ALLAHABAD HIGH COURT

Lala Raj Kishore

Vs.

District Board of Seharanpur

Civil Misc. Writ No. 55 of 1954

(M.L. Chaturvedi, J.)

04.05.1954

ORDER

M.L. Chaturvedi, J.

1. This is a petition under Article 226 of the Constitution by eight persons, who own machine, for hulling rice, or a flour mill, or an oil crusher or a sugar-cane crusher. Respondent No. 1 is the District Board of Shaharanpur and respondent No. 2 to 5 are lessees of the right of the respondent No. 1 to collect license fee from the petitioners and others.

2. On 17-1-1948 the District Board of Shaharanpur (respondent No. 1) approved certain draft bye-laws by means of a resolution and directed their publication in papers. They were published in the Hindi Weekly called "Hindu", and in the English Weekly called the "Peoples General of Shaharanpur". After the publication, the matter came up before the Board on 11-11-1948 when the Board finally approved the bye-laws and resolved that they should be submitted to the Commissioner for his sanction. The Commissioner sanctioned them and the bye-laws were published in the U.P. Gazette dated 28-5-1949, when they came into operation. These bye-laws were purported to have been framed under Section 174(2)(K) of the U.P. District Boards Act, and they directed the levy of a license fee of Rs. 500/- per year on sugar factories propelled by petrol, steam or electricity, a fee of Rs. 100/- per year on crushers propelled by petrol, steam or electricity, a fee of Rs. 100/- on centrifugal machines propelled by engines, and a fee of Rs. 50/- each on certain flour mills, oil mills, rice making machines, sawing machines, cotton cloth mills and certain other machines.

3. Under bye-law No. 1 the word "factory" was to include sugar factory, flour mills, oil machines, rice making machines, cotton machines and sawing machines. Sugar factory was said to include any factory in which sugar was prepared from sugar-cane juice or from molasses or in which Gur is prepared from 'shira' and which was worked by electricity, steam or oil, or by

manual labor by the old Khanchi or Bojha system or by centrifugal machines. Flour mills, oil, cotton, rice-making and sawing machines were to mean all such machines where work was done by electricity or petrol or water or wind or any other mechanical contrivance. The machines worked by all the different petitioners came within the definition of factory.
Bye-law No. 3 prohibited the starting, establishing or maintaining of any factory within the rural area of Shaharanpur district, unless a license had been granted on payment of the prescribed fee. Bye-law No. 4 made the Secretary of the District Board as the Licensing Officer for the purposes of these bye-laws and an appeal against his decision was to lie to the President of the District Board. Certain conditions for the grant of the license were imposed by bye-law No. 5 and the license fee mentioned above was imposed by bye-law No. 6. Eye-law No. 7 provided for the procedure for making an application; bye-law No. 8 provided the period during which a license was to remain in force and bye-law No. 9 authorized the Licensing Officer to suspend a license. At the end the penalty for disobedience of the bye-laws was provided, which could extend to Rs. 100/-, and, in the event of a continuing breach, might extend to Rs. 5/- for every day after the first conviction during the period that the offender was proved to have persisted in the continuance of the offence.

4. The petitioners had been paying the license fee since the date of its imposition in 1949 for about four years, when disputes arose and the petitioners and other factory owners refused to pay the license fee. The present petition was filed in this Court on 4-2-1954, and the prayers contained in this petition are that a writ or direction in the nature of certiorari be issued quashing bye-law No. 1 mentioned, above, that a writ or direction in the nature of mandamus be issued to the respondents restraining them from enforcing bye-law No. 6 and that another writ or direction in the nature of mandamus be issued directing respondent No. 1 not to prosecute the petitioners for omitting to take the license for working their machines. There was a prayer for an ad interim order also, but no such interim order was passed at the time when this petition was admitted.

5. The petition is based mainly on the ground that the license fee levied under bye-law No. 6 was really a tax and has been, imposed in order to raise the general revenues of the Board and that it has wrongly been called a license fee. It is said that the amount of the fee bears no relation to the expenses required for regulating the trade, nor has the District Board incurred any expense worth the name for the purpose of regulating the petitioner's trade.

