(1977) 01 OHC CK 0003

In the Orissa High Court

Case No : O.J.C. No. 810 of 1976

Bhaskar Textile Mills Ltd. APPELLANT

Vs

Jharsuguda Municipality and Others RESPONDENT

Date of Decision : 05-01-1977

Acts Referred:
Orissa Grama Panchayat Act, 1964 — Section 149, 149(1), 3, 3(2)
Orissa Municipal Act, 1950 — Section 117, 131(1), 133(1), 3(1), 318

Citation : (1977) 43 CLT 537

Hon'ble Judges : R.N. Misra, J;N.K. Das, J

Bench : Division Bench

Advocate : R. Mohanty, for the Appellant; Government Advocate, C.V. Murty and P.C. Misra, for the Respondent

Final Decision : Dismissed

Judgement

R.N. Misra, J.—Petitioner, a public limited Company, with registered office at Calcutta and the factory in Jharsuguda area of Sambalpur District, has asked for quashing of the imposition of octroi u/s 131(1)(kk) of the Orissa Municipal Act, 1950 (hereinafter referred to as the "Act") and for a declaration that the notifications dated 31st July, 1973 and 12th August, 1975 issued by the State Government in exercise of powers vested u/s 4 of the Act are illegal and unenforceable and for a further declaration that the octroi Bye-laws of the Jharsuguda Municipal Council are also void and inoperative.

2. The Jharsuguda Municipality (opposite party No. 10 is a Municipality incorporated under the Act. In March, 1962, the State Government accorded sanction for the imposition of octroi in terms of the Proviso to Section 131(1) of the Act. A set of octroi bye-laws were framed by the Municipal Council in terms of Section 318 of the Act and the same were also approved by the State Government in exercise of powers u/s 390 of the Act on 19th of March, 1968. The Petitioner-Company established a spinning mill in village Ektali some time in 1962. It is alleged that the Company carried on the operation of transformation

of loose fibrous cotton into yarn in the spinning mill. At the relevant time, Ektali used to be a part of a Grama Panchayat by its own name. In 1969, the Revenue authorities of the district of Sambalpur recommended inclusion of certain neighbouring villages within the limits of the Jharsuguda Municipality and Ektali was one of them. On 25th of March, 1970, the Municipal Council adopted a resolution accepting the proposal in consideration of the facts that these villages were lying in the outskirts of the Municipal area, in those villages several Government institutions were located, these areas were fast developing industrially and the staff quarters of the Orissa State Electricity Board were located in some of these villages. In June, 1971, the State Government directed the local areas comprising the named villages to be classed as Towns in terms of Rule 2(2) of the Orissa State Urban Land Settlement Rules, 1939. On 28-7-1973, a notification was made in terms of Section 4(1)(c) of the Act inviting objections to the proposal of inclusion of the villages within the Jharsuguda Municipality (Annexure-3). The Ektali Grama Panchayat as also the Petitioner filed their objections. On 12-8-1975, a notification was made u/s 4(3)(b) of the Act including the villages within the Jharsuguda Municipality. On 1-9-1975, the Municipal Council called upon the Petitioner to pay octroi under its Byelaws. In September, 1975, as per Annexure-9, the Ektali Grama Panchayat by its letter dated 6-9-1975, called upon the Petitioner to deposit the licence fee for the year 1975-76. Petitioner has thereupon filed this writ application for the reliefs indicated above.

3. Opposite parties 1 and 3 have filed separate counter affidavits supporting the inclusion of Ektali within the Municipal area and the levy of octroi. The Ektali Grama Panchayat is no more in existence but Petitioner had impleaded the said Grama Panchayat represented by its Sarpanch as opposite party No. 2. When notice of this application was taken, one Pratap Mohanty received it styling himself as the ex-Sarpanch and did not choose to appear in the proceeding until 13th of December, 1976. When these circumstances were put to counsel appearing for opposite party No. 2, he made no further contentions.

