

(1994) 08 MP CK 0025

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 3167 of 1985

Kothari Brothers

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 22-08-1994

Acts Referred:

Madhya Pradesh Sthaniya Kshetra Me Mal Ke Pravesh Par Kar Adhiniyam, 1976 —
Section 3

Citation : AIR 1995 MP 102 : (1995) 40 MPLJ 241 : (1995) MPLJ 241

Hon'ble Judges : U.L. Bhat, C.J.; M.V. Tamaskar, J

Bench : Division Bench

Advocate : B.L. Nema, for the Appellant; A. Choudhary, Addl. Advocate Gen., for the Respondent

Final Decision : Dismissed

Judgement

U.L. Bhat, C.J.

This is a Writ Petition seeking declaration that Section 3(1)(a) and Clause (4) of the proviso thereto are ultra vires to Constitution and to quash Annexures B to E and G to M Orders relating to levy of entry tax. Respondents have filed return.

2, Petitioner is a registered firm carrying on wholesale textile business at Durg. It is stated that the firm supplies textiles to other dealers doing business in the local area of Durg and to dealers of Balaghat and Raipur which are places outside the local area of Durg. The petition relates to six assessments for various periods from 5-11-1975 to 24-11-1971 (sic). For the first period, petitioner raised preliminary objection against levy of entry tax. It was overruled by Annexure B Order. Assessment was completed vide Annexure C Order. Annexures D and E are the assessment orders for subsequent periods. Annexure G is the order by the revisional authority dismissing the revision filed against Annexure B order. Annexure H is the order by which the Additional Commissioner Sales Tax imposed penalty for non-payment of entry tax on goods re-exported from Durg area and for not showing the same in the return. Annexure I, J and K are

assessment orders for later periods against the petitioner. By Annexure L, appeals filed against the three assessment orders were rejected. By Annexure M, the Board of Revenue dismissed the second appeal against the appellate orders.

Petitioner stated in para one of the petition that cloth is supplied by the petitioner to other dealers within the local areas of Durg and to dealers carrying on business outside local area of Durg.

Petitioner does not dispute liability to pay entry tax in regard to goods brought into the local area of Durg and sold to dealers in Durg, since subsequent sale by Durg dealers was for consumption or use by persons in the local area. Petitioner contends that a part of the goods which petitioner brought into Durg area, were sold in Durg to dealers of Balaghat and Raipur and were taken to Balaghat and Raipur for sale to customers in such places and such goods were not intended for consumption or use within the local area of Durg, but were intended for consumption or use outside the local area of Durg, i.e. in Balaghat and Raipur and, therefore, the original entry of those goods into local area of Durg could not be regarded as entry for the purpose of "consumption, use or sale therein." as contemplated u/s 3 of the Entry Tax Act, 1976, (for short, the Act). The answer of the learned Additional Advocate General is that to escape from tax liability, there must be re-export and in the present case, there is no re-export by the petitioner, since he sold at Durg all the goods to dealers either of Durg or from outside and if those dealers took goods outside the local area of Durg for sale to their customers outside the local area, it cannot be regarded as re-export. Learned Additional Advocate General also contended that the Question is one of intention at the time of entry of goods into the Durg local area. The challenge against Section 3(1)(a) and Clause (4) of the proviso of the Act has not been pressed by petitioner.

The State Legislature derives its competence to legislate under Entry 52 of List II of Schedule VII of the Constitution. Entry 52 reads :

"Taxes on entry of goods into local area for consumption, use or sale therein".

Section 1(b) of the Act defines "entry tax" as follows :

"Entry tax means a tax on entry of goods into a local area for consumption , use or sale therein levied and payable in accordance with the provisions of this Act and includes composition money payable u/s 7(a)."

