

(1988) 12 GUJ CK 0009
In the Gujarat High Court

Gujarat State Fertilizer Co. Ltd.

APPELLANT

Vs

Sikka Digvijaygram, Joint Nagar Panchayat and Others

RESPONDENT

Date of Decision : 12-12-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, 146

Gujarat Gram and Nagar Panchayats (Taxes and Fees) Rules, 1964 — Rule 36

Citation : (1989) 2 GLR 725

Hon'ble Judges : M.B. Shah, J

Bench : Single Bench

Judgement

M.B. Shah, J.—Being aggrieved and dissatisfied by the judgment and order dated 24th March, 1986 passed by the 2nd Joint Civil Judge. (S.D.), Jamnagar, below Ex. 5 in Special Civil Suit No. 171 of 1985, the Appellant Gujarat State Fertilizer Company Limited, has filed this appeal.

2. The appellant has filed the aforesaid suit before the Civil Judge (S.D.), Jamanagar, seeking relief of declaration that it is entitled to exemption from payment of octroi duty and also for a permanent injunction restraining the Sikka Digvijay Gram Joint Nagar Panchayat, Sikka and its agents or the Ijardars to whom the contract for recovery of octroi is given by the Panchayat from recovering the octroi. The plaintiff-company has started a project to put up the plant for manufacturing Di-Ammonium Phosphate Fertilizer. The project envisages putting up a plant for manufacture of the said product and a part of this project, namely Ammonia Storage Tank and storage facilities for phosphates, etc. which are to be imported is to be located near Fisheries Office, within the limits of Sikka Nagar Panchayat. It is further stated that the plant is being put up entirely as a new industry. The plaintiff has obtained lands from the Government of Gujarat for this part of the project within the limits of village Sikka. Foundation stone was laid on July 16, 1985 and the construction on the said lands at Sikka has commenced on or around October 20, 1985. It has been further stated that the plaintiff has awarded a contract for erection of the Tank and other civil structures on the land to one M/s. National Builders. Hence it is contended by the

plaintiff that under Rule 36 of the Gujarat Gram and Nagar Panchayats (Taxes and Fees) Rules, 1964 (hereinafter referred to as the "Taxes and Fees Rules"), the plaintiff is entitled to have exemption from octroi duty. In spite of this position, the defendant No. 1 or their agents were threatening to detain the goods of the plaintiff for non-payment of octroi duty. Therefore, the suit was filed for declaration and permanent injunction. In that suit application Ex. 5 for temporary injunction against the defendants restraining them, their servants, agents, employees etc. from claiming and/or recovering any octroi for any goods brought for the purpose of new industry of the plaintiff, was filed on 19th November, 1985. The learned Judge has rejected the said application as stated above, by his judgment and order dated 23rd March, 1986.

3. The above Appeal From Order was filed on 6th May, 1986. Along with the Appeal From Order, Civil Application for interim relief was filed.

4. Before that, on behalf of the Nagar Panchayat, a caveat was filed on 16th April, 1986.

5. The matter came up for admission on 15th May, 1986. The Court passed the following order:

Admitted Paper Book dispensed with. Appellant to supply the paper book. To be heard in the week commencing from 23rd June, 86. Mr. Hathi and Mr. S.M. Shah waive service of the rule.

On the Civil Application the Court has passed the following order:

Interim relief refused on condition that the respondents Nos. 1 and 3 to file undertaking in this High Court within 2 weeks from today to the effect that in the event of the appellant succeeding in this Appeal or in the suit the amount of octroi recovered from the appellant shall be refunded within such time as may be granted by this Court. It is clarified that this order will operate in the present proceedings only and in other proceedings the Court will deal with the same in accordance with law.

6. In view of the aforesaid order, on the same day, on behalf of the Sikka Digvijay Gram Joint Nagar Panchayat, Sikka, its Secretary, Rameshbhai Pandya, filed an undertaking to the effect that in case the applicant Company succeeds in the appeal, the Panchayat will refund the octroi amount collected from the Company.

