(1985) 01 J&K CK 0002

In the Jammu And Kashmir High Court

Case No : Writ Petition No. 200 of 1977, Writ Petition No. 550 of 1980

Devinder Singh Khorana and others : Narsingh Dass and another — APPELLANT

Vs

Administrator, Municipality, Jammu : The State of J&K and two ors. — RESPONDENT

Date of Decision : 02-01-1985

Acts Referred:

Citation : (1986) JKLR 349 : (1985) KashLJ 446 : (1985) KashLJ 447

Hon'ble Judges : M.A.Shah, J and K.K.Gupta, J

Bench : Division Bench

Advocate : S.S.Nanda, R.C.Nanda, S.D.Sharma, T.S.Thakur, J.L.Sehgal, Advocates appearing for the Parties

Judgement

Shah, J.—In the above said two writ petitions, although filed by different petitioners and in writ petition No, 200 of 1977 only the

Administrator ? Municipality, Jammu is the respondent; Whereas in writ petition No. 550 of 1980, the State of Jammu and Kashmir a well as

Municipal Council, Jammu through its Chairman and the Octroi Officer, Tawi Octroi House, Jammu are the respondents, but the point involved in

both the petitions is the same with respect to the realisation of Octroi Duty by the respondents on the import of wheat and wheat flour into the

municipal limits Jammu at the rate of Rs. 1/ per .quintal is involved. By both the petitions the said imposition is challenged inter alia en the ground

that by virtue of the Notification issued under the Jammu and Kashmir Octroi Act. 1958, the above said commodity of wheat and wheat flour is

exempted from the Octroi Duty, the imposition of Octroi on that Commodity and the levy thereon under the Jammu and Kashmir Municipal Act, 2008 is bad in law and also that the Municipal Committee is not empowered to realise and impose that levy under the provisions of section 77 or

section 78 of the Jammu and Kashmir Municipal Act (both the Acts for brevity shall hereinafter be called respectively as the Octroi Act and the

Municipal Act). Both the petitions are he; rd together and are hereby disposed of together by this judgment. By way of the present petition the

petitioners have submitted that Vide Government Order No. 26/C of 1943 dated 8. 1. 1943 issued under in the Octroi Act wheat and wheat

products are exempted from Octroi Jammu Town under the Octroi Act till further orders. The respondents, therefore, have no authority to charge

the Octroi Duty on the Poodgrains being imported by the petitioners for the payment of Octroi, who are Proprietors of the Flour Mills and are

dealing in that business of importing the wheat and selling the flour. Subsequent to the said Notification Exemption by SRO86 of 1966, certain

conditions were imposed and the respondents under a misconception started realisation of Octroi Duty on the imported wheat arid wheat

products, which is without jurisdiction. The respondentMunicipality is not empowered to realise the Octroi Duty, as the Bye Laws and the

Schedule therein on the basis of which the Municipality is realising the Octroi Duty are in violation of the provisions of sections 77 and 78 of the

Municipal Act. It is also submitted that by the arbitrary imposition, the Government is charging Octroi from the petitioners while other Millers in

Jammu and Srinagar are not subject to the said levy. The provisions of Section 5 of the Octroi Act also suffer from the vice of excessive delegation

and the imposition notified in exercise of the power vested in the Government under this Section deserves to be quashed being unconstitutional. On

the above grounds, the petitioners have prayed for issuance of a writ of Certiorari to quash the order of realisation of Octroi Duty from the

petitioners on the import of Wheat within the Municipal Limits of Jammu and also prayed for the direction to refund the amount already paid by

them.

2. In writ petition No. 200 of 1977, the order passed by the then Administrator of Municipal Committee, Jammu on 8th of Oct. 1977 is also

challenged by which the plea of the petitioner was rejected by the Administrator on the ground that exemption of the Octroi Duty on the import of wheat and wheat products in the Jammu Town issued vide Council Order No. 26fC of 1943 dated 8. 1. 1943 stands modified and further orders

were made by sro86 of 1966 dated 12th of March, 1966 limiting the exemption are based.

3. Both the petitions are contested by the respondents on several grounds inter alia this is also submitted in the preliminary point that being an

alternative remedy of appeal under sec. 104(1) against the assessment or levy of, or against the refusal to refund any tax under the Municipal Act,

shall lie to the Government or to such authority as may be empowered by it in this behalf, whose orders shall be final, the petition is not

maintainable. Inter alia it is also submitted that in view of the valid imposition under the Municipal/Octroi Byelaws under Sec. 77/(ii) of the

Municipal Act issued u/s 78 of the Municipal Act vide Notification SRO153 dated 1041974, the Octroi is liviable according to the Octroi Tarrif

sanctioned by the Municipal Council. The provisions of Octroi are not applicable in view of the above said Byelaws, since the Municipal council

levies or collects the Octroi itself the provisions of the Octroi Act have ceased to apply.