Section 2(1)(aa) defines "entry of goods into local area" as under :

""Entry of goods into a local area" with all its grammatical variations and cognate expressions means entry of goods into that local area from any place outside thereof including a place outside the State for consumption, use or sale therein:"

Section 3(1)(a) reads as follows :

"3. Incidence of taxation -- (1) There shall be levied an entry tax --

(a) on the entry in the course of business of a dealer of goods specified in Schedule II, into such local area for consumption, use or sale therein and such tax shall be paid by every dealer liable to tax under the Sales Tax Act who has effected entry of such goods".

Items 8 to 10 of Schedule II to the Act refers to cotton fabrics, Silk fabrics and woollen fabrics.

The entry tax is a substitute for the octroi recovered earlier by local bodies under the respective laws relating to local authorities relating to activity of goods entering for consumption, use or sale. Under the scheme of imposition and recovery of octroi, the intention of the dealer was expressed by filling the declarations and when the declaration was presented at the time of "taking away the goods" from local area refund was made. Though the present act does not lay down any elaborate procedure, the words "brought for consumption, use or sale" have acquired a definite connotation and should receive interpretation similar to the one given in *Man Mohan Tuli v. Delhi Municipality*, AIR 1981 SC 991 in the context of "octroi". The Supreme Court considered the import of entries 52 and 56 in the List II and pointed out the distinction between the Octroi and Terminal Tax at Page 995 :

"(1). Terminal tax and octroi are similar kinds of levies which are closely interlinked with (1) destination of the goods, (2) the user in the local area on arrival of the goods. Where the goods merely pass through a local area without being consumed therein, the mere fact that the transport carrying the goods halt within the local area for transshipment or allied purposes would not justify the levy of either the terminal tax or octroi duty. This is because the halting of the goods is only for an incidental purpose to effectuate the journey of the goods to the final destination by un-loading, sorting and reloading them at a particular place.

(2) There is very thin margin of difference between a terminal tax and octroi. In the case of the former (Terminal Tax), the goods reach their final destination and their entry into the area of destination immediately attracts payment of Terminal Tax irrespective of their user. In the case of octroi, however, the tax is levied on goods for their use and consumption.

(3) But, at the same time, the goods, while halting at a local area, should leave for their destination within a reasonable time which may depend on circumstances of each case and if the goods are kept within the area for such a long and indefinite period that the purpose of reaching the final destination lying in a different area is frustrated or defeated, they may be exigible to terminal tax.

(4) Where the goods enter into a local area which is also the destination of the goods either temporarily or otherwise, the Terminal Tax would be leviable. For instance, if A consigns goods from Patna in Bihar to Delhi in the name of X and X, after having received the goods at Delhi rebooks or re-loads the same on a transport for Chandigarh in the name of Y, terminal Tax would be leviable by the

Corporation at Delhi, because the destination of the goods in the first instance was Delhi and that by itself would attract the imposition of Terminal Tax. The fact that X rebooks them to Chandigarh would not make any difference because the act or re-booking by X at Delhi would constitute a fresh transaction by which the goods, after having been carried into Delhi, are further exported to Chandigarh. On the other hand, when there is one continuous journey of the goods from Patna to Chandigarh without any break, the final destination would be Chandigarh, even though the goods may have to be hatted in Delhi for the purpose of unloading, sorting and reloading and may have to be kept in Delhi for a reasonable time. In such a case, Terminal Tax would not be exigible."

Thus, in the case of entry tax, it is for the assessee to point out that the goods brought into a local area were not mixed up in the mass of the property in the local area. In case where there is no material to conclude that the goods were not intended to become the mass of the property within the local area, tax will be leviable under the provisions of the Act.