7. On the same day, on behalf of the respondent No. 3, M/s. Amratlal and Company, Prabhudas D. Kataria, i.e. its partner, has filed an undertaking as under:

I, Prabhudas D. Kataria, partner of Messrs Amratlal and Company, do hereby solemnly state on behalf of respondent No. 3 that in case the Applicant-Company succeeds in the above mentioned appeal from Order, the respondent will refund the amount of Octroi collected from the Company.

I am filing this Undertaking as directed by the Hon''ble Gujarat High Court, Ahmedabad.

8. Mr. S.M. Shah, the learned Advocate appeared on behalf of the respondent No. 3, at the time of bearing for admission of the Appeal From Order as well as the Civil Application.

9. At the time of hearing of this Appeal From Order, along with Mr. S.M. Shah, Mr. S.B. Vakil appeared as Counsel for respondent No. 3 and he raised a contention that appeal against respondent No. 3 is not maintainable as he was not a party before the trial Court when the impugned order was passed and therefore appeal should be dismissed against him.

10. It is true that on 24th March, 1986 when the trial Court passed the impugned order, respondent No. 3 was not a party to the suit. But that was because at that time respondent No. 2, M/s. Anand Corporation, was Ijardar for recovering octroi on behalf of the Sikka Nagar Panchayat. After 1st April, 1986 the contract was given to the respondent No. 3 and therefore as an agent of respondent No. 1, respondent No. 3 was joined as party to the aforesaid appeal.

11. In the affidavit filed on behalf of the appellant-Company it has been stated that from 1st April, 1986 till 31st March, 1988 defendant No. 3, M/s Amratlal and Co., acted as Ijardar from the Panchayat collected the octroi. The total amount recovered by the said Ijardar from the plaintiff-Company is about Rs. 8,44,610/- and this amount is recovered directly from the Company in spite of the fact that the Panchayat has categorically stated that no amount has been collected or would be collected from the plaintiff-company directly. It is further stated that these amounts are in respect of material goods brought by the plaintiff-Company itself and the defendant No. 3 has been able to collect this amount only because the injunction order during the pendency of the appeal was not granted relying upon the undertaking filed by respondent No. 3. It has been further pointed out in the affidavit that for the the cement and steel brought for construction of the plant, Ijardar of the Panchayat has recovered Rs. 1,51,345/- directly from the Company and Rs. 1,13,666/- from the contractor of the appellant-Company, i.e. in all for cement and steel, Ijardar has recovered an amount of Rs. 2,65,011/- as octroi. Thereafter, a further sum of Rs. 2,13,174/- is recovered as octroi from the contractor of the Company for which the Contractor has claimed refund from the appellant for bringing cement and steel for the construction work Along with this affidavit, statement of payment of octroi is produced and it reveals that in all Rs. 12,45,488/- is paid by the Company towards octroi. To this, affidavit-in-reply is filed at a late stage, namely, at the fag end of the arguments, by partner of respondent No. 3. In the said affidavit except bare denial, nothing further is pointed out nor has it been stated how much amount is recovered by the Ijardar towards the octroi. It seems that the purpose of raising the aforesaid objection and not filing proper affidavit is to delay the proceedings and to keep the large amount with the respondent No. 3-firm inspite of the undertaking given before this Court.

12. In deciding the main controversy it will be necessary to consider Rule 36 of the Gujarat Gram and Nagar Panchayats (Taxes and Fees) Rules, 1964, which is as under:

36. Exemption from octroi: (1) The following articles shall be exempt from payment of octroi--

xx xx xx xx

(2) Subject to the provisions of Sub-rule (4) building materials, plants, machinery, stores spare parts, raw materials, finished goods or any other articles brought within the limits of gram or nagar not for sale but for use thereof in the manufacture of any goods or in erecting any factory, by any new industry shall be exempt from the payment of octroi.

(2) (A) deleted.

(3) For the purposes of Sub-rule (2), "new industry" means-

(i) any industry established within the limits of the gram or as the case may be nagar on or after the 1st May, 1960.

(ii) any industry established within such limits before the 1st May, 1960 but the production of goods in which has commenced after the 1st May, 1960 and

(iii) in the case an industry which has been established before the 1st May, 1960 but which has undergone or which undergoes expansion after that date of the expanded part of the industry:

Provided that as industry shall be demand to undergo expansion merely an account of replacement or overhauling of any existing machinery.