6. The learned counsel for the respondent Board has controverted the petitioners' case on the points mentioned above, and has further argued that this writ petition should not be entertained, because there was the alternative remedy of a regular suit open to the petitioners and that under the circumstances of the case, the more appropriate remedy is the remedy of a suit and not that of a petition under Article 226 of the Constitution.
He also urged that during the pendency of this writ petition, the Board had amended the provision under which the bye-law was originally passed and it is now said that the bye-law should be deemed to have been passed under Section 174(1) of the District Boards Act, and this

sub-section, authorized the District Board to fix any amount of fee that it considered proper, there being no limitation imposed in this, sub-section as there is in Section 174(2)(k) of the Act.

7. Originally the position taken up by the learned counsel for the Board was that any amount could be fixed by the Board as license fee, and that it was not necessary that the amount fixed should bear any relation to the expenses that were to be incurred in regulating the trade. But this position was subsequently given up and the learned counsel agreed that our Constitution had made a clear distinction between a 'tax' and a 'license lee', and he referred me to items Nos. 82 to 89 in List I of the 7th Schedule attached to the Constitution and said that these items related to the imposition of taxes, and item No. 96 authorized the levy of "fees". Similar was the position with respect to item Nos. 46 to 58, 60 and 62 which related to 'tax', and No. 66 which related to 'fees' in List II. He said that the main characteristics of a license fee were that the fee was imposed on trade or calling itself, and not on the income derived from the trade or calling; that the license lee could not be imposed for raising the general revenues but only for purposes of being spent over the regulation of the trade or calling; and that it must bear a relation to the expense that was expected to be incurred in doing so. I entirely agree with the propositions urged by the learned counsel subsequently, and the learned counsel for the petitioners also does not challenge their correctness.

Some of these propositions are borne out by the decision of the Privy Council in the case of - *'Pazundaung Bazar Co., Ltd. v. Municipal Corporation of the City of Rangoon*[1]*',* Their Lordships agreed with the views of the High Court and held that the license fee might reasonably cover the cost of all special services necessitated by the duties and liabilities imposed upon the Corporation, in respect of the supervision and regulation of private markets.

8. The Bombay High Court had to consider the point in the case of - *'Ratilal Panachand v. State of Bombay*[2]*',* The learned Judges quoted with approval a passage from Findley Shirras in his Science of Public Finance, which is helpful in understanding the difference between a tax and a fee. Findley Shirras says :

> "Taxes are compulsory contributions to public authorities to meet the general expenses of Government which have been incurred for the public good and without reference to special benefits. Fees are payments primarily in the public interest for special services which people must accept whether willingly or not;....Fees are for governmental services, while prices are for services of a business character. They differ also from taxes in that they are payments for special benefits enjoyed by the payer, while taxes are for general benefits, expenses which are laid, as Adam Smith says 'for the benefit of the whole society'. The essence of a tax is the absence of 'quid pro quo' between the tax payer and the public authority."

9. The same is the principle laid down by this Court in the case of - *'Biswa Nath Singh v. District*

Board, Ballia[3]',

10. The nature of license fee having thus been explained, I have to consider whether the imposition of the fee in this case was really for the purposes for which fee could be levied or it was imposed for purposes of raising the general revenues of the Board. The burden of proving that the levy is not what it purport to be on the face of it lies on the person, who says that it is not a fee but a tax, and in the present case it is for the petitioners to show that the fee levied, is really a tax in the garb of a license fee. The question is really one of fact, and will be considered after considering the other legal issues raised by the

[1] AIR 1931 PC 217 [3] AIR 1953 All 415
[2] AIR 1953 Bom 242

learned counsel for respondent No. 1.

11. The learned counsel for the respondent urged that a writ petition was not maintainable as a suit for the same reliefs could have been instituted before a regular civil court. The general rule is that if another remedy is open, the High Court does not entertain a petition under Article 226 of the Constitution, which has been filed for obtaining the same relief. The rule is not one of universal application, and, in appropriate cases, the High Courts do entertain writ petitions, even though a regular suit may be maintainable. A Full Bench of this Court in - *'Buddhu v. Municipal Board of Allahabad[4]',* had to consider this question and its decision was that no hard and fast rule could be laid down as to the class of cases in which directions, orders or writs could be issued under Article 226 and the class of cases in which they ought not to be issued. It held that there was no inflexible rule that in every case in which a fundamental right was involved, a decision should be given by the Court on merits in an application under Article 223 and that there are also cases in which the existence of an alternative remedy may be a ground for the rejection of the application. The circumstances of each case have to be considered and then a decision taken as to whether the discretion should be exercised or not. They then laid down some of the principles which would justify the High Court in issuing a writ and their Lordships said :

> "Where a general question of some public importance has been raised and it is desirable that it should be speedily decided and the parties should not remain under suspense for a long time and on the determination of the question the decision of the petitioner and others of his class whether to continue in the present avocation or to take some other will depend, the High Court can entertain the petition under Article 226, even though an alternative remedy by way of a suit for injunction is available to the petitioner".