4. At the hearing, counsel for the Petitioner advanced the following contentions:

(1) The notifications of the State Government under Annexures 3 and 6 are illegal and invalid because

(a) there is no notification in terms of Sections 3 and 149 of the Orissa Grama Panchayat Act; and

(b) the requirements of Sub-section (1) of Section 4 of the Act which are conditions precedent to amalgamation of a non-urban area within the municipal limits are not satisfied.

(2) The representations made in terms of Section 4(3) of the Act have not been considered and, therefore, the notification of inclusion of the local area of Ektali within the Municipal Council is vitiated.

(3) Octroi is leviable on goods brought within the limits of a Municipality for consumption use or sale therein. In the instant case, however, cotton which is brought within the municipal limits and on which octroi is levied is neither sold, consumed nor used by the Petitioner so as to give rise to liability for levy or octroi.

(4) The Bye-laws of the Jharsuguda Municipality having not been appropriately published as required u/s 392 of the Act when they were originally introduced are unenforceable?

Even if it be accepted that there was adequate publication, when the same was extended to a new area, the procedure laid down in Sections 390 and 392 of the Act had to be followed again.

(5) Neither the Act nor the Bye-laws prescribe for a right of appeal or a machinery for determination and quantification of the liability and therefore, levy of octroi is unconstitutional.

(6) The provisions in Section 131(l)(kk) of the Act are violative of Article 301 of the Construction.

We shall now proceed to deal with these contentions.

Contention No. 1:

5. Admittedly, village Ektali, where the factory of the Petitioner used to be located, was a part of the duly constituted, Ektali Grama Panchayat prior to 1973. Section 3 of the Orissa Grama Panchayat Act provides for constitution of Gramas. Sub-section (2) provides:

Whenever the State Government deem it fit so to do they may cancel any notification in respect o? a Grama under Sub-section (1) or may, after the area comprised in a Grama by reducing or adding to the number of villages comprised within such Grama and by declaration notified in the Gazette constitute such altered area or areas as a Grama or Gramas, as the case may be, for the purposes of the said Sub-section.

Section 149 of the Grama Panchayat Act provides:

(1)(a) Whenever the State Government decide upon a general reorganisation of the Gramas within the State they may for the said purpose by order direct all steps to be taken in accordance with this Act and the Rules made thereunder in the matter of redelimitation of Gramas, divisions thereof into wards and for the constitution of Grama Panchayats for such Gramas.

(b) ....

Admittedly there was no general re-organisation when some of the outlying local areas were included within the Jharsuguda Municipal limits. Therefore, application of Section 149(1) of the Grama Panchayat Act was not attracted.

Section 3(2) of the Grama Panchayat Act vests jurisdiction in the State Government to cancel a notification in respect of a Grama made under Sub-section (1). Petitioner''s contention is that though admittedly there had been a notification in terms of Section 3(1) of the Grama. Panchayat Act constituting a group of contiguous villages as the Ektali Grama, there is no notification cancelling the notification of such Grama. Therefore, the Ektali Grama and the Panchayat still continue to have legal existence.

The State of Orissa in paragraph 10 of its counter affidavit has taken the stand:

...it is submitted that by inclusion of these villages into Municipality, they automatically cease to be Grama Panchayats. There is no conflict between the area of operation of provisions of Grama Panchayat Act and Orissa Municipal Act. Thus while including new areas in Jharsuguda Municipality, the provisions of the Orissa Grama Panchayat Act have not been violated.

This stand of the State Government is not very appropriate, because when a duly constituted Grama has to go out of existence an order of the State Government cancelling the notification in terms of Section 3(2) of the Grama Panchayat Act is necessary. The Grama Panchayats, however, has not challenged the notification and at the Instance of the Petitioner, we are not prepared to examine the question. Besides, in paragraph 6 of the counter affidavit of the State Government, there is an assertion that the Grama Panchayat Department had been consulted before the impugned notification was made and that fact has not been further questioned. We would, therefore, conclude that Petitioner is not entitled to relief on the basis thus there is no Government order in terms of Section 3(2) of the Grama Panchayat Act cancelling the constitution of the Ektali Grama under the Section 3(1) of the Act.