(4) The exemption under Sub-rule (2) shall not be available to a new industry after the expiry of five years from the date on which the first lot of manufactured good is produced by it for expiry of seven years from date of its establishment whichever event occurs earlier.

Explanation: For the purposes of the Sub-rule (4) the date of establishment of an industry means the date on which any of the building materials or other article: referred to in Sub-rule (2) are brought within the limits of the gram or nagar as the case may be for the first time for erecting any factory by such industry.

From Sub-rule (2) of Rule 36, it is clear that if building materials, plants, machinery, stores, spare parts, raw materials, finished goods or any other articles are brought within the limits of gram or nagar panchayats (i) not for sale but for use thereof in the manufacture of any goods, or (ii) in erecting any factory, by any new industry, as provided in Sub-rule (3), they are exempted from payment of octroi. Exemption shall continue for a period prescribed under Sub-rule (4). Therefore, reading Sub-rule (3) it is clear that Panchayat is not entitled to recover octroi from a new industry if (1) any building materials are brought within the limits of the Panchayat for erecting any factory, (2) any plants

or machinery and spare parts are brought within the limits of the Panchayat and (3) any raw materials, finished goods or any other articles are brought within the limits of Nagar Panchayat for the use by the new industry in manufacture of any goods. When this position of law pointed out to the trial Court, it was the duty of the Court to verify the say of the appellant-Company. Admittedly the Company was a new industry. Some goods, plants and machinery were brought by the Company or its agent (Contractor) for construction of the factory.

13. In spite of this clear position of law, the learned Judge refused to grant any injunction solely on the ground that the Company was act bringing the goods, but the Contractor was bringing the goods or materials on his own name and those articles or goods, belong to the Contractor, till those articles or goods are used for construction and therefore the plaintiff has failed to establish its prima facie case. The learned Judge overlooked that in any case plants and machinery were brought for the Company. The trial Court further observed that even if there is substantial question or issue between the parties and that the plaintiff has prima facie case, then also the plaintiff is not entitled to any injunction against the recovery of octroi. The trial Court tried to refer to some judgments in support of the aforesaid view.

14. In this case, apart from the prima facie case, the second reason given by the trial Court is without application of mind. The trial Court ought to have considered that in the present case the appellant Company virtually is a Company owned by the State Government because about 80% of the equity shares belongs to the State Government. Therefore, even if any injunction was granted, there was no question of irreparable loss either to the Panchayat or to its Ijardars. The appellant-Company would have paid the said amount of octroi, if the suit, after final hearing, would, have been dismissed. The trial Court overlooked the fact that Nagar Panchayat was not going to recover any amount of octroi from the appellant, but its Ijardar was to recover the amount from the appellant-Company. After recovering a huge amount as Octroi Ijardar would try to delay refund of the said amount even if the Court passes decree, by raising all sorts of contentions, and would see that for a long period refund is dealed.

15. Mr. G.N. Desai, the learned Counsel appearing on behalf of the appellant, submitted that in this particular case it is not necessary to decide the point whether provisions of Sub-rule (2) of Rule 36 of the Taxes and Fees Rules would be applicable in those cases where on behalf of the new industry building materials are brought within the limits of Nagar Panchayat by its Contractor for construction of the factory premises, because according to him, as per the agreement between the appellant-Company and its Contractor, building materials such as structural steel and reinforcement cement rounds are required to be supplied by the appellant-Company to the Contractor. He relied upon the agreement between the appellant-Company and its Contractor, M/s. National Builders. The relevant term which is Term No. 4, reads as under:

Company will supply free of cost structural steel and reinforcement cement

rounds to the Contractor at Company's Motikhavdi Steel Yard. Company will supply cement to the Contractor on chargeable basis at Company's Stores and/or at DCC, Sikka. However, the Contractor will make necessary arrangement for transporting steel/cement to shore terminal site at Sikka. In this connection, octroi duty, if leviable by Sikka Gram Panchayat authority, shall be to the Company's account.