4. In order to appreciate the above said arguments and to decide the controversy raised in the present petitions, it will be convenient to quote the

relevant Notification before deciding the points raised. The first notification in order on the basis of which the exemption claimed issued by the

council for the City of Jammu on 8, 1. 1983 is reproduced as under:

Annexure to council order No. 26/c of 1943 dated 8th January, 1943. In exercise of the powers conferred by section 6 of the Jammu and

Kashmir Octroi Act, Svt. 1958, Government are pleased to remit octroi duty on the import of wheat and wheat products into the Jammu town

with effect from the date of publication of this notification in the Government Gazette until further orders."" Notified in the Government Gazette

dated 22nd Magh, 1999.

By the above said Notification it is manifest that the Government in exercise of its power under section 6(3) of the Octroi Act is empowered to

exemption by Notification any Commodity from payment of duty levied under that Act, subsec. (3) of Section 6 runs as follows :

(3) The Government may, by notification in the Government Gazette, define and

grant exemptions from payment of duty levied under this Act.

Thus it is clear that by the above said Notification, the State Government was pleased to remit Octroi duty on the import of wheat and wheat

products into Jammu town,

5. Subsequent to that Council Order No. 26 C of 1943, the Government under the Pctroi Act .issued another SRO86 of 1966 dated 12th of

March 1966, which is reproduced herewith as under :

Finance Department Notification SRO86 dated 12th March 1966, In exercise of the powers conferred by subsection (3) of section 6 of the

Octroi Act, Samvst 1,958, the Govt. hereby exempt the food grains impored into the cities of, Jammu and Srinagar on Government account from

payment of octroi duty subject to a certificate being given by the Director (s) Food and Supplies Jammu/Srinagar to the effect that he has

personally satisfied himself that the benefit of exemption will accrue to the consuming public in general and ,not to any individual transporting or

handling food grains in any manner.

Published in the GovernmentGazette dated 12th March, 1966

It ispertinent to note by the reaing of above said two Notifications that by way of this SRO86, the State Govt. maintaining the exemption, have put

a rider of certificate being given by the Director, Food and Supplies relating to foodgrains imported into the cities of Jammu and Srinagar on

government account. There is nothing in this SRO, by which it can be inferred that supercedes the Government Order No. 26/C of 1943.

Moreover, it is of the wider import, whereas the Notification No. 26/C relates only to wheat and wheat Products, we will be dealing with the

statutory force of the exemption granted to wheat and wheat products under the Octroi Act hereinafter while discussing the provisions of Octroi

Schedule Subsequently issued with the byelaws under section 77 & 78 of the Municipal Act.

6. Another point canvassed very vehemently by the learned counsel for the petitioners is based on the interpretation of exemption mentioned in the

Octroi Schedule published for inviting objections under section 78 of the Municipal Act vide Government Gazette dated 4th October, 1973. This

is a Schedule published inviting objections to the proposed tax as required under section 78 of the Municipal Act on Item No. 9 of this Schedule appears the folio entry :

9. Foodgrains and pulses all sorts including Singaras ......1,00 per 100 Kgs.

Thereafter in the same Schedule entry No. 6 any Exemption is relevant for the purposes of the discussion in the present case:

6. Such other exemptions as have already been granted by the Government from time to time shall continue to be in force.

It is submitted that by the force of Entry No. 6 in the column of exemptions wheat and wheat Products, which stands exempted from the Octroi

duty under Notification No. 26/C (supra) stands exempted and despite the fact that the same is covered by Entry No. 9 quoted above of the

Schedule. It being a specific article stands exempted despite the notification under section 78 of the Municipal Act.

