(1999) 03 OHC CK 0034

In the Orissa High Court

Case No : Original Jurisdiction Case No. 1270 of 1999

Barada Kanta Mohanty APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 09-03-1999

Acts Referred:

Orissa General Clauses Act, 1937 — Section 22
Orissa Municipal Act, 1950 — Section 131, 188A(1)
Orissa Municipal Rules, 1953 — Rule 602

Citation : AIR 1999 Ori 178 : (1999) 87 CLT 637 : (1999) 1 OLR 525

Hon'ble Judges : Pradipta Ray, J;A. Pasayat, J

Bench : Division Bench

Advocate : Arun Ku. Mishra, G.S. Panda, A.R. Mohanty, R. Pati, L. Prusty and N. Mohanty, for the Appellant; S.K. Nayak (1), A.K. Baral, S.K. Nayak (6) and M. Bhanja, for the Respondent

Judgement

A. Pasayat, J.—Petitioner purporting to be the General Secretary of Cuttack Chamber of Commerce, Malgodown, Cuttack has filed this writ application on behalf of its members challenging collection of octroi u/s 131(1)(kk) of the Orissa Municipal Act, 1950 (in short ''the Act'') in respect of imported edible oils.

2. With reference to a Notification No. 711/85 dated 30th September, 1985 issued by the Housing and Urban Development Department it is pleaded that collection, of octroi on imported edible oils is unauthorised. A copy of the said Notification dated 30th September, 1985 is annexed as Anncxure-1 to the writ application. Certain receipts have been filed to show that octroi has, in fact, been collected on the imported R. B. D. Palm oil. The Cuttack Municipal Corporation (in short "the Corporation") has taken the stand that the Housing and Urban Development Department by order dated 5th March, 1998 has accorded sanction to the imposition of octroi on various goods and serial No. 4 of the order deals with Dalda, Vanaspati Ghee and all types of oil and, therefore, collection of octroi is legal. The collection is to be made at the rate of 1%. It is further submitted that by Notification dated 26-11-1998 the Government of Orissa in Housing and

Urban Development Department decided to withdraw the concession granted in the Notification dated 30-9-1985. A copy of the said Notification is annexed as Annexure-B/2 to the counter affidavit. The Notification is to take effect from the date of its publication in the Orissa Gazette. It is stated that the Notification dated 26-11-1998 (S. R. O. No. 762/98) has been duly published in the Orissa Gazette, Extraordinary, No. 1568 dated 1-12-1998.

3. The stand of the Municipal Corporation in short is that when State Government accorded sanction for levy of octroi on different goods brought within the limits of Cuttack Municipal Corporation at the specified rate vide order dated 5-3-1990, it meant that the exemption granted by Notification No. 30318-HUD dated 30th September, 1985 automatically stood revoked, so far as Cuttack Municipal Corporation is concerned.

4. According to the petitioner, even if stand of Corporation is correct, the exemption which was granted has been withdrawn by Notification dated 26-11-1998 and is to take effect from the date of its publication in the Orissa Gazette. Though the Gazette is dated 1-12-1998, as the copy of the Gazette filed shows it was printed on 6-12-1998. That being the position, the stand that in view of SRO No. 92/98 dated 5th March, 1998 the exemption granted earlier stood withdrawn is fallacious.

5. In order to appreciate the rival submissions it is necessary to take note of few provisions of the Act. Section 131 appearing in Chapter XIII (Municipal Taxation) relates to the power (o impose taxes, and Section 131(1)(kk) deals with the power to impose octroi on goods brought within the limits of a municipal area for consumption, use or sale therein. Section 188-A by exercise of which the Notification dated 30th September, 1985 was issued reads as follows:--

"188-A. Exemption from and compounding of Octroi --

(1) The State Government after consultation with the municipality may, by notification, exempt :--

(a) any class of commodities; or

(b) any new industry established within the municipal area from levy of octroi;

Provided that in cases coming under Clause (b) the exemption shall be for such period, not exceeding five years from the date the industry first goes into production, as may be fixed by the State Government.

(2) The State Government may on their own motion or on application made in that behalf and after consulting the municipality revise the rate of octroi.

(3) The municipality may in such circumstances and subject to such conditions as may be prescribed, permit any person to compound the octroi payable by him by paying in lieu thereof a lump sum amount to be determined in the prescribed manner."

The Notification reads as follows :--

"S.R.O. No. 711/85 -- In exercise of the powers conferred by Clause (a) of Sub-section (1) of Section 188-A of the Orissa Municipal Act, 1950 (Orissa Act 23 of 1950) and in consultation with the Municipality and Notified Area Council the State Government do hereby exempt all imported edible oils brought into the limits of Municipalities and Notification Areas for consumption, use or sale from levy of octroi.

By Order of the Governor B. D. Mohanty Under Secretary to Government."

