

(1993) 02 BOM CK 0006

In the Bombay High Court

Case No : Writ Petition No. 6037 of 1991

H. and R. Johnson (India) Ltd. and Another

APPELLANT

Vs

The Municipal Commissioner and Another

RESPONDENT

Date of Decision : 03-02-1993

Acts Referred:

Constitution of India, 1950 — Article 226

Maharashtra Municipalities Act, 1965 — Section 105, 321(2)

Citation : (1993) 3 BomCR 356

Hon'ble Judges : S.P. Kurdukar, J;A.P. Shah, J

Bench : Division Bench

Advocate : D.Y. Chandrachud and Sanjay Udeshi, instructed by Haresh Mehta and Co, for the Appellant; R.S. Apte, for the Respondent

Judgement

A.P. Shah, J.—The short question for determination in this writ petition is whether clay imported by the first respondent Company is exigible to octroi under Entry 45 of the Ist Schedule of the Maharashtra-Municipalities (Octroi) Rules, 1968 at the rate of 4% ad-valorem or at the rate of Re. 1/- per tonne under Entry 45 of the said Schedule.

2. Every Municipal Council or Corporation is entitled to levy octroi u/s 105 of the Maharashtra Municipalities Act, 1965. The Government of Maharashtra has framed Rules called Maharashtra Municipalities (Octroi) Rules, 1968 under sub-section (2) of section 321 read with the proviso to sub-section (1) of section 105 of the Maharashtra Municipalities Act, 1965. Schedule I of the said Rules classifies all specified goods either on the basis of their usage or the materials used in their manufacture. So-far as the present petition is concerned, the relevant entries are found in Class IV, which bears the heading "Building and other construction materials". Class IV consists of entries 44 to 52, of which entries 45, 46 and 47 are of relevance, and are, therefore, extracted below :

Serial	Description	of	Ad-valorem
-----		No.	goods Maximum

Minimum	Rate.	Rate.	2	3	4
-----			45	Coal tar, asphalt, bitumen, flooring	4.00 0.50
			46	stone, manganese, emery stone or powder, stone chips, stone powder, Agra stone, stone for building clinker and coal-ash.	4.00 0.50
			47	Glazed, bricks, tiles, marble pieces, roofing tiles, flooring tiles and slabs farshi etc., China mosaic chips, mosaic marble, mosaic or Terrazo tiles, earthen pipes, china pipes, cement pipes and asbestos cement sheets.	4.00 0.50
				Yellow earth and earth of any other kind, sand, metal, rubble, murum and gravel.	

Insofar as the Thane Municipal Corporation is concerned, the rate of octroi is fixed at 4% ad-valorem in respect of Entries 45 and 46 and at the rate of Re. 1/- per tonne in respect of Entry 47.

3. The first petitioner is a Company engaged in the manufacture of ceramic tiles. One of the raw materials used by the first petitioner for the manufacture of ceramic tiles is clay. The quality of clay used by the petitioners is available in Rajasthan and Andhra Pradesh and the petitioners, therefore, import the same into Thane Municipal Corporation limits from outside thereby becoming liable for the levy of octroi on importation.

4. Initially, the first petitioner Company had obtained exemption from payment of octroi in respect of the clay imported by it. From 1-4-1975, the Municipal Authorities of Thane have been collecting octroi as if falling under Entry 45 at the rate of 4% ad-valorem. According to the petitioners, the clay being a raw material squarely falling within the definition of "Earth of any other kind" under Entry 47, necessarily had to be assessed at the rate of Re. 1/- per tonne instead of 4% ad-valorem, as charged. The petitioners, under a mistaken notion of the law, have paid octroi at the rate of 4% ad-valorem, though the clay imported by them clearly falls under Entry 47. The petitioners, upon realising that the collection of octroi at the rate of 4% ad-valorem, was unlawful addressed a letter dated 23rd October, 1990 to the second respondent, viz., the Superintendent of Octroi, Thane Municipal Corporation, pointing out that clay was exigible to octroi under Entry 47. No reply was, however, received by the petitioners and the Octroi Department of the Corporation continued to insist levy at the rate of 4% ad-valorem. The petitioners thereafter addressed a letter dated December 20, 1990 to the first respondent, viz., the Municipal Commissioner, Thane Municipal Corporation, again complaining about the levy at the rate of 4% ad-valorem. The petitioners made similar representations to the first and the second respondents under their letters dated February 28, 1991, May 6, 1991 and June 29, 1991, but the respondents did not pay any heed to the complaints made by the petitioners and, therefore, the petitioners filed the present writ petition under Article 226 of the Constitution of India.