We will now advert to the decisions placed before us by both sides having a bearing on the controversy in this case. Petitioner relies on the leading decision that of the Constitution Bench in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, . The company caused entry of petroleum products into the municipal octroi limits either for use or consumption by itself or for sale generally to its dealers and licensees who in their turn, sold them to others. The company was also directly selling the products to Govt. local bodies and private concerns. It has a Divisional Office and Depot at Belgaum within its municipal limits. The company appointed dealers and licensees as per agreement. The Court held that the company was liable to pay octroi tax on the goods brought into local area (a) to be consumed by itself or sold by it to consumers direct and (b) for sale to dealers who, in their turn, sold the goods to consumers within the municipal area irrespective of whether such consumers bought them for use in the area or outside it. The Court held that the company was not liable to pay octroi in respect of goods which it brought into the local area and which were re-exported, either by itself or through dealers outside the area. In such cases, the company has to follow the procedure and claim refund. Tax is payable even when goods are brought into the area for sale within the area to an ultimate consumer for consumption or use, though he may consume or use the same outside the area. In such a case, the act of sale means putting the goods for use or consumption. This decision has been followed in *Hiralal Thakorlal Dalal Vs. Broach Municipality and Others*, .

Strong reliance is placed by the respondents on the decision in *Municipal Council, Jodhpur Vs. Parekh Automobiles Ltd. and Others*, . Second respondent in that case, Indian Oil Corporation, has a Depot at Jodhpur. Petroleum products were brought to the Depot within municipal limits and taken to Dangiawas, a place outside the octroi limits and supplied to the Dealer, first respondent, M/s. Parekh Automobiles Ltd., who sold the same to consumers in Dangiawas. The Court

proceeded on the basis that the sale by the I.O.C. to M/s. Parekh Automobiles took place within the Octroi limits of Jodhpur. The matter was considered in the light of Section 104 of Rajasthan Municipalities Act which provided for octroi on goods and animals brought within the limits of the municipality for "consumption, use or sale therein". Octroi was to be collected at the time of entry. Section 133 provided an alternative mode of payment by mercantile firms or public bodies by maintaining current account for the octroi so due and the current account was to be settled periodically. Rule 13 of the Rules, worked out the details of the alternative mode. When the goods are brought into the local area, entry pass in Form No. 7 would be given. When the goods are taken out of the octroi limits, transport pass in Form No. 5 would be given. In the latter case, the amount of octroi payable shall be based on the total amount of octroi as shown in the entry pass less the total amount of octroi on goods taken outside the octroi limits as shown by the transport passes, but the deduction would be given only if such goods are not sold within the municipal limits and if they are exported within a period of six months from the date of import. The High Court held that the goods were re-exported by the I.O.C. from inside the local area to its retail outlet outside the local area for use or consumption by the ultimate consumer outside the local area and, therefore, octroi was not leviable even if the sale took place within the local area. Supreme Court, (in para 18 of the judgment) rejected the contention of the State that the earlier decisions of the Supreme Court were not concerned with the situation where the goods were sold within the octroi limits thereafter exported for consumption outside the said limits and there was nothing in those judgments to the effect that if the goods are brought into a local area for sale to a dealer who then transports the goods outside the local area for sale, no octroi is chargeable. It was further observed :

"If the goods were brought within the municipal limit for the purpose of sale (sale means passing of the title to the purchaser), then different considerations might have applied".

In para 19 of the judgment in Parekh Automobiles Ltd., it was observed that in view of the facts of the case, "title passed to the goods outside the municipal limits even in respect of the petroleum products which were sold within the municipal limits". In the separate judgment of Ranganathan, J., it was observed with reference to Rule 13 as follows :

"It may be contended that in the present case, as the I.O.C. had sold the goods within the municipal limits and the subsequent transport to Dangiawas, though effected by the I.O.C. was really on behalf of the dealer the goods so transported and entered in the transport passes of the I.O.C. should be excluded from deduction under Sub-rule (4) of Rule 13. But this construction, in my view, cannot be accepted. The expressions used in the proviso to Sub-rule (4) cannot be interpreted differently from the words used in Section 104, on the basis of which chargeability to duty arises. If, as we have held, there can be no octroi duty at all levied by the Jodhpur Municipality in respect of the goods sold by the

I.O.C. within, but clearly intended to be transported for use or consumption outside, the municipal limits, then this statutory limitation cannot be defeated by interpreting the proviso in such a way as to make all goods sold within the municipality liable to duty even if the sale is in pursuance of a clear intention that the goods are to be despatched outside".

