
(2013) 04 GUJ CK 0115
In the Gujarat High Court
Case No : Second Appeal No. 99 of 2013

Jamnagar Municipal Corporation

APPELLANT

Vs

Hemalbhai Ishwarlal Dubal

RESPONDENT

Date of Decision : 29-04-2013

Acts Referred:

Citation : (2013) 3 GLR 2435

Hon'ble Judges : N.V. Anjaria, J

Bench : Single Bench

Advocate : Jayant P. Bhatt, for the Appellant; Manisha Lavkumar, for the Respondent

Judgement

N.V. Anjaria, J.—With consent of and request by both the learned Advocates, the matter was taken up for final consideration, and was heard at length. By presenting this appeal under Sec. 100 of the Code of Civil Procedure, 1908, the appellant-Corporation seeks to challenge the judgment and decree passed by learned Sixth Additional District Judge, Jamnagar District, Jamnagar, whereby the appellant-original defendant is directed to refund the original plaintiff, who was the appellant before the lower Appellate Court and is respondent herein, Rs. 88,345-50 (Rupees Eighty-eight Thousand Three Hundred Forty-five and Paise Fifty) being the amount of the penalty of octroi recovered by the Corporation.

2. The relevant facts of the case are that plaintiff purchased vehicle being Tata Sumo bearing Registration No. GJ-10-Complaint-9534 on 2nd February, 1996, for the purpose of using it for his factory at Hapa. Factory address of Hapa in the Hapa Industrial Area being outside the limits of Jamnagar Municipal Corporation, according to the case of the plaintiff, the Corporation had no authority in law to collect penalty on octroi on the vehicle in question. It was pleaded that despite that the Corporation charged not only the octroi of Rs. 8,834-50, but levied ten times penalty, and thus recovered total Rs. 97,180/-. It was the further case, that thereafter, objections in writing were lodged, demand notice dated 19th March, 1998 was given seeking refund of the amount, but the same was not

answered, much less the amount refunded. The plaintiff once again, therefore, gave another notice dated 26th May, 1998, through Advocate.

2.1. The plaintiff-respondent thereupon instituted Special Civil Suit No. 65 of 1998 for recovery of the amount of Rs. 97,180/-, pleading and contending that in September, 1997, the officers of the Corporation in course of and under excuse of drive to recover the octroi came to plaintiffs place on 30-9-1997. It was alleged that they behaved high-handedly, asked for old bills and required to pay octroi of Rs. 1 lakh and further asked the plaintiff to voluntarily disclose that the octroi was unpaid. At that time, the plaintiff refused to voluntary disclosure; it was the case of the plaintiff that the aforesaid amount of Rs. 97,180/- was collected towards octroi and penalty, which was paid.

2.2. In the Written Statement at Exh. 38, the defendant-Corporation denied the case put forth by the plaintiff. It was contended that at the time of checking, partner of the plaintiff firm voluntarily disclosed Rs. 51,000/-; that a cheque dated 5-3-1998, for Rs. 25,000/- and dated 10-3-1998, for Rs. 26,000/-, and thereafter, upon request the plaintiff, the second cheque for Rs. 26,000/- was returned back. It was thereafter contended that the cheque for Rs. 97,180/- was given towards octroi and penalty and subsequently cash was given and the Corporation returned the cheque. It was the case of the defendant-Corporation that the address of Hapa was given at the time of purchase of the vehicle with a view to evade the payment of octroi, and therefore, octroi and penalty were rightly recovered and paid, with such attendant facts the Corporation, thus, mainly raised two-fold contentions. It was contended that the plaintiff had paid the amount inclusive of penalty voluntarily, therefore, there was no question of refunding the same. According to the defendant the amount being of penalty for octroi theft the same was rightly paid and duly collected. Furthermore, on the ground that the appeal was pending consideration before the Standing Committee of the Corporation, the suit was not competent and the Civil Court could not have exercised its jurisdiction to try and entertain the suit.