16. To this contention, learned Counsel for respondent No. 3 submitted that this agreement was not produced on record before the trial Court and no application is given to this Court for production of the said agreement before this Court and therefore the said agreement cannot be looked in to by this Court. Mr. Desai, learned Counsel for the appellant, submitted that in the list of the documents supplied by the appellant plaintiff, it has been stated that the plaintiff would produce the aforesaid documents at the time of hearing of application Ex. 5. He further pointed out that one Mr. Ashok H. Vyas, Civil Engineer of the Contractor, has filed an affidavit before the trial Court on 4-12-1985 stating that cement and iron were to be supplied by the plaintiff-Company for the construction of the factory and the learned Judge has not bothered to apply his mind to the evidence which was on record. From the contentions of the parties it is clear that xerox copy of the agreement was not produced before the trial Court. But at the same time, at the time of hearing of this matter, learned Counsel for the appellant had pointed out the said document and he was asked to produce it on record because it was the most relevant document and at no stage the learned Counsel for the respondent No. 3 had pointed out that the said document cannot be relied upon for any other reasons except that it was not produced on record before the trial Court. Under Order 41, Rule 27 of the Code of Civil Procedure, 1908, if for a substantial cause Court requires certain additional evidence to enable to pronounce the judgment or for any other substantial cause, production of additional document can be permitted.

17. further, apart from the octroi on cement and iron recovered by the respondent No. 3 from the Contractor of the appellant-Company, it is the say of the appellant that the Ijardar has recovered octroi of Rs. 1,51,345/- directly from the plaintiff-Company. It has been further pointed out that Ijardar of the Panchayat has recovered Rs. 7,67,303/- in respect of machinery, pipes, etc. brought by the Company. Therefore, with regard to this amount, it can be said that it has been recovered from the plaintiff-Company itself. To this averment, there is no specific reply by the respondent No. 3-Company. Therefore, without any hesitation it can be said that the respondent should refund Rs. 9,18,648/- to the appellant. That means, even for the time being accepting the contention of the respondent No. 3 that agreement executed between the appellant and its Contractor, National Builders, is not taken into consideration, yet for the amount which is recovered directly from the appellant, the respondent No. 3 is bound to refund it, in view of his undertaking given before this Court and if his contention that appeal against him was not maintainable is not accepted because Rule 36, Sub-rule (2) of the said Rules leaves no doubt that if any building material is

brought by a new industry for erection of a factory, then the new industry is exempt from payment of octroi. It further provides that if the new industry brings within the limits of the Panchayat any material for its use in the manufacture of any goods, then also it is not required to pay any octroi.

18. It is not necessary at this stage to deal with the contention of the learned Advocate for the respondent No. 3 that no appeal against respondent No. 3 was maintainable because he was not a party to the proceedings before the trial Court. In my view, this contention is absolutely a dishonest one. At the time of admission of this matter, the respondent No. 3 agreed that if it is permitted to recover octroi and if appeal is allowed, then it would refund the said octroi to the appellant. To that effect, this Court has passed the order on Civil Application. In that order it has been specifically stated that in the event of the appellant succeeding in this appeal or in the suit, the amount of octroi recovered from the appellant shall be refunded within such time as may be granted by this Court. Apart from this specific order by this Court, respondent No. 3 has given an undertaking to this Court that in case the appellant-company succeeds in the Appeal From Order, the respondent No. 3 would refund the amount of octroi collected from the Company. In my view, once a person who is joined as a party before this Court gives an undertaking on solemn affirmation before this Court, he cannot be permitted to take the dishonest plea at this late stage after recovering large amount of Rs. 12 lacs that appeal against it was not maintainable. Respondent No. 3 got benefit of the interim order. If it had objected at the time of admission that it cannot be joined as party respondent, then the Court would have passed appropriate order. In any set of circumstances, it ought not to have given an undertaking before this Court that if the appeal is allowed it would refund the amount.