His Lordship observed in para 32 as follows :

"The result of the above discussion is that the present case is governed by the terms of Rule 13 and the I.O.C. is entitled to go on paying octroi duty on the basis of the goods brought by it within the municipality less the goods transported outside the municipality even where the transport outside the municipality may be in pursuance of a sale within the municipality so long as such sale is in pursuance of an intention that the goods should be consumed or used outside the municipal limits."

The next decision referred to is HMM Ltd. and another Vs. The Administrator, Bangalore City Corporation, Bangalore and another, . Horlicks milk powder was imported into the corporation limits in bulk containers for being packed in glass bottles at the packing station of the appellant in Bangalore and thereafter exported outside the municipal limits. Undoubtedly, there was no sale within the corporation limits. Appellant's claim was for refund of octroi as there was no use or consumption or sale within the corporation limits. Rule 24 of the Rules contemplated refund only where the goods are exported within three months and Rule 25 required observance of some formalities. The Supreme Court held that the claim was sustainable.

The next decision is Indian Oil Corporation Vs. Municipal Corporation, Jullundhar and others, . The I.O.C. set up a pipe line terminal and L.P.G. bottling plant at Suchi Pind which later on was brought within the municipal limits. I.O. C. transported petroleum products through underground pipelines to its Depot within the Corporation. These petroleum products were meant :

- (i) for use or consumption by the I.O.C. within the limits of the Municipal Corporation;
- (ii) for sale by I.O.C. through its dealers or by itself for consumption within the octroi limits, by persons other than the I.O.C.;
- (iii) for sale by the I.O.C. through its dealers or by itself inside the octroi limits and the vendee, after completion of sale takes those products outside the octroi limits for sale, use or consumption; and
- (iv) for export by the I.O.C. from the depot inside the octroi limits to outside the municipal limits, to its dealers for sale, use and consumption by persons other than the I.O.C. outside the octroi limits.

Section 113 of the Municipal Corporation which enables levy of octroi on articles and animals imported into the city was held by the Supreme Court to mean

"imported in the city for consumption, use or sale in the local area". There was no dispute before the Supreme Court in the I.O.C. case that no octroi was leviable on goods re-exported by the I.O.C. from its depot inside the octroi limits to outside limits to its dealers where those goods were meant for use, consumption or sale by the consumers outside the limits. The only controversy was whether the transaction within the municipal limits reflected in category (iv) in the facts and circumstances of the case, could be treated as sale to dealers at the Depot or was only in the nature of re-export. It was not disputed that if the transaction was only in the nature of reexport, it was not exigible to levy of octroi duty. The transaction was in pursuance of order placed by dealers outside the municipality of unascertained goods and transfer was made in tankers belonging or hired by I.O.C. at the risk of I.O.C. The Supreme Court considered the agreement between the I.O.C. and dealers and other relevant materials and came to the conclusion that it was a case only of re-export. This finding was based entirely on the facts and circumstances of the case. The Supreme Court was satisfied that the transaction covered by category (iv) above, namely where petroleum product transported to the Depot of the I.O.C. were meant for export from its Depot inside the octroi limits to outside the municipal limits to its dealers for sale, use and consumption by persons other than the I.O.C. outside the octroi limits was a transaction of re-export and that appropriation of the goods did not take place at the Depot, but at the outlets of the dealers or agents outside the municipal limits. Octroi duty was, therefore, not charge able on such transaction. It has to be noticed that affidavits of dealers were filed by the I.O.C. to establish that title in the property of the goods passed to the dealers only after delivery and the transport was made by the I.O.C. at risk of I.O.C.