7. Mr. T. S. Thakur, learned counsel for the petitioners raised a further contention attacking the invalidity of Schedule under section 78 of the

Municipal Act on the ground that the preliminary requisites have not been complied with for obtaining the sanction of the Government about the

imposition of Octroi and also not following the procedure prescribed under section 77 and other clauses of section 78 of the Municipal Act, the

imposition is not valid and thus the Notification issued under the Octroi Act vide No. 26/C still holds good and the State Government vide SRO86

have restricted the exemption for the import of foodgrains on Government account, for which the Certificate is needed and not on the personal

account as is done by the petitioners. There is no dispute about the fact that the wheat and wheat products imported by the petitioner is utilised for

the conversion of wheat into wheat flour, which is either consumed within the Municipal limits or sent outside. Thus according to the learned

counsel for the petitioners no octroi can be levied by virtue of the said notifications. No other argument is advanced before us by any of the learned

counsel for the petitioners. Learned counsel for the petitioners in support of their contentions regarding invalidity of imposition under sec. 78 of the

Municipal Act places their reliance on Article 265 of the Constitution of India and the proposition laid down by their Lordships of the Hon'ble

Supreme Court in AIR 1979 S. C. 321 (Avinder Singh etc., Petitioners Vs. State of Punjab and another, Respondents) and AIR 1963 S. C. 1561

(Municipal Council, Palai through the Commissioner of Municipal Council, Palai (In all appeals), Appellant Vs. T. J. Joseph (In C. A. Mp79/61;

T. V. Antony, (In C. A. No, 80/61: V. S. Eapen (In C. A, No. 81/61) Respondents. On going through the proposition laid down by their

Lordships of the Supreme Court in the above said two decisions, we find that both the authorities are distinguishable on facts with the present case

and in AIR 1979 S. C. 321 (supra), their Lordships of the Hon'ble Supreme Court have upheld the validity of tax questioned therein. Thus in view

of that proposition on that ground we do not find that the petitioners have any case to demonstrate regarding the invalidity of the Schedule

regarding imposition for the reasons, which are discussed hereinafter relating to the conclusiveness of the publication of this Schedule under the

previsions of Section 78(7) of the Municipal Act. Nothing has been pointed out relating to the invalidity of Section 5 of the Octroi Act, which has

been mentioned in the petition that it suffers from vice of excessive delegation. Even otherwise we find that the said provision is a valid piece of

legislation and is not hit by the theory of vice of excessive delegation.

8. Coming to the point regarding the validity of the Octroi Schedule published under section 78 ibid, it is sufficient to point out as mentioned above

that a preliminary Notification as required under section 78 of the Municipal Act having been issued vide Gazette Notification dated 4. 10. 1973

for information of public at large. It is presumed that the necessary formalities as required under section 77 of passing the Resolution or the

sanction of the Government is fulfilled. Nothing has been laid before us that on the primary Notification issued under section 78 inviting objections

to the proposed tax were filed by any Citizen or any of the petitioners against the said imposition. The petitioners are thus not entitled to challenge

the imposition on that ground. Learned counsel for the respondents have placed before us Notification issued in the imposition of the Octroi

Schedule after the expiry of the period of objections invited vide Notification dated 4th October, 1973. The said final Notification is to the

following effect:

Octori Tax within Jammu Municipal Limits, Office of the Executive Officer, Municipal Council, Jammu. The proposed Octroi Schedule was

published in the Government Gazette dated 4th October, 1973 and also kept in the Municipal Office as required under Section 78 of the

Municipal Act. This was done with the previous sanction of the Government accorded vide Government order No. 570UD/LM of 1973 dated

18th July, 1973. No objection to the proposed taxes within 30 days from the date of publication of said schedule has been received by the council

in writing. The Municipal Council in its meeting held on 20th Nov. 1973 vide resolution No. 104 has resolved that the said tax shall come into

force from the date it is published in the Government Gazette. Therefore, it is notified under subsection (6) of Section 78 of the Municipal Act,

2008 that the said tax shall come into force from the date this notification is published in the Government Gazette.

By this Notification the imposition of the said Octroi Schedule is enforced finally with effect from the Notification published in the Government

Gazette. By virtue of subsection 78 of the Municipal Act such a Notification of imposition is declared conclusive evidence, which is to the following

effect:

(7) A notification of the imposition of a tax under this Act shall be conclusive evidence that the tax has been imposed in accordance with the

provisions of this Act.

It is now well setted that once such a Notification is finally issued, it is a conclusive evidence of the fact that the tax has been imposed in

accordance with the provisions of this Act. (Emphasis supplied by us). In support of the above said contention relating to the validily of such an

imposition and the powers of the court to probe into the prior procedure is barred and no evidence could be allowed to combat. Their Lordships

of the Hon'ble Supreme Court in the case of the Municipal Board Maunath Bhanjan, Appellant T/s M/s Swadeshi Cotton Mills Co. Ltd. and

others, Respondents reported in AIR 1977 S. C. 1055 have laid down to the following effect :

As the Notification had really been issued in compliance with the requirement of subsection (2) of section 135 of the Act. That would attract the

application of subsection (3) So when a probative effects had been given by law making the notification of the imposition of the tax as ""conclusive

proof"" that the tax had been imposed ""in accordance with the provisions of this Act"", no evidence could be allowed to combat that fact.