19. Apart from this dishonest contention, even on merits there is no substance in this contention firstly because upto 31st March, 1986 respondent No. 3 was not at all in the picture. For the first time contract was given to the respondent No. 3 in March, 1986 for collecting octroi from 1st April, 1986 onwards. Prior to that, respondent No. 2 was Ijardar for collection of octroi and respondent No. 2 was party before the trial Court. Secondly, respondent No. 3 is acting as an agent of the respondent No. 1-Panchayat. Therefore, once the direction is given to respondent No. 1-Panchayat not to collect the octroi from the appellant, then the said direction would be binding to the respondent No. 3. Further, in view of the provisions of Section 146 of the CPC respondent No. 3 could be joined as party respondent. Section 146 provides that where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him. Respondent No. 3 cannot directly claim that it is entitled to recover the octroi, but as respondent No. 1-Panchayat has assigned its right to collect octroi to respondent No. 3, it claims right to recover octroi from the appellant. Section 146 is considered by the Supreme Courts in the case of Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and Another, , wherein the Court has held that Section

146 was introduced for the first time in the Civil Procedure Code, 1908 with the object of facilitating the exercise of rights by persons in whom they come to be vested by devolution or assignment, and being a beneficent provision should be construed liberally and so as to advance justice and not in a restricted or technical sense. The Court further held that the right to file an appeal must therefore be held to carry with it the right to continue an appeal which had been filed by the person under whom the applicant claims. Thereafter also the said provision is considered by the Supreme Court in the case of Zila Singh and Others Vs. Hazari and Others, , and the aforesaid decision is approved by it. In the case of Shew Bux Mohata and Others Vs. Bengal Breweries Ltd. and Others, , the Supreme Court held that pending appeal before the Supreme Court if the mortgaged property was sold in execution, then the auction-purchaser can be brought on record of appeal before the Supreme Court. The relevant discussion is in paragraph (19) which is as under:

It appears to w that the added respondents were properly brought on record. The decision of this Court in Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and Another, , supports that view. There it was held that an appeal is a proceeding within the meaning of Section 146 of the Code and the right to file an appeal carried with it the right to continue an appeal which had been filed by person under whom the appellant claimed and on this basis a purchaser from the appellant under a purchase made prior to the appeal was brought on the record of the appeal. We think that on the same principle the added respondents in the case before us were properly brought on the record.

20. From the aforesaid discussion, this appeal requires to be allowed as the order passed by the trial Court is against the statutory Rule 36 of the Gujarat Gram and Nagar Panchayats (Taxes and Fees) Rules, 1964. The contention raised by the respondent No. 3 that it cannot be joined as party respondent in this appeal is not only dishonest but also without any substance.

21. Hence the injunction as prayed for by the appellant deserves to be granted. In this Appeal From Order the question whether the goods which are brought by the Contractor on behalf of the appellant are required to be exempted under Rule 36(2) of the aforesaid Rules is not considered as it depends upon the facts of the case. The trial Court is directed to decide the suit on merits including the issue whether Rule 36(2) would apply to the facts and circumstances of the case and its effect when the goods are brought by the Contractor of the appellant-company.

22. In the result, the appeal is allowed. It is directed that pending hearing and final disposal of the suit respondent No. 1 or its agents or Contractors shall not recover any octroi from the appellant for (1) any building materials brought within the limits of the Panchayat for erecting any factory; (2) any plants or machinery and spare parts brought within the limits of the Panchayat, and (3) any raw materials, finished goods or any other articles brought within the limits of the Nagar Panchayat for the use by the new industry in manufacture of any

goods.

23. As this appeal is allowed, in view of the undertaking given by respondents Nos. 1 and 3, they are required to refund any amount of octroi received from the appellant pending disposal of this appeal. However, to avoid any controversy at this stage it is directed that within two months from today respondent No. 3 shall refund only the amount of Rs. 8,44,610/- which it has recovered directly from the appellant as pointed out in the affidavit filed by the appellant. With regard to the remaining amount i.e. Rs. 1,51,345/- which is directly recovered from the Company and Rs. 1,13,666/- which is recovered from the Contractor as stated in the affidavit filed by the appellant and other amount after filing of the aforesaid affidavit or prior to it to respondent No. 2 or to the Panchayat, it shall be determined by trial Court after taking into account the octroi receipts or other material which may be produced by the appellant at the time of passing the decree. The trial Court would pass appropriate order with regard to the interest.

The trial Court is further directed to dispose of the suit at the earliest and in any set of circumstances without fail within four months from today. The Appeal From Order is allowed with costs.