6. Section 188-A, inter alia, deals with the power of the State Government to exempt any class of commodities from payment of octroi. The exemption can be granted after consultation with the concerned Municipality. Sub-section (2) provides that the State Government may on their own motion or on application made in that behalf and after consulting the municipality, revise the rate of octroi. The Notification dated 30-9-1985 made it clear that the imported edible oils brought into the limits of Municipalities and Notified Areas for consumption, use or sale are exempted from levy of octroi. The Notification was issued in exercise of power conferred under Clause (a) of Sub-section (1) of Section 188-A after due consultation with the Municipalities and Notified Areas. Subsequently, as is evident from the Notification dated 26th November, 1998 (S. R. O. No. 762/98) the Government felt that in the changed context when bulk of the imported edible oil is being dealt with by different private business firms barring a small quantity channelised through Orissa State Civil Supplies Corporation (in short ''OSCSC") under Public Distribution System and having regard to the representation of Municipal Bodies and taking into account the wide gap between the price of the edible oil dealt by private firms meant for open market cell and that marketed through OSCSC (the consumer price of the Palm oil approved by Food Supplies and Consumer Welfare Department has taken into account 1% levy towards Octroi in fixing the price per litre of Palm oil in their letter No. FIA-8/98-28754 dated the 3rd November, 1998), there was a need for withdrawal of the concession granted under Notification No, 30313-HUD dated 30th September, 1985 exempting levy of octroi on imported edible oil brought into the Municipal Limits either for consumption, use or sale. The action was necessary for streamlining the present system in the larger interest of the Municipal Bodies.

7. The stand of the Municipal Corporation that while according sanction for levy of octroi at the rate of 1%, as evident from S. R. O. No. 92/ 98 (Annexure-A/2), there was implied withdrawal of the Notification cannot be accepted because in the Notification dated 26th November, 1998 there is nothing to show that it did not operate in respect of Cuttack Municipal Corporation. Additionally as the said Notification clearly shows, the decision to withdraw was taken in view of the circumstances indicated therein. The position is, therefore, clear mat the decision to withdraw is for the first time reflected in the Notification itself to be operative from a future date, i.e. the date of its publication in the Official Gazette.

8. At this juncture true import of the word "publication" has to be noted. The dictionary meaning of the word ''publish'' as given in Webster''s Comprehensive Dictionary, International Edition, is "(1) To make known or announce publicly; promulgate; proclaim. (2) To print and issue to the public. (3) To communicate to a third person". According to the Legal Glossary, published by the Legislative Department, Ministry of Law, Justice and Company Affairs, Government of India in 1992, it means "to make generally accessible or available; to place before or offer to public; to bring before the public for sale or distribution". Notification, according to Webster''s Third New International Dictionary, inter alia, means "1 : the act or an instance of notifying; Intimation, Notice; etc. : the act of giving official notice or information; 2: a written , or printed matter that gives notice". The Legal Glossary, referred to above, defines it as "a written or printed matter that gives notice". Even if we go by the dictionary meaning the requirement of publishing the notifications would connote that what is intended to give notice or information to the public can be treated as published only when it is made available to the public so that they can know about it. The requirement of publishing the notifications in the official Gazette, which is an official journal or a newspaper containing public notices and other prescribed matters, also indicates that the word "publish" in Rule 602 of the Orissa Municipal Rules, 1953 (in short "Rules") should be so interpreted.

8.1 In State of Madhya Pradesh v. Ram Ragubir Prasad Agarwal AIR 1979 SC 888 while interpreting the word "publish" in Section 3(2) of M.P. Prathamik Middle School Tatha Madhyamik Shiksha (Pathya Pustakon Smabandhi Vyavastha) Adhiniyam, this Court observed that "in our view, the purpose of Section 3 animates the meaning of the expression ''publish''. ''Publication'' is the act of publishing anything; offering it to public notice, or rendering it accessible to public scrutiny. An advising of the public; a making known of something to them for a purpose. Logomachic exercises need not detain us because the obvious legislative object is to ensure that when the Board lays down the ''syllabi'' it must publish ''the same'' so that when the stage of prescribing test-books according to such syllabi arrives, both the publishers and the State Government and even the educationists among the public; may have some precise conception about the relevant syllabi to enable Government to decide upon suitable text-books from the private market or complied u/s 5 by the State Government itself. In our view, therefore, "publication" to the educational world is the connotation of the expression. Even the student and the teaching community may have to know what the relevant syllabus for a subject is, which means wider publicity than minimal communication to the departmental officialdom".