2.3. On the premise that the amount was voluntarily paid, and the plaintiff had made request to the Standing Committee, the Court of 5th Jt. Civil Judge (S.D.), Jamnagar dismissed the suit by judgment and order dated 28th December, 2001. It, however, negated the contention that the Court had no jurisdiction to try the suit. The lower appellate Court, allowing the appeal of the original plaintiff, held that the for collection of ten times penalty, the Corporation had no authority in law and that whether the amount was paid voluntarily was of no significance.

3. It was vehemently argued and emphasised by the learned Advocate for the appellant Mr. J.P. Bhatt that the amount of penalty was already paid by the respondent and that the trial Court on evidence found that the said payment was voluntary. It was submitted that finding being one of fact and having not been upset by the lower Appellate Court, the same ought to be maintained in the Second Appeal. It was submitted that in the circumstances the lower Appellate Court strongly held that the recovery of the amount not being legal, the same

was liable to be refunded. He submitted that the plaintiff applied before the Standing Committee and without awaiting the decision, instituted the suit which was not competent.

3.1. On the other hand, learned Advocate for the respondent Ms. Manisha Lavkumar at the outset relied on decision in *Vanza Karsandas Nathabhai v. Jamnagar Municipal Corporation*, 1998 (3) GCD 2226 to contend that the very Corporation had taken a different stand on the same issue in the said decision wherein also grievance was against the imposition of penalty on octroi. By inviting attention of the Court to Paragraph No. 8 of the said decision, it was contended that the Corporation had conceded that collection of octroi was required to be in accordance with law and in the event it was found that there was evasion of octroi, action as contemplated under Sec. 398 of Bombay Provincial Municipal Corporations Act, 1949 (B.P.M.C. Act) was required to be initiated by the officers concerned, and that the Court would decide the question of fine/penalty.

3.2. The finding and the contention that there was a voluntary payment of penalty was sought to be countered by learned Advocate for the respondent, who submitted that it was never out of volition. She submitted that objections and two notices were sent claiming the refund and by no stretch of logic, the payment of ten times penalty could be termed as voluntary. She submitted that the Corporation or its officers had no authority in law to impose penalty and the penalty could be imposed only by the competent Court. He submitted that penalty could be levied only in accordance with provisions of Sec. 398 of the B.P.M.C. Act and for that the competent Court only had the power.

4. In the context of facts emerging from record and the submissions made by learned Advocates for both the sides, it is required to be considered that whether the appellant-Corporation was competent in law and had authority in law to recover the penalty on the amount of octroi. Besides this moot point, the question is about rival claim of voluntary nature of payment of the penalty and the effect thereof.

4.1. Section 398 of the B.P.M.C. Act reads as under:

398. Penalty for evasion of octroi or toll:- Where any vehicle, animal, or goods imported into the limits of the City are liable to the payment of toll or octroi any person who, with the intention of defrauding Corporation, causes or abets the introduction of or himself introduces or attempts to introduce within the limits of the city and such vehicle, animal or goods upon which payment of the toll or octroi due on such introduction has neither been made nor tendered, shall, on conviction, be punished with fine which may extend to ten times the amount of such toll or octroi or two hundred and fifty rupees, whichever may be greater.

4.2. The aforesaid provision contemplates penalty for evasion of the octroi or toll to be the criminal offence. The person would be required to be prosecuted, convicted and punished before the penalty could be levied. The words "shall, on

conviction, be punished" are plainly significant. First requirement to be satisfied under this provision that person has with an intention to defraud the Corporation brings the vehicle within the limits of Corporation, when octroi is due on such vehicle, by not tendering the amount of octroi. Secondly, the penalty is made leviable on conviction of such person. Thirdly, it says that it will be payable by way of punishment upon conviction, and finally, that the amount of penalty so payable may extend to ten times the amount of octroi. The minimum amount of penalty is two hundred and fifty rupees, and the ten times is the maximum. What is material to be noticed is that the penalty is the outcome of punishment upon conviction. The conviction and punishment criminal Court which shall have power to impose penalty after it records conviction.