5. The respondents, in their return, contended that the clay imported by the first petitioner Company is a special category of clay called "China" clay and that the

same falls under Entry 45 under the caption of "Stone Powder". The respondents maintained that "China" clay is a "Stone Powder" within the meaning of Entry 45 and that, therefore, the levy of octroi at the rate of 4% ad-valorem was legal and valid. The respondents in their additional return filed at the time of hearing of this writ petition raised a preliminary objection to the maintainability of the petition pointing out that the petitioners had remedy of appeal u/s 406 of the Bombay Provincial Municipal Corporation Act, 1965, which has not been availed of before moving this Court.

6. In view of the rival contentions, the first question, which falls for determination is whether the petitioners should be denied relief under Article 226 of the Constitution on the ground that there is an alternative efficacious remedy of filing a statutory appeal is available. Mr. Apte, learned Counsel for respondent No. 1, invited our attention to the judgment of this Court in Wandalside National Conductors Limited v. Municipal Corporation for the city of Wandalside National Conductors Ltd. Vs. Municipal Corporation for the City of Pune and Others, , to point out that section 406 of the Bombay Provincial Municipal Corporation Act enables the aggrieved assessee to file an appeal before the Civil Judge and can carry further appeal to District Court. Mr. Apte also pointed out that in the said decision the Division Bench refused to entertain the writ petition even-though the same was admitted and was pending for nearly nine years and that the assessee was directed to adopt the remedy of the statutory appeal under the Act. Dr. Chandrachud, learned Counsel for the petitioners, countered this submission by bringing to our notice a recent Judgment of the Division Bench of this Court in Asmaco Plastic Industries and another v. Municipal Corporation for the city of Thane and others, reported in 1992 M.L.J. 1212 , in which the earlier judgment in the case of Wandalside National Conductors Limited has been distinguished and explained by holding that the said decision proceeded on the particular facts of that case and that the High Court can entertain such petition if it thinks proper to do so in the circumstances of the case. Dr. Chandrachud also invited our attention to a judgment of this Court in Navyug Steel Industries and Others Vs. Bombay Municipal Corporation and Another, , in support of his plea that the existence of an alternative remedy cannot operate as absolute bar when the factual position is virtually indisputable and the quality and extent of dispute, which survives is easily soluble. Dr. Chandrachud also relied upon a recent judgment of the Supreme Court in Shyam Kishore and others Vs. Municipal Corporation of Delhi and another, . In para 37 of the said judgment the Supreme Court observed as follows :

"It is true that the High Court would not ordinarily entertain the petition under Article 226 of the Constitution when the alternative remedy of appeal is available to the party but it must be said that the High Court has the jurisdiction to grant such a relief it thinks proper to do so in the circumstances of any case. Reference in this behalf is invited to the decision of this Court in Municipal Council, Khurai and another v. Kamal Kumar and another, the relevant portion of which reads as under:

Before us it is contended by Mr. Setalvad on behalf of the Council that an appeal had already been preferred by the respondent against the assessment list and, therefore, they were not entitled to any relief under Article 226 of the Constitution. It is true that the High Court would not ordinarily entertain a petition under Article 226 of the Constitution where an alternative remedy is open to the aggrieved party. Though that is so the High Court has jurisdiction to grant relief to such a party if it thinks proper to do so in the circumstances of the case. In the present case the High Court has chosen to exercise discretion in favour of the respondents and it would not be right for us to interfere with the exercise of that discretion unless we are satisfied that the action of the High Court was arbitrary or unreasonable. Nothing has been brought to our notice from which it would be inferred that the High Court acted arbitrarily in granting the writ prayed for to the respondents."