The learned Judges had to consider the validity of a bye-law passed by the Municipal Board of Allahabad prohibiting the slaughter of cows, and they held that an a case of that kind the High Court could properly enter into the merits of the petition and come to decision thereon.

12. A Division Bench of this Court, of which I was a member in - Civil Misc. Writ No. 7735 of 1951, D/-6-3-1953 (All) (E)' quashed a bye-law passed by the Municipal Board of Allahabad imposing a license fee on the owners of certain flour mills. The point was considered in that case and lit was held that, where a large number of persons were involved and the question was of general importance, it would be a proper exercise of the discretion of the High Court to decide the petition under Article 226 on the merits. These cases cover the point and conclude it against the contention of the learned counsel for respondent No. 1, and it is not necessary to go further into the matter.

13. The question then arises whether, on the peculiar facts of the case, I should refuse to hear the petition on the merits. The learned counsel for respondent No. 1 has laid great stress on the fact that the license fee had been paid for four years by the petitioners who

[4] AIR 1952 All 753

have shown by this conduct of theirs, that there is no urgency in the matter and they might, therefore, very well be relegated to the ordinary procedure provided by law.

This delay on the part of the petitioners in filing the present petition is very much against the petitioners, but there are other circumstances of the case, which outweigh this consideration. The Constitution came into force in January 1950 and before that date this Court had no power of issuing writs. The question that has been raised in the present petition, namely, that the license fee must bear some relation to the amount of expenditure incurred in regulating the trade was not generally known to the members of the Public, or even to the members of the Bar in the districts. The position was made clear, as far as this Court is concerned, in the case of - 'Biswa Nath Singh (C)' mentioned above.

14. I also find that about 200 criminal prosecutions are pending at the instance of respondent No. 1 on account of failure to pay the license fee, and it appears to be a bit hard that the persons be allowed to be convicted of the offence before the main question raised in the petition is finally determined. The matter also, to some extent, concerns the public at large because if the petitioners' trades are unduly hampered, it is bound to result in inconvenience to the members of the public. I, therefore, think that this is a petition which ought to be considered and decided on the merits. I may also mention that the Supreme Court has quashed a number of bye-laws passed by the Municipal Boards or the District Boards on the ground that they interfered with the petitioners' fundamental right of trade.

15. The next point urged by the learned counsel for respondent No. 1 was that the remedies provided by the District Boards Act were not pursued by the petitioners and they, therefore, were not entitled to have the question determined in the proceedings under Article 226 of the Constitution. He referred to Section 186 of the District Boards Act, which provides for an appeal by any person aggrieved by any order or direction made by a Board under the powers conferred upon it by Section 95 or under a bye-law made under Clause (k) of Sub-Section (2) of Section 174, to the District Magistrate in case no other officer has been appointed by the State

Government, for the purpose.
It is argued that the petitioners could have filed an appeal under this section, but they failed to seek this remedy. I have considered the argument, but I do not agree with the contention of the learned counsel. The appeal that is provided, is against any order or direction made by a Board under a bye-law passed under Section 174(2)(k) of the Act, but it does not provide for an appeal to challenge the validity of the bye-law itself. To my mind, the wording of this Section is quite clear, and it does not confer any right of appeal against the resolution of a Board passing a bye-law. I think no appeal lay to the District Magistrate at the instance of the petitioners challenging the validity of the bye-law, and this contention of the learned counsel also fails.

