the Nagar Nigam Adhiniyam.

15. Before dealing with the rival contentions, it would be relevant to mention that though it is said that there is no generic difference between the tax

and a fee and the taxing power of a State may manifest itself in different forms known respectively as special assessments, fees and tax. Our

Constitution has for legislative purposes, made a distinction between the tax and fee. Hence while drafting the Bill or making the legislation, one has

to keep in mind the relevant entries of the Constitution of India. The distribution of the power to levy a tax is not identical, with that of the power to

levy a fee. Taxes are specifically distributed as between the Union and the State Legislation by various entries in List I and List II and residuary

power to levy a tax which is not enumerated in any of the entries lies under Entry 97 of List I exclusively for the Parliament. On the other hand,

entry relating to fee has been specifically mentioned in the end of the three List I, II and III.

16. Every legislature has the power to levy fee which is co-extensive with power to legislate with respect to substantive matters and legislature may

while making law relating to a subject-matter within its competence, levy a fee with reference to the services that would be rendered by the State

under such Law. Taxes are specifically divided between List I Entries 82 to 92A and in List II Entries 46 to 63. The fees are however, not

mentioned specifically. There is a general entry towards the end of each list which empowers the legislature to levy a fee in respect of any matter

over which it has legislative power according to the relevant List. The power to levy fee is thus distributed in Entry 96 of List I, 66 of List II and 46

of List III. The result is that power of legislature to levy a fee or tax is to be determined by complying different test. If a fee is levied on the capacity

of the payer, then it shall not be treated as fee and will be held to be a tax.

17. The traditional view, as asserted by the Counsel for the petitioners, that there must be actual quid pro quo for a fee has undergone a sea

change. In this connection, we may refer to and rely upon the decision of Hon"ble The Apex Court in Kishan Lal Lakhmi Chand and Others Vs.

State of Haryana and Others, : where it was held by Hon"ble The Supreme Court:

The traditional view that there must be actual quid pro quo for a fee has undergone a sea change. The distinction between a tax and fee lies

primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special

advantage is secondary to the primary purposes of regulation in public interest, if the element of revenue for general purposes of the State

predominates, the levy becomes a tax. In regard to fee, there is, and must always be, co-relation between the fee collected and the service

intended to be rendered. In determining whether a levy is a fee, the true test must be whether its primary and essential purposes it to render specific

services to a specified area or class; it may be of no consequence that the State may ultimately and indirectly be benefited by it. The power of any

legislature to levy a fee is conditioned by the fact that it must be ""by and large"" a quid pro quo for the services rendered. However, co-relationship

between the levy and the services rendered/expected is one of general character and not of mathematical exactitude. All that is necessary is that

there should be a ""reasonable relationship"" between the levy of the fee and the services rendered. There is no genetic difference between a tax and

a fee. Both are compulsory extractions of money by public authorities. Compulsion lies in the fact that payment is enforceable bylaw against a

person in spite of his unwillingness or want of consent. A levy in the nature of a fee does not cease to be of that character merely because there is

an element of compulsion or coerciveness present in it, not is it a postulate of a fee that it must have direct relation to the actual service rendered by

the authority to each individual nor that each should obtain the benefit of the service.

18. In view of the aforesaid law laid down by Hon"ble Apex Court in M/s. Kishan Lal Lakhmi Chand v. State of Haryana, there may be a

regulatory fee and a compensatory fee. In the cases of licence fee, which is a regulatory fee, the condition of quid pro quo is not necessary. It

would, therefore, appear that a provision for the imposition of licence fee does not necessarily lead to the conclusion that the fee must be only for services rendered.

Same view was taken:

P. Kannadasan etc, etc. Vs. State of Tamil Nadu and others [OVERRULED], . It has been observed that:

Even in the matter of fees, it is not necessary that element of quid pro quo should be established in each and every case, for it is well-settled that

fees can be both regulatory and compensatory and that in the case of regulatory fee, the element of quid pro quo is totally irrelevant.