Now it is true that this Court would not ordinarily entertain a petition under Article 226 of the Constitution when the alternative remedy of appeal is available, but essentially the question is being one of discretion, we will proceed to examine the facts of the present case in order to see whether we should drive the petitioners to the Civil Court u/s 406 of the Bombay Provincial Municipal Corporation Act, 1965. This petition was admitted by this Court after notice to the respondents. Initially ad-interim relief was granted, but the same was subsequently vacated by passing following order :

"Heard Counsel. Interim relief refused. The payment of octroi duty cannot be stayed. In case petitioner succeeds, the respondents will refund the excess duty."

It is pertinent to note that the plea of availability of an alternative remedy was not raised at the time of admission or at the time of vacating interim relief. This plea was taken for the first time by filing an additional return at the time of hearing of the writ petition. The order passed by the Division Bench, while vacating interim relief, clearly indicates that the Corporation was willing to go for the hearing of the petition and did not resist the petition on the ground of alternative remedy. The second reason for not acceding to the objection of maintainability of the petition is that the issue involved in the petition is neither complicated nor required any evidence. The only question is whether the raw material imported by the first petitioner falls under Entry 45 or Entry 47. What arises in substance is, therefore, a question of interpretation that is the question of law. Moreover, we cannot overlook that the Corporation is required to spend taxpayers' money to defend the litigation and there is likelihood of a spate of appeals. Further the petitioners would be put to undue expenditure and multiplicity of proceedings if they had to prefer repeated appeals every time the demand was made by the Municipal Authorities. In these circumstances, it would be inappropriate to drive the parties to fresh round of litigation. We hold that the preliminary objection raised by the Municipal Authorities must be negated.

7. Coming to merits of the case, Dr. Chandrachud submitted that the clay imported by the first petitioner falls within Entry 47, which applies to "yellow

earth and earth of any other kind". The Counsel further submitted that the words "any other" in the context in which they are used, clearly mean "all other", and therefore, every kind of earth is included therein. He brought to our notice the dictionary meanings of the words "clay", "earth" and "earthen" and contended that these entries make it clear that clay is a kind of earth and that it, therefore, falls within the ambit of Entry 47 of Schedule I. "Clay" is defined in Concise Oxford Dictionary as follows :

"Clay n. stiff tenacious earth, material of bricks, pottery, etc. ..."

The Chambers English Dictionary similarly defines "clay" in the following terms:

"Clay n. earth in very fine particles, tenacious and impervious (agri.): a tenacious ductile earthy material, hydrated silicates more or less impure (Chem. and min.) : earth in general : the human body : ..."

In Readers Digest Encyclopadic Dictionary, the definition of "clay" runs as follows :

"Clay a stiff viscuous earth consisting chiefly of aluminium silicate and forming with water a tenacious paste which may be moulded, or dried and baked into bricks, pottery, tiles, etc., ... Earth, esp. the earth covering a dead body when buried; earth as the material of the human body, hence, the body."

Similarly, "earth" and "earthen" are defined in various dictionaries as follows :

(i) Readers Digest Encyclopadic Dictionary : "Earth the ground; (with pl.) soil, esp. as suited for cultivation; mould, dust, clay; .."

(ii) Concise Oxford Dictionary : "Earthen a. made of earth; made of baked clay."

(iii) Chambers English Dictionary : "Earthen made of earth or clay."

8. The dictionary meanings of the words "clay" "earth" and "earthen" make it clear that clay is a kind of earth. It is a part of the soil, which is sticky, viscous and tenacious in nature. The words used in Entry 47 "yellow earth" and "earth of any other kind" are wide enough to include every kind of earth of whatsoever description. In common parlance, clay is understood to mean a type of earth. The normal meaning of clay would not find in the description of "stone powder". This is not the natural meaning as understood by common people. The dictionary meaning also corresponds to the same view.