16. I now come to the question of the interpretation of Section 174(1) of the District Boards Act. The contention of the learned counsel for respondent No. 1 on this point was that Section 174(2)(k) imposes a restriction on the District Board while prescribing a license fee on certain trades, which is to the effect that the fee can be prescribed in order to defray the expenditure incurred by the Board for purposes of regulating the trades, but it is said that there is no such restriction contained in Section 174(1) of the Act. But I think that this sub-section authorizes the Board to make bye-laws, consistent with the Act for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants and for the furtherance of the administration of the district under this Act, but it does not say whether a bye-law framed under this Sub-section may also impose license fees or taxes. It gives a general power to the District Boards to make bye-laws for the purposes mentioned therein. The Clauses contained in Sub-Section (2) are really illustrations of this power contained in Sub-Section (1), and they show what nature of power has been conferred on the Board by Section 174(1). The power, in my opinion, contained in Sub-Section (1) should be read as 'ejusdem generis' to the powers contained in the different Clauses of Sub-Section (2). The respondent No. 1 expressly passed the resolution in 1949 under Section 174(2)(k) and it is somewhat curious that after the institution of this petition, it passed a resolution saying that the power should be taken to have been exercised under Section 174(1). Still if Section 174 (1) had given it any power to impose taxes or fees, and the provision of this sub-section had authorized the passing of the bye-law, the bye-law could not be held to have been invalid. But, in my opinion, Section 174(1) just gives a power to frame a bye-law and I cannot read in it any general power to levy taxes and fees under the bye-laws passed under that Sub-section. Even if it be assumed that it had the power to levy license fees, its power should be read to be the same as contained in the different Clauses enumerated in Sub-Section (2). A bye-law passed under Section 174(1) may go beyond the matters enumerated in Clauses (a) to (w) of Sub-Section (2), and it may not strictly be justified under those Clauses, but the power under Sub-Section (1) is similar and of the same nature as illustrated by Clauses (a) to (w) of Sub-Section (2). If the fees imposed by this bye-law I cannot be validated under Section 174(2)(k), I do not think that it can be validated under Section 174(1).

17. The nest Section that was referred to was Section 106 of the Act, which may be called the general charging section authorizing a Board to charge a fee to be fixed by the bye-law for any

license, sanction or permission. It was argued that there is no limit imposed by this section, and the Courts are not entitled to determine whether the amount of fee that has been fixed by the bye-law is a reasonable one or not. I am unable to accept this argument either, because the use of the word "fee" by itself denotes as to what kind of levy the District Board can impose. The legal significance of the word "fee" as quite clear and its object is to recover money necessary for defraying the expenses of carrying out the purpose for which, it is levied. The "fees" that a District Board could impose must be "fees" land not "tax". I am also unable to accept that argument of the learned counsel that the only restriction imposed on the District Board in determining the amount of fees is that which goes beyond the reasonable restrictions which may be imposed under Article 19(1)(f) of the Constitution. That restriction is certainly there, but the District Boards are statutory bodies having only those rights which are conferred upon them by the statute. The statute does not authorize them to impose taxes but only gives them a power to levy certain fees.

18. This brings me to the question of fact as upto whether it has been proved in the case that a tax has been imposed on the petitioners' trade in the garb of a license fee.
The relevant paragraphs of the affidavit filed with the petition are paragraphs Nos. 6, 14, 15, 16, 17, 20, 21 and 23. The averments in paragraph 6 are somewhat general, and what is stated therein is that the license fee levied under the impugned bye-law is a tax, though it is called a license fee, and the same has been imposed to raise the general revenues of the Board and not to cover the expenses necessary for the purpose of supervising the factories.
In paragraph 14 it has been stated that the District Board merely takes the license fee, but at no time has any single officer of the Board visited or inspected any of the factories belonging to the petitioners and others, and that the District Board has not spent anything out of the huge amount realized as license fee on the working of the bye-law, excepting perhaps some insignificant Amount. Paragraph 15 gives the number of the mills and crushers that exist within the area of the District Board, and the total license fee recoverable from all these mills comes to a sum of Rs. 48,250/- per annum. Paragraph 17 states that the Public Health Scheme was introduced in 1930, that there has been staff employed under the scheme since that year, that after the enforcement of the present bye-law there has been no increase in the staff of the Public Health Department and that no special staff has been employed by the Board for this purpose, nor has any additional expense been incurred due to the enforcement of these bye-laws excepting the cost of issuing license. Paragraph 20 says that in the budget from 1948 onwards no expense for the working of the impugned bye-laws is shown. According to the averments in paragraphs 21 the license fee bears no relation to the expense that was likely to be incurred in the issue of licenses and regulating the licensed factories. The right to collect the license fee has been transferred to the respondents for a consideration of Rs. 38,500/- per year.