19. In Vam Organic Chemicals Ltd. and Another Vs. State of U.P. and Others, --

...has approved that there is a distinction between the fees charged for licence, i.e. regulatory fees and the fees for the services rendered as

compensatory. It approved the view that in case of regulatory fees like the licence fees, existence of quid pro quo is not necessary.

20. In this connection, we may also refer to a recent decision of Hon"ble the Apex Court in Secunderabad Hyderabad Hotel Owners Association

and Others Vs. Hyderabad Municipal Corporation, Hyderabad and Another, . Relevant paragraph 9 reads as under:

9. It is, by now, well-settled that a licence fee may be either regulatory or compensatory. When a fee is charged for rendering specific services, a

certain element of quit pro quo must be there between the services rendered and the fee charged so that the licence fee is commensurate with the

cost of rendering the service although exact arithmetical equivalence is not expected. However, this is not the only kind of fee which can be

charged. Licence fee can also be regulatory when the activities for which a licence is given required to be regulated or controlled the fee which is

charged for regulation for such activity would be validly classifiable as a fee and not a tax although no service is rendered. An element of quid pro

quo for the levy of such fees is not required although such fees cannot be excessive.

In Chakresh Kumar Jain and Others Vs. State of Uttar Pradesh and Others, , a Division Bench of this Court pointed out the distinction between a

compensatory fee and a. regulatory fee. Quid pro quo is required in the case of a compensatory fee but not for a regulatory fee. In P. Kannadasan

etc, etc. Vs. State of Tamil Nadu and others [OVERRULED], , the Supreme Court observed that there is no need for any element of quid pro

quo in a regulatory fee. The Supreme Court took the same view in the State of Tripura and others Vs. Sudhir Ranjan Nath, . Regulatory fees are

charged because staff has to be engaged for enforcing the regulations, and their salaries have to be paid and other expenses incurred in this

connection. In view of the above clear legal position, the case laws relied upon by the petitioners are of no avail to them.

21. It is wrong to say that the liquor has no correlation with increasing health disease, the health hazards of liquor intake are well known and time

and again liquor has proved a threat to peace and law and order. There is no denying that the effects of liquor intake cause nuisance to public. The

state Government by a Government Order dated 27.10.1994 had issued directions to all Nagar Nigam/Nagar Palika Parishad/Nagar Panchayat

throughout the State of U.P. in respect of imposition of license fee in respect of the commodity alongwith the rate of fee to be charged. A list of

commodities and the fee to be charged was annexed with the said Government Order. One of the objects of this Government order was to

empower the Nagar Nigam to create its sources of income in order to meet its huge financial burden for providing different services and carrying

out the obligations prescribed under the Act for the public purposes. By another Government Order the State Government directed the Nagar

Nigam/Nagar Palika Parishad/Nagar Panchayat to amend the bye-laws. Therefore, this imposition of fee was done not only with respect to liquor

trade but in respect of other commodities as well. Hence in this case there is no violation of Article 14 of the constitution. Further the imposition of

license fee is different from the levy of excise duty or fee under the Excise Act. The Nagar Nigam in this case is not charging for any other tax in

respect of liquor and it is only the license fee that is being charged for the aforesaid purposes, so there is no question of dual taxation. Also, the

subject-matter in case of fee by the Nagar Nigam and that of the Excise license is very different. Therefore, both should not be confused to be one

and the same.

22. Moreover, as far as notification of the bye-law is concerned, it has been pointed out that the impugned bye-law was duly notified in the U.P.

Gazette dated 29.3.1997 and public notice was also given through leading newspaper in the year 2000, as well as in the year 2001 on 6.2.2001

and 21.3.2001 requiring the persons carrying trade in liquor to obtain license from Nagar Nigam before opening of new shops which was also in

consonance with rule 5(8) of Uttar Pradesh Number and Location of Excise Shops Rules, 1968.