8.2 Following this judgment of Madras High Court in Asia Tobacco Company Ltd. Vs. Union of India and Others, held that in such cases the effective date is the date of knowledge and not the date of the official Gazette. The relevant observation made in paragraph 4 of the said judgment arc as under :--

"The mere printing of the official Gazette containing the relevant notification and without making the same available for circulation and putting it on sale to the public will not amount to the ''notification'' within the meaning of rule 8(1) of the Rules. The intendment of the notification in the Official Gazette is that in the case of either grant or withdrawal of exemption the public must come to know of the same. ''Notify'' even according to ordinary dictionary meaning would be "to take note of, observe; to make known, publish, proclaim; to announce; to give notice to; to inform". It would be a mockery of the rule to state that it would suffice the purpose of the notification if the notification is merely printed in the Official Gazette, without making the same available for circulation to the public or putting it on sale to the public. .... Neither the date of the notification nor the date of printing, nor the date of Gazette, counts for notification within the meaning of the rule, but only the date when the public gets notified in the sense, the concerned Gazelle is made available to the public. The date of release of the publication is the decisive date to make the notification effective. Printing of the Official Gazette and stacking them without releasing to the public would not amount to notification at all. The respondents are taking up a stand that the petitioner is expected to be aware of the withdrawal Notification and that the words "publish in Official Gazette'' and the words "put up for sale to public'' are not synonymous and offering for sale to publish is a subsequent step which cannot be imported into the Act, and the respondents are expressing similar stands. They could not be of any avail at all to the respondents to get out of the legal implications flowing from want of due notification, as exemplified above printing the notification in the Official Gazette without making it available for circulation to the concerned public, or placing it for sale to the said public, would certainly not satisfy the idea of notification in the legal sense."

9. The same view was taken by the Bombay High Court in CTC Industries Ltd. v. Union of India 1987 (13) ECR 1161 and by Delhi High Court in Universal Cans and Containers v. Union of India 1993 (64) ELT 23 (Delhi)

10. The following observations made in the case of B.K. Srinivasan and Others Vs. State of Karnataka and Others, also support the view that we are taking :--

"Whether law is viewed from the standpoint of the ''conscientious good man'' seeking to abide by the law or from the standpoint of Justice Holmes''s ''unconscientious bad man'' seeking to avoid the law, must he known that is to say, it must be made that it can be known so".

The aforesaid position has also been taken note of by the Supreme Court in Collector of Central Excise Vs. New Tobacco Co. Etc. Etc., etc. In terms of rule 602 of Orissa Municipal Rules 1953 (in short ''Rules'') every notification required to be published in English is to be published in the Gazette. So the requirement is publication of the notification in the Official Gazette. Therefore, the effect of the withdrawal is from the date of publication of the Notification dated 26-11-1998 in the official Gazette. That being the position, any collection of octroi before that date is unauthorised. It shall he, open to the concerned parties from whom the octroi has been collected to move the Municipal Corporation for refund of the octroi paid by them. If any prayer is made in that regard, the same shall be dealt with in accordance with law.

11. However, the concerned parties shall be liable to pay octroi in respect of the imported edible oil after publication of the Notification in the Official Gazette. That was stipulated in the interim order dated 19th February, 1999. The payment be made forthwith.

The writ application is disposed of accordingly.

Pradipta Ray, J.

12. I have the benefit of reading a very learned judgment by Hon''ble brother A. Pasayat, J. I agree with him, but I like to add additional reason of my own for not accepting the Municipal Corporation''s submission that by Notification No. SRO No. 92/98 of March 12, 1998 there was an implied withdrawal of exemption.

12.1 Section 188-A(1)(a) of the Orissa Municipal Act, 1950 has empowered the State Government to exempt any class of commodities from levy of octroi. Section 13(1)(kk) has authorised a Municipality to impose an octroi on goods brought within the limits of Municipal area for consumption, use or sale therein, with the sanction of the State Government. When the State Government grants an exemption u/s 188-A(1) of the Act, the Municipality''s power to levy octroi in respect of the exempted goods is temporarily withdrawn or kept under suspension. Even where the Municipality has already imposed an octroi on a particular class of goods/ commodities the State Government has authority to exempt such goods from levy of octroi and if the State Government grants exemption, imposition and realisation of octroi will remain suspended during the operation of exemption.

13. Imposition of tax or rate has several parts : namely decision to impose tax, fixation of rate thereof and levy or actual realisation thereof. Even if the Municipality decides to impose octroi and fixes the rate with the sanction of the State Government, it cannot realise the same from exempted goods till the exemption is withdrawn. Exemption is granted u/s 188-A(1) of the Act. There is no separate provision for withdrawal of exemption, but u/s 22 of the Orissa General Clauses Act, 1937 the power to make or issue notification includes a power exercisable in the like manner, to vary or rescind any notification subject to the like sanction and condition. Thus, an exemption granted u/s 188-A(1) can be rescinded only by notification issued under the same provisions. The Notification dated March 5, 1998 was issued under the proviso to Clause (k) (the appropriate Clause is (kk)) of Subsection (1) of Section 134 read with Sub-section (2) of Section 188-A of the Act. Sub-section (2) of Section 188-A of the Act authorises the State Government to revise the rate of octroi. The effect of the said Notification, in my view, is that the Cuttack Municipal Corporation''s decision to impose an octroi on palm oil, and fixation of rate was finalised, but actual levy and realisation thereof was not legally permissible till the exemption was withdrawn in exercise of the implied power u/s 188-A(1) of the Act. The said

exemption was ultimately withdrawn by the Notification dated 26th November, 1998 with effect from the date of its publication in the Orissa Gazette. Thus 1 % octroi became realisable only from the date when the earlier Notification dated September 30, 1985 stood withdrawn or rescinded.