6. Petitioner has next contended that the requirements of Section 4(1) of the Act having not been satisfied, the non-urban areas including the Ektali Grama Panchayat could not have been included in the municipal area. Section 4(1) of the Act as far as relevant provides:

The State Government may, by notification declare their intention-

(a) to constitute any town, together with, or exclusive of any railway station, village, land of building in the vicinity of any such town, a municipality under this Act; or

(b) ....

(c) to include within a municipality any local area continuous to the same and defined in the notification ; or

(d) to (h) ....

Provided that a declaration shall not be made under this Sub-section unless the State Government are satisfied that two-thirds of the adult male population of the town to which it refers, are chiefly employed-in pursuits other than agricultural, and that such town contains not less than ten thousand inhabitants and an average number of not less than one thousand inhabitants to the square mile of the area of such town." The requirements in the Proviso relate to such of the clauses in Sub-section (1) as may be applicable and not to each of the clauses. The concept of two-thirds of the adult male population being chiefly employed in pursuits other than agricultural is with reference to the town to which the declaration refers. Thus, the Proviso is intended to apply to Clause (a) of Section 4(1) where the word ''town'' occurs and is not relevant to the other clauses. Though a lot of arguments had been advanced before us, on the basis of the Proviso, we do not find it necessary to refer to it in view of what we have said above. The first contention advanced by the Petitioner must, therefore, fail.

Contention No. 2:

7. Sub-section (2) of Section 4 of the Act authorises any inhabitant of the town or local area, or a rate payer of the Municipality in respect of which any such notification has been published under Sub-section (1) to file an objection to anything contained in the notification before the State Government through the Magistrate of the District within six weeks from the date of publication of the notification and the State Government is required to take the objection into consideration. The General Manager of the Petitioner filed an objection. It is contended that the State Government without considering the objection made the final notification of inclusion as per Annexure-6. Reliance is placed on the following averment in paragraph 6 of the counter affidavit of the State Government:

... Objections were received from some of the persons within the stipulated time. These were examined by the District Magistrate, Sambalpur and Revenue Divisional Commissioner (Northern Division), Sambalpur. They reported that the objections were of general and did not merit any consideration. After that the Community Development and Panchayati Raj (Grama Panchayat) Department were consulted to agree with this proposal to which they have agreed. Thereafter the Government in Urban Development Department had issued a final notification in notification No. 21088 UD dated 12-8-1975 to include the above villages into the municipal limits of Jharsuguda Annexure-A/3.

Mr. Mohanty for the Petitioner has contended that the examination of the objections was by the District Magistrate and the Revenue Divisional Commissioner and the State Government has not at all considered the objections. According to learned Counsel, the extracted portion of the averment is an admission of the submission. We are not inclined to agree. The objection is required to be made through the Magistrate of the district. Naturally, the District Magistrate while forwarding the objection to the State Government made his comments. The Revenue Divisional Commissioner intervenes in the channel of communication between the District Magistrate and the State Government and he had, therefore, occasion to process the matter. The State Government while dealing with the matter consulted the Panchayat Raj Department and ultimately notified in terms of Annexure-6. We do not find any basis to hold that the objections had not been considered at all. The second contention must also fail.

Contention No. 3:

8. It is the common case of parties that cotton which is subjected to octroi is brought into the municipal limits by the Petitioner-Company not for sale but for processing into yarn. Liability for octroi arises when any of the three alternatives in Section 131(1)(kk) of the Act is satisfied, namely, when the goods are brought within the municipal limits for (i) consumption, (ii) use or (iii) sale. Reliance is placed on the decision of the Supreme Court in Burmah- Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality, , where referring to the meaning of consumption occurring in Section 73 of the Bombay Municipal Boroughs Act, the Court observed:

... The word consumption in its primary sense means the act of consuming and in ordinary parlance means the use of an article in a way which destroys, wastes or uses up that article. But in some legal contexts, the word consumption has a wider meaning. It is not necessary that by the act of consumption the cammodity must be destroyed or used up....