The latest decision is the one in *The Entry Tax Officer, Bangalore v. Chandanmal Champalal & Co.*, 1994 (3) JT (SC) 334. It was argued before the Court that the words "sale therein" in Entry 52 which speaks of tax on entry of goods into a local area for consumption, use or sale therein, must be given their due and natural meaning and should not restricted to sale for the purpose of consumption or use of the goods sold within the limits of the concerned local areas. Reference was made to the propositions in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, ; *Hiralal Thakorlal Dalal Vs. Broach Municipality and Others*, ; and *Municipal Council v. Parekh Automobiles Ltd.*, (1990) 1 SCC 367, which, it was contended, dealt with cases where the levy was of Municipal Octroi under State Legislation and there was no justification to take a restricted view of the word "sale therein" where the levy is created by the State Legislature and assessment and collection is made by the State Govt. The Court observed as under :

"While we cannot deny the force and substance in the submission urged by Sri Narsimlia Murthy, we do not find it possible to give effect to it in the light of the decisions referred to by Sri Salve. It is true that *Burmah Shell*, *Hirajal Thakorlal* and *Parekh Automobiles* were concerned with State enactments which empowered the Municipalities to levy the impost, all the same, a close reading of

the said decisions does indicate that they have read the words "sale therein" occurring in Entry 52 of List II as meaning "a sale of goods within a local area for consumption or use therein" -- though as a matter of fact, in a given case, the goods may be taken out and consumed there. The decisions clearly say that where the goods are sold within a local area for the purpose of being taken out of that local area and are actually taken out, no levy is permissible under Entry 52. It is not possible to distinguish the said decisions on the grounds suggested by Sri Murthy".

Burmah Shell case and H.M.M. Ltd. case deal with clear cases of entry and reexport. The significant aspect in Parekh Automobiles Ltd. is the finding that title in goods passed to the dealer outside the local area and goods were clearly intended to be transferred for use and consumption outside the area and the sale to the dealer was in pursuance of the clear intention that the goods were to be despatched outside for such consumption. In H.M.M. Ltd., there was no sale, use, or consumption at all in the local area and the goods were exported after merely changing the container. The significant aspect in the Indian Oil Corporation's case was that dealer placed order for unascertained goods which were later on transported in tankers belonging to or hired by I.O.C. and the transport was at the risk of I.O.C. and appropriation of goods did not take place at the depot in the local area, but took place at the outlet of the dealers outside and title passed only after delivery. It was held that where the sale took place inside the local area to a dealer, and the vendee took the goods outside the local area for consumption, use or sale, entry tax was payable. Chandanmal Champalal's case related to a case of sale inside the local area for being taken out and the goods were actually taken out,

Petitioner's case is that he caused entry of the goods into the local area of Durg for the purpose of sale. He has no case that at the stage of entry, any goods were ear-marked for being sold in Durg to dealers from outside. He has also no case that title in the goods passed to such dealers not within the local area, but outside the local area. He has no case that the sale to dealers was of unascertained goods or that appropriation of goods did not take place within the local area. Going by the averments in the writ petition, entry of goods to Durg was caused for the purpose of sale in Durg and it so happened that both dealers inside Durg and outside Durg purchased goods from the petitioner. Appropriation took place in Durg and the sale was of ascertained goods. It is not the contention of the petitioner that the transport of the goods from Durg to outside was by or at the risk of the petitioner. The transport was by the purchasers themselves who instead of dealing with the goods in Durg, chose to deal with them outside. Title in the goods also passed to such dealers within the local area of Durg. These circumstances show that the case falls within the third category described in paragraph 2 of the judgment in I.O.C.'s case, i.e., entry for sale by the assessee inside the local area and after completion of sale, vendee took those products outside the local area limits for sale, use or consumption and as such, entry tax would be payable. We, therefore, reject the contentions of the petitioner that

entry tax is not payable.

Petition is dismissed. There shall be no order as to costs. Security deposit, if any, shall be refunded to the petitioner.