4.3. In *Municipal Corporation, Ludhiana Vs. Commissioner of Patiala Division, Patiala and Another*, the Supreme Court, dealt with an identical issue with reference to the similar provision under Sec. 116 under Punjab Municipal Corporations Act, 1976. It was ruled that the High Court rightly held that power to impose fine was exercisable by a Criminal Court and not by an officer of the Municipal Corporation. The Apex Court observed:

The Punjab and Haryana High Court has held that the fine contemplated by Sec. 116 can be imposed only by a Criminal Court and not by an officer of the Municipal Corporation. The correctness of the said view is questioned. So far as the levy of octroi is concerned, there is no dispute that it can be assessed, collected and recovered by the officers of the Corporation. Indeed it is generally collected at the point of entry itself. The only dispute is with respect to the levy of fine under Sec. 116, which can extend either to twenty times the value of the octroi evaded or attempted to be evaded or Rs. 50, whichever is higher. (Para 3)

It appears that the Punjab and Haryana High Court has consistently taken the view that the imposition of fine under Sec. 116 (and the corresponding provision in the proceeding enactments) can be only by a Criminal Court vide *Nitco Roadways (P) Ltd. v. Municipal Corpn. of Ludhiana*, (C.W.P. No. 1804 of 1977, decided on 4-9-1985 (P. & H. H.C.) disposed of on 4-9-1985 and *Gian Chand v. State*, 1958 PLR 539, we are of the opinion that the said view is correct in law. The normal rule of legislative drafting is that wherever it says that a particular Act shall be punishable with fine, it contemplates its imposition by a Criminal Court only. Be that as it may, both Secs. 116 and 388 speak of punishable with fine. Section 388 provides not only for fine but also for imprisonment. It cannot be suggested that the punishment of imprisonment contemplated by Sec. 388 can be awarded by the officers of the Corporation. If so, the punishment of fine can also not be imposed by them. The same logic applies to Sec, 116 as well. We, therefore, agree with the High Court that punishment of fine provided by Sec. 116 can be imposed only by the Criminal Court and cannot be imposed by the officers of the Corporation. (Para 6)

5. It was not in dispute that the respondent had paid the octroi amount and with the amount of octroi, Corporation recovered penalty to the extent of 10 times of

the octroi payable. Concededly, recovery of the penalty was without filing any complaint, without prosecution launch and without conviction recorded by the competent Criminal Court. It could also not be said that respondent acting intentionally so as to avoid the payment of octroi, and thereby to defraud the Corporation, an essential ingredient, was established. The decision in Municipal Commissioner, Ludhiana (supra) squarely covers the answer to the issue.

5.1. In the facts and circumstances, reasoning of the lower appellate Court that since recovery of penalty by the Corporation was without authority of any law, question whether the amount was paid voluntarily or not was rendered redundant. As regards the contention of the appellant-Corporation that penalty was voluntarily paid, it is to be observed that the respondent-plaintiff did lodge protest in writing and also issued demand notices twice seeking refund of the amount of penalty. Therefore, an inference may not be drawn that the payment was voluntary. The question whether payment of penalty was voluntary or not, really pales into insignificance being of no consequence inasmuch as it could be crystally seen that Corporation had no authority in law to recover. The Corporation collected 10 times penalty without being backed by the authority of law for the same, it could not have put forward a plea before the Court of law that since the amount was voluntarily paid, it was entitled to retain the same. The stand cannot be countenanced, as it would come to a statutory body unjustly enriching itself by retaining the amount, recovery of which had no legal sanction. For the foregoing reasons, the judgment and decree of the lower appellate Court is justified. No ground is made out to interfere with the same in respect of jurisdiction under Sec. 100 of the Code of Civil Procedure, 1908. The Second Appeal stands dismissed summarily.