Admittedly Petitioner does not indulge in sale of the cotton it brings into the municipal area. There is no dispute that the Petitioner uses the cotton for manufacture of yarn. Cotton and yarn are two different commodities by the test of the use to which the commodities are put to. When yarn is made out of cotton, a new commodity comes into existence and yarn cannot be restored to its former stage of cotton even by a counter process. In the circumstances, even if there is force in Mr. Mohanty''s contention that cotton is neither sold nor consumed by the Petitioner, we cannot take the view that cotton is not used by the Petitioner. Since one of the three alternatives contemplated u/s 133(1)(kk) of the Act is satisfied, levy of octroi is not open to challenge on the ground indicated. This contention, therefore fails.

Contention No. 4:

9. Section 392 of the Act provides:

The State Government, before making any rules under Sub-section (2) of Section 81 and Section 387 and a municipal council, before making any regulation or bye-laws u/s 388, shall publish, in such manner as the State Government deem sufficient for giving information to persons interested, the proposed rules or regulations or bye-laws together with a notice specifying a date on or after which the same will be taken into consideration; and shall before making such rules or regulations or bye-laws, receive and consider any objection or suggestion which may be made by any person with respect to the same before the date so specified.

Every such rule or regulation or bye-law shall be published in the Gazette in English and Oriya and such publication shall be evidence that the rule or regulation or bye-law has been made as required by this section.

Though in paragraph 36 of the writ application, Petitioner alleged that the Bye-laws were not published in the State Gazette either in Oriya or English, in paragraph 18 of the counter affidavit given by the State Government, the following averment has been made:

... Thereafter the Bye-laws were approved and confirmed by the Government in Urban Development Department vide Order No. 1903/Legis-43-69/UD dated nil published in the Orissa Gazette for information of the general public on 23rd May, 1969, at page 691 to 697....

The statutory presumption indicated in Section 392 of the Act, therefore, applies and we must assume, in the absence of anything more from the side of the Petitioner that the bye-law making procedure provided in Chapter XXVIII of the Act has been complied with.

The Petitioner has contended that even if it is held that when the Bye-laws were initially enforced, there was statutory compliance, in the absence of similar steps being taken at the time of extension of the Bye-laws to the new area. Section 5 of the Act provides:

When any local area is included in a municipality, by a notification under Clause (b) or (c) of Sub-section (3) of Section 4, all the provisions of this Act and of any rules, bye-laws, notifications, or orders made thereunder, which immediately before such inclusion were in force throughout such municipality, shalt be deemed to apply to such area, unless the State Government, in and by the notification, otherwise direct.

Section 4(3)(b) of the Act provides for inclusion of local area in the Municipality. Therefore, when the new area got included in the Municipality by operation of Section 5, the existing Byelaws became operative for the new area. There is no requirement as claimed by the Petitioner that the procedure provided in Section 392 of the Act has to be worked out again as a condition precedent to enforceability of the Bye-laws in respect of the newly added area. This contention must accordingly be repelled.

Contention No. 5:

10. Petitioner''s contention is that there is no machinery in the Bye-laws or even under the Act for quantification of octroi and for a challenge of the quantification in case of dispute. Accordingly the power is said to be arbitrary. Reliance has been placed on two decisions of the Supreme Court being Kunnathat Thathunni Moopil Nair Vs. The State of Kerala and Another, , and State of Andhra Pradesh and Another Vs. Nalla Raja Reddy and Others, . Though Mr. Mohanty had been strenuously raising this issue when he was told during argument by us that this contention IS essentially founded upon infringement of Article 14 of the Constitution and in view of the Presidential Order. Article 14 was not enforceable, he did not raise further arguments on this question. We must refrain from

dealing with the point any further on the basis that it has been abandoned as not available.