9. Mr. Apte fairly conceded that the words " earth of any other kind" are wide enough to include clay. In fact, in the return filed by the respondents, the fact that clay is a kind of earth is virtually accepted. The respondents, in their return, relied upon the definition of clay in the Webster's Dictionary, which reads as follows :

"The natural earthy material, plastic when wet, resulting from the decomposition of certain rocks, consisting essentially of a hydrated silicate of aluminium and used chiefly for making bricks or pottary, loosely, earth or mud; earth considered

as the material from which the human body was originally formed, Gen. (ii) 7; Job xxxiii 6 hence the human body flesh, as opposed to spirit; fig. anything which is easily shaped or influenced v.t. - to treat with clay; over or daub with clay. Earth is defined inter alia - esp. cultivable soil of dirt, as contrasted with rock or sand."

The respondents have also relied upon the definition of "China" clay, as defined in the dictionary of Geology, written by DGA Whitten with JRV Brooks, published by Penguin Books, which reads as follows :

"Deposits of Kaolin produced by hydrothermal decomposition or weathering of feldspars in granites".

The abovesaid definitions relied by the respondents also support the plea of the petitioners that the clay is a kind of earth and, therefore, falls under Entry 47. Mr. Apte, however, submitted that in Entry 47 different articles are classified as one class and, therefore, those articles will have to be construed ejusdem generis. The counsel submitted that "China" clay is a material, which does not go along with the other articles in Entry 47 i.e. yellow earth, murum, sand, metal rubble and gravel. According to the counsel, on true interpretation of Entry 47, clay or china clay imported by the first petitioner cannot be included in Entry 47, and the same will be covered by the expression "stone powder" in Entry 45. The counsel relied upon the judgment of the Supreme Court in Siddeshwari Cotton Mills (P) Ltd. Vs. Union of India (UOI) and Another, . It is not possible to accede to the submission of the counsel inasmuch as rule of ejusdem generis has no application to the facts of the present case. Rule of ejusdem generis signifies a principle of construction whereby words in a statute, which are otherwise wide but are associated in the text with more limited words are, by implication, given a restricted operation and are limited to matters of the same class or genus, as preceding them. The principle underlying this approach to statutory construction is that the subsequent general words were only intended to guard against some accidental omission in the objects of the kind mentioned earlier and were not intended to extend to objects of a wholly different kind. If, however, no class can be found, ejusdem generis rule is not attracted and if there is only one species, it cannot supply the idea of a genus. In Assistant Collector of Central Excise, Guntur Vs. Ramdev Tobacco Company, , the Supreme Court observed as follows :

"The general expression has to be read to comprehend things of the same kind as those referred to by the preceding specific things constituting a genus, unless from the language of the statute it can be inferred that the general words were not intended to be so limited and no absurdity or unintended and unforeseen complication is likely to result if they are allowed to take their natural meaning. The cardinal rule of interpretation is to allow the general words to take their natural wide meaning unless the language of the statute gives a different indication or such meaning is likely to lead to absurd results in which case their meaning can be restricted by the application of this rule and they may be required to fall in line with the specific things designated by the preceding words.

But unless there is a genus which can be comprehended from the preceding words, there can be no question of invoking this rule. Nor can this rule have any application where the general words precede specific words."

Entry 47 begins with item "yellow earth and earth of any other kind", which is a distinct species by itself and, therefore, there is no scope for invoking rule of ejusdem generis in the present case. By any common notion, it could not be said that clay is a "stone powder" within the meaning of Entry 45.

10. Mr. Apte then submitted that clay is formed out of decomposition of rocks and, therefore, the same should be treated as "stone powder". The counsel relied upon the definitions in Modern Science Dictionary of Webster in support of his submission. It is not necessary to refer to the said definitions because for the purpose of classification under a Tariff Entry, the end product must be looked at and not its components. It must be classified on the basis of how it is looked upon by persons dealing in the product. The components of the end product is not relevant for the purpose of classification. See *Fair Deal Corporation v. Municipal Corporation of Greater Bombay* 1988 M.L.J. 503 : 1988(3) Bom.C.R. 656.