19. As against these clear and definite allegations the counter-affidavit filed on behalf of the District Board contains merely some vague statements. These statements are contained in paragraphs 5, 6, 7, 8 and 9. In paragraph 5 it is stated that the license fee levied under the bye-

law is just, proper and fair, and there is a rational nexus between the amount of the fee and the expenses incurred by the Board for the purpose of the subject matter of the license. Paragraph 6 says that the employees of the Board have to give their time to regulate and control the business and trades mentioned in the bye-laws, that they have to inspect the buildings wherein these trades are housed, and that the expenditure incurred by the Board is very close to the income earned out of the license fee. Paragraph 7 merely records a denial of the facts contained in certain paragraphs of the petitioners' affidavit. Paragraph 8 is to the effect that the entire staff is employed and is maintained by the Board, and the expenses of the staff are met by the Board. According to paragraph 9 certain officers of the Board have to discharge certain duties in connection with the running of the trades in question.

20. A rejoinder affidavit was also filed on behalf of the petitioners, which mainly reiterates the facts contained in the first affidavit.

21. The facts stated above would show that in the counter-affidavit no attempt has been made to actually show what expense the District Board has to incur in issuing the license and in regulating the petitioners' trades. It is stated that there is a "rational nexus" between the amount of the fee and the expenses, and that the expenditure incurred is very close to the income earned out of the license fee. These assertions, in my opinion, merely amount to a statement of the case of the District Board. But the counter-affidavit does not disclose what actual expenditure is incurred by the Beard every year for the purpose of carrying out the duties imposed upon the Board by the bye-law in question. The learned counsel for the Board strenuously contended that it must be accepted by the Court that there is a "rational nexus" between the amount of the fee and the expenses, and the same are very close to each other because the Board says that it is so. But accepting this argument would really amount to a failure to consider the question. The Board has made certain allegations, and I have to see how far those allegations are borne out by the facts placed before me. If allegations like these are accepted it would amount to accepting the 'ipse dixit' of the Board. If there were any truth in the allegations contained in paragraphs 5 and 6 of the counter-affidavit, I see no reason why the Board should not have filed their accounts, because the bye-law has been in force since 1949 and the income and expenditure must have been entered in the account-books during all these years. The facts, as they have been stated in paragraph 9 of the counter-affidavit, actually go to support the petitioners' case because they show that no separate staff has been engaged for the purpose of regulating the petitioners' trades. The paragraph merely contains an assertion that the officers, mentioned in the paragraph, regulate and control the trades for which the license fee has been prescribed. Definite facts have been asserted in the affidavit filed along with the petition, which have given the approximate amount of money recovered as the license fee by the Board every year, and it is also said that not a single officer of the Board visited or inspected any of the factories belonging to the petitioners and to others, nor has the District Board spent anything on the working of the bye-law under which the license had been issued. There is a clear assertion in paragraph 17 that there has been no increase in the staff of the Public Health Department at all since the introduction of the bye-law, and no special staff

has been employed by the Board for the purpose of regulating the petitioners' trades, nor has any additional expenditure been incurred due to the enforcement of these bye-laws. It has further been said that in the successive budgets from 1948 onwards no expense for the working of the impugned bye-law is shown. None of these facts have been controverted in the counter-affidavit.

22. After the arguments were practically over, I gave an opportunity to the learned counsel to produce the account-books of the District Board, and adjourned the case for the purpose. But on the adjourned date the learned counsel informed me that the District Board had not sent the account-books to him, but had only sent him certain extracts from the account-books typed on separate sheets of paper. They are not even copies of the account-books, but merely extracts from them. These papers, therefore, could be of no possible assistance to me. The omission of the District Board to file the account-books, in spite of an opportunity being given to it, goes against the District Board, and this fact can be taken into consideration in coming to a conclusion on the facts that have to be decided in the case. As a result of what I have stated above, I have come to the conclusion that the amount of license fee fixed under the bye-law was not fixed with the object of meeting merely the expenses of regulating the trade or of meeting the expenses that became necessary by virtue of the framing of these bye-laws, but that the fee was fixed with a view to enhance the general revenues of the District Board. The facts of this case are very similar to the facts of the case in 'Civil Misc. Writ No. 7735 of 1951 (All) (E)' decided on the 6th March 1953 by a Division Bench of this Court, of which I was a member.

23. For the reasons given above, I hold that Bye-law No. 6 of the Bye-laws framed by the District Board of Saharanpur, which were published in the Gazette, dated the 28th May 1949 was ultra vires the Board, and I direct the issue of a writ of mandamus commanding the respondent No. 1 to refrain from enforcing Bye-law No. 6 of the impugned Bye-laws against any one of the petitioners.

24. The petitioners will be entitled to their costs of this petition, which I assess at Rs. 100/-.

Writ issued.