Contention No. 6:

11. We must now come to the last contention. Petitioner has alleged that the provision in Section 131(1)(kk) of the Act which was brought into the Statute Book by Orissa Act 3 of 1954 is violative of Article 301 of the Constitution. Admittedly, the parent Act as also the Amending Act were assented to by the Governor of the State and not the President. Reliance is placed on the provisions of Articles 301 and 304 of the Constitution in support of this contention. Those two provisions are as follow:

301 Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

304. Notwithstanding anything in Article 301 or Article 303, the Legislature of a State may by law-

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and,

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of Clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President.

The question of constitutional validity of Section 131(l)(kk) of the Act came up for consideration before this Court in the case of Orissa Ceramic Industries Ltd. and Anr. v. Executive Officer, Jharsuguda Municipality and Ors. ILR 1963 Cutt 543 and in fact the very Municipality was the opposite party. The present contention of Mr. Mohanty was advanced as the second contention on behalf of the Petitioner in that case, as would appear from paragraph 3 of the decision. Referring to it, Narasimham, C. J., spoke thus:

The second argument is now concluded by the recent judgment of the Supreme Court in the Rajasthan case reported in Gopinath Pramanik Vs. The District Magistrate, Nadia and Others, . There, after noticing all the previous conflicting decisions on the vexed question as to when a tax levied by a State in exercise of its taxing power conferred by List II of Schedule VII of the Constitution would amount to reasonable restriction for the purpose of Article 304 of the Constitution, the majority of the Judges held that taxes which are essentially in the nature of regulatory or compensatory taxes cannot be held to impose any unreasonable restrictions on the freedom of trade, commerce and intercourse. Their Lordships have further indicated in the following terms what are ''compensatory taxes'' (at the end of paragraph 19 of their judgment (page 1425):

It seems to us that a working test for deciding whether a tax is compensatory or not is to enquire whether the trades people are having .the use of certain facilities for the better conduct of their business and paying, not patently, much more than what is required for providing those facilities. It would be impossible to Judge the compensatory nature of the tax by a meticulous test and in the nature of things that cannot be done.

Judged by these principles there can be no doubt that an octroi duty levied by the municipality is essentially a compensatory tax. The municipality is required to provide certain amenities not only for the permanent residents within the municipality, but also even for casual visitors who may on occasions enter the limits of the municipality. The entry of large quantities of goods within the municipality almost daily from outside necessarily creates innumerable problems such as provision of water-supply, lighting facilities, facilities for conservancy, sanitation, main tenance of good roads and markets, etc.. These are all within the well defined purposes of a municipality and, u/s 117, and tax collected must be only utilised for those purposes. Hence, if with a view to meet the extra expenditure involved in solving the problems created by the daily influx of people carrying goods within municipal limits the municipality imposes an octroi duty with a view to increase its income, it must be held that such an octroi duty is essentially a compensatory tax. As Their Lordships pointed out in the aforesaid paragraph of their judgment it is not necessary for a tax to be compensatory, to show that the amount collected is actually used in providing facilities. But bearing in mind the fundamental limitation on the power of a municipality not to expend its income for purposes other than making provisions for the convenience of the people residing either temporarily or permanently within municipal limits-such octroi duty must be held to be essentially compensatory in nature. Hence, Article 304 does not apply and the impugned provision does not require either the previous sanction or the subsequent assent of the President.

This decision of the Court directly meets the point raised before us. Mr. Mohanty, however, contends that the concept of compensatory character of tax has since changed and, therefore, the ratio of the decision is no more good law. In support of his contention, he places reliance on the decision of the Supreme Court in the case of Bolani Ores Ltd. v. State of Orissa AIR 1962 S.C. 17, wherein it was observed:

... The Taxation Act is a regulatory measure imposing compensatory taxes for the purpose of raising revenue to meet the expenditure for making roads, maintaining them and for facilitating the movement and regulation of traffic. The validity of the taxing power under Entry 57, List II of the Seventh Schedule read with Article 301 of the Constitution depends upon the regulatory and compensatory nature of the taxes. It is not the purpose of the Taxation Act to levy taxes on vehicles which do not use the roads or in any way form part of the flow of traffic on the roads which is required to be regulated. The regulations under the Motor Vehicles Act for registration and prohibition of certain categories of vehicles being driven by persons who have no driving licence, even though those vehicles are not plying on the roads, are designed to ensure the safety of passengers and goods etc. and for that purpose it is enacted to keep control and check on the vehicles. Legislative power under Entry 35 of List III (Concurrent List) does not bar such a provision.