The provisions of subsection (6) and subsection (7) are paramateria to the provisions of subsection (2) of section 135 and subsection (3) of the U.

P. Municipalities Act, with which their Lordships of the Hon'blc Supreme Court were dealing in the above mentioned case. Similar view held in a

earlier authority of their Lordships of the Hon'ble Supreme Court in the case of (The Municipal Council, Raichur (In all the Appeals), Appellant

Vs. Bohar Amarchand Prasanna and ors. Respondents) reported in AIR 1968 S. C. 225 following the above said dictum of their Lordships of the

Supreme Court, we are of the opinion that the arguments advanced fey the learned counsel for the petitioners challenging the validity of the Octroi

Schedule discussed above issued under Section 78 of the Municipal Act has no legs to stand and the validity of the Schedule is, therefore, upheld.

9. The last point which remains for determination is with respect to the exemptions mentioned in clause (6) of the Heading Examinations in the

Octroi Schedule. It is no doubt true that the entry of foodgrains appears in Item No. 9 of the Schedule, which includes in it wheat and wheat

products also, because the same cannot be separated, but once the Government and the Municipality chooses to retain the exemptions as have

already been granted by the Government from time to time. They shall continue to be in force by the force of clause (6) stated above of lh

Exemptions. Merely because as provided under section 100 of the Municipal Act ""the levy of octroi and other matters connected therewith shall,

only such time as the Council levies or collects the octroi itself, be governed a d controlled by. the provisions of Jammu and Kashmir Octroi Act,

it cannot be said that the Notification of exemptions enforced at the time, when the said schedule came into force stands abrogated by the force of

Section 100 of the Municipal Act. In this respect we would like to mention the provisions of Section 1 of the Municipal Act, which provides a

Saving Clause, by the force of this Saving Clause, which is to the following effect :

Saving Clause. But all municipalities constituted, committees established, limits defined, appointments,

rules, regulations, byelaws and orders made, notifications and notices issued, tax, tolls, rates and fees imposed or assessed, contracts entered into

and suits instituted under the said Act shall, so far as may be. deemed to have been respectively constituted, established, defined, made, issued, imposed or assessed, entered into and instituted under this Act.

The taxes and tolls shall in so far as may be, shall continue and the Notification issued by the earlier enactments are not superseded. Thus in our

view although by virtue of the provisions of Section 100 of the Municipal Act, the provisions of Octroi Act no more survives since a valid

imposition is made under section 78 ibid of the Municipal Act. The Notifications of exemption issued under the Octroi Act still stands served by

the Saving Clause stated above, in so far as it relates to wheat and wheat products by the force of Clause (6) of the exemptions. We also find that

there is no force in the arguments of the learned counsel for the respondents that by the force of SRO86 dated 12th March, 1966, the exemption

granted for the wheat and wheat products stands superseded. In our iopinion that relates to the import of foodgrains, which are imported on

Government account or for the private use and not for public purposes, in case any such doubt is created that the import by the petitioners is not

on account of the sale or consumption by the public at large and are on the Government account requiring the Certificate under SRO86, the

authorities shall have to consider this appeal in the light of the circumstances prevailing in each case. In the present petitions, we do not find any

such averment that the wheat imported by the petitioners is covered by SRO86, we are therefore, of the opinion that Government Order No. 26/C

dated 811943 unless specifically superseded or abrogated by any other Government Order, which has not been placed before us by the learned

counsel for the respondents. The are entitled to get the exemption under Government Order No. 26/C ibid.

10. For the reasons stated above, we allow the writ petitions partly to the extent that the exemption granted by the Government vide Order No.

26/C ibid dated 811943 still holds good unless superseded specifically or abrogated by any other Notification in this behalf. The respondents are

not entitled to realise Octroi Duty on the import of wheat which is consumed by the petitioners for converting into wheat flour and used for the sale

and consumption of the general public at large, thus the order of the Administrator passed on 8th October, 1977 and the realisation of the Octroi

duty on the wheat imported by the petitioners is hereby quashed by a writ of Certiorari and it is held that in so for as the refund of the tax already paid and realised by the respondents is concerned shall be subject to the scrutiny by the Administrator or the authority concned in the light of our

findings in the present writ petitions. On the other grounds the petitions stands dismissed with no order as to costs, The connected CMPS aro also

stands disposed of accordingly.