23. u/s 541, the Nagar Nigam is fully competent to enact laws in matters envisaged in different sub-sections of Section 541, so long as the bye-

laws are not inconsistent with the Nagar Nigam Adhiniyam. The Section 541(20), (36) and (41) state as under:

(20) the control and supervision of all premises used for any of the purposes mentioned Section 438 and of all trades and manufactured carried

thereon and the prescribing and regulating of the construction, dimensions, ventilation, lighting, cleansing, drainage and water supply of any such

premises.

(36) securing the protection of public markets, gardens, public parking places and open spaces vested in or under the control of the Corporation

from injury, or misuse, regulating their management and the manner in which they may be used by the public and providing for proper behavior of

persons in them.

(41) fixing of fees for any license, sanction or permission to be granted by or under this act; from the perusal of sub-section 20 of Section 541, it

has been provided that the control and supervision of all premises used for any of the said purposes mentioned in Section 438 and for all trade and

manufactures carried thereon and the prescribing and regulating of the construction, dimensions, ventilation, lighting, cleansing drainage wand water

supply of any such premises;

The Section 438 of the Act, provides:

(1) Except under and in conformity with the terms and conditions of a license granted by the Mukhya Nagar Adhikari, no person shall--

(a) Keep in or upon any premises any article specified in the bye-laws as the maximum quantity of such article which may at one time be kept in or

upon the same premises without a license.

Clause (d) of sub section (i) of Section 438 further provides that no person shall carry on or allow to be carried on, in or upon any premises:

(I) any trade or operation connected with any trade specified in the bye-laws,

(II) any trade or operation which is dangerous to life or health or property, or likely to create nuisance either from its nature or by reason of the

manner in which or the conditions under which, the same, is or is proposed to be carried on.

24. Thus, from the reading of the above sections, it is imminently clear that the IMFL and Country liquor is of such nature that it can be regulated

by the Nagar Nigam.

25. Further, as far as the position of the Nagar Nigam is concerned with regards to the state acts and laws in the matter of Excise Shops it is

important to our discussion to mention rule known as "Uttar Pradesh Number and Location of Excise Shop Rules, 1968" framed in exercise of

powers under clause (e) and (f) of sub-section (2) of Section 40 of Uttar Pradesh Excise Act, 1910, read with Section 21 of the U.P. General

Clauses Act, 1904. The Rule-5(8) of the said rules provide that in urban areas, no new shop shall be opened without notice to the Nagar

Mahapalika, Town area or notified area, as the case may be.

26. As stated in foregoing paragraphs, Nagar Nigam is a body that has to perform certain obligatory duties. These duties are provided u/s 114 of

the Nagar Nigam Adhiniyam. A cursory look at the section will make it abundantly clear that these duties are directly related to public welfare,

health, peace and well being. Further, in order to carry out these duties there is a huge financial burden that the Nagar Nigam has to meet, this

financial burden is reduced by collecting taxes and fees in lieu of these services. As averred above, Rule 5(8) enshrines that in urban areas, no new

shop shall be opened without notice to the Nagar Mahapalika, Town area or notified area, as the case may be. Sending of notice is not a mere

formality. Requiring of notice denotes that if any objection is made by the Nagar Nigam it will be decided by the collector. Thus the objections

raised by the Nagar Nigam cannot be ignored or taken lightly.

27. Since we are concerned with a regulatory fee there is no need for any quid pro quo, though the fee cannot be excessive. The assertion of the

petitioners that charging of Rs. 12,000/- per annum is highly excessive. The bye-laws have provided Rs. 6,000/- as licence fee for country-made

liquor and Rs. 12,000/- for foreign liquor. In our opinion, the fee of Rs. 6,000/- for country-made liquor and Rs. 12,000/- per annum is not

excessive as it works out to only about Rs. 500/- and Rs. 1,000/- per month, which is a meagre amount. In the result, we do not find any merit in

the writ petitions. Writ petitions are accordingly dismissed. Costs easy.