But Entry 57 of List II is subject to the limitations referred to above, namely, that the power of taxation thereunder cannot exceed the compensatory nature which must have some nexus with the vehicles using the roads, viz., public roads. If the vehicles do not use the roads, notwithstanding that they are registered under the Act, they cannot be taxed. This very concept is embodied in the provisions of Section 7 of the Taxation Act as also the relevant sections in the Taxation Acts of ether States, namely, that where a motor vehicle is not using the roads and it is declared that it will not use the roads for any quarters or quarter of a year or for any particular year at years, no tax is leviable thereon and if any tax has been paid for any quarter during which it is not proposed to use the motor vehicle on the road, the tax for that quarter is refundable....

What is said here, in our view, does not run counter to the guideline indicated in Automobile Transport case6. In fact, in paragraph 15 of the judgment, the earlier case was referred to and the ratio thereof was not differed from. In Bolani Ores'' case5, the Court was only analysing the provisions of the Motor Vehicles Act to indicate that in the absence of actual user and direct benefit, the Taxation Act did not impose the burden of tax. We are not prepared to accept Mr. Mohanty''s contention that a new concept of compensatory character was intended to be indicated.

Reliance was also placed by Mr. Mohanty on another case of the Supreme Court being G.K. Krishnan and Others Vs. State of Tamil Nadu and Others, , where the validity of the enhancement of motor vehicle tax imposed by the Tamil Nadu Government was examined. In paragraph 27 of the judgment, the Court observed:

... What is guaranted by Article 301 is freedom of trade, commerce and intercourse. Freedom of movement of goods from one place to another is a very important facet of freedom of trade and commerce. That is perhaps the reason why the Court, in the Automobile case6, restricted the freedom of trade and commerce guaranteed under Article 301 to the movement part of it. Whether there is any warrant for respecting the concept of freedom of trade and commerce to the movement part of it is a matter upon which we are not called upon to make any pronouncement. A tax on sale of goods might encumber sale and purchase and, to that extent, restricts the freedom of trade and commerce. That apart, as Shah, J. said, if tax on interstate sale is in essence a tax which encumbers movement of trade and commerce, a tax on intra state sale, if it involves movement from one part of the State to another part of the same state, would encumber the movement part of it and is a restriction on the freedom of trade and commerce. Generally speaking, selling and buying involves delivery of the goods sold and bought. If that be so, it would mean that imposition of sales tax by a state on intra state sale, at any rate, when the sale involves movement of goods will be restriction of trade and commerce and unless the law imposing it has received the previous sanction of the President, the law would be bad as a tax on sales in neither regulatory nor compensatory. If the President were to refuse his consent, the state will be bereft of that source of revenue which the Constitution has expressly given to the State. It is unnecessary to pursue the matter further, as we think the tax imposed by the notification is compensatory in character and could not, therefore, restrict the freedom of trade and commerce, according to the decision in Automobile case.

It thus follows that the test indicated in the Automobile case was applied and no new test was attempted to be laid down.

Mr. Mohanty then contended that since the compensatory character is to be judged in relation to the commensurate benefit accruing to the tax-payer, it is providing to the tax-payer in lieu of octroi. We must say that such a case has not been made out in the writ petition and at any rate in view of the ultimate ratio in the Automobile case5, and as indicated by Narasimham, C. J. of this Court, it is not necessary to be shown that such a relationship directly exists in order to justify the levy of the tax. We must conclude for the reasons now indicated that there is no force in this contention also.

12. The net result, therefore, is that the writ application must be dismissed. We accordingly reject the application with costs. Hearing fee is assessed at rupees two hundred to be paid to the Municipality.

N.K. Das, J.

I agree.

Writ application dismissed.