11. Mr. Apte then relied upon the judgment in *Casher v. Holmes*, reported in (1831)109 Eng Rep 1263 and submitted that "China" clay imported by the first petitioner is of higher value than the yellow earth or an ordinary earth and, therefore, the same is not covered by Entry 47. We must reject this submission also. The question involved in the aforesaid case was whether the words "metals not enumerated" would include precious metals like gold or silver. It was held that the said words mean metals ejusdem generis with those previously mentioned and not precious metals. This principle has no application to the facts of the present case.

12. The result of the foregoing discussion is that the clay imported by the petitioner Company falls in Entry 47 and is, therefore, exigible to octroi at the rate of Re. 1/- per Metric Tonne and not under Entry 45 at the rate of 4% ad-valorem. The petitioners are, therefore, entitled for a declaration and we grant as prayed for in prayer (a) of the writ petition and also for an order as per prayer (b) for directing respondents (1) and (2) to levy and collect octroi on clay imported by the petitioner Company at the rate of Re. 1/- per Metric Tonne under Entry 47. The petitioners have also prayed for refund of all octroi collected in the past in excess of Re. 1/- per M.T. Dr. Chandrachud fairly conceded that the petitioners are not entitled to claim the refund from 1975, but the counsel insisted that they should be granted relief atleast for a period of three years prior to the filing of this writ petition. The counsel relied upon the judgment of the Supreme Court in *Shri Vallabh Glass Works Ltd. and Another Vs. Union of India (UOI) and Others*, . Mr. Apte, on the other hand, relied upon the judgment of the Supreme Court in *Orissa Cement Ltd. v. State of Orissa*, reported in 1991 Supp. (I) S.C.C. 430. He submitted that a finding regarding the invalidity of a levy need not automatically result in a direction for a refund of all collections made earlier.

The counsel relied upon the following passage from the judgment of the Supreme Court :

"However, a finding regarding the invalidity of a levy need not automatically result in a direction for a refund of all collections thereof made earlier. The declaration regarding the invalidity of a provision and the determination of the relief that should be granted in consequence thereof are two different things and, in the latter sphere, the Court has, and must be held to have, a certain amount of discretion. It is open to the Court to grant, mould or restrict the relief in a manner most appropriate to the situation before it in such a way as to advance the interests of justice. It is not always possible in all situations to give a logical and complete effect to a finding. Where a person affected by an illegal exaction files an application for refund under the provisions of the relevant statute or files a suit to recover the taxes as paid under a mistake of law, the Court can grant relief only to the extent permissible under the relevant rules of limitation. Even if he files an application for refund or a suit for recovery of the taxes paid for several years, the relief will be limited only to the period in regard to which the application or suit is not barred by limitation. Where a petitioner seeks relief against an illegal exaction in a writ petition filed under Article 226, the question has often arisen whether a petitioner's prayer for refund of taxes collected over an indefinite period of years should be granted once the levy is found to be illegal. To answer the question in the affirmative would result in discrimination between persons based on their choice of the forum for relief, a classification which, prima facie, is too fragile to be considered a relevant criterion for the resulting discrimination. This is one of the reasons why there has been an understandable hesitation on the part of courts in answering the above question in the affirmative."

Mr. Apte also pointed out that the levy was collected ad-valorem and that it will be difficult to ascertain the difference inasmuch as the duty payable under Entry 47, is on the basis of the weight of the raw-material. Having regard to the facts and the circumstances of the case and the orders passed by this Court, at the interlocutory stage, we feel that the interests of justice will be served if we direct refund from the date of the filing of this petition. In the result, we pass the following order :

ORDER

Rule made absolute in terms of prayers (a) and (b). The respondents are directed to refund to the petitioners all octroi collected on import of clay by the petitioners, at any rate, in excess of Re. 1/- per Metric Tonne after the date of filing of this writ petition.

The refund will be made within a period of eight weeks from today.

In the circumstances of the case, there will be no order as to costs.

Rule made absolute.