
(1973) 09 MP CK 0002
In the Madhya Pradesh High Court
Case No : M.P. No. 384 of 1970

Madanlal Kishangopal and others	Vs	APPELLANT
Municipal Council, Tarana and another		RESPONDENT

Date of Decision : 28-09-1973

Acts Referred:

Madhya Pradesh Municipalities Act, 1961 — Section 127(2), 130, 130(1)

Citation : (1979) ILR (MP) 111 : (1974) JLJ 323 : (1974) MPLJ 251

Hon'ble Judges : P.K. Tare, C.J;Raj Krishna Tankha, J

Bench : Division Bench

Advocate : C.M. Mehta and V.S. Pandit, for the Appellant; Y.S. Dharmadhikari, Advocate General for Respondent No. 1 and M.V. Tamaskar, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

R.K. Tankha, J.

By this writ petition under Article 226 of the Constitution, the petitioners pray quashing of an order dated 23-12-1969 (Annexure-6) passed by the Administrator, Municipal Council, Tarana, relating to increase in the rate of octroi tax and also the gazette notification dated 23-1-1970 in respect of the same (Annexure-7) The petitioners further seek a direction that section 130 of the M.P. Municipalities Act, 1961 is ultra vires.

The facts of the case are that the petitioners 1, 2 and 3 are registered partnership firms while the petitioners 4 and 5 are sole proprietors of the firms Jagdishchandra Hariram and Ashok Kumar, Kishore Kumar respectively. Petitioners 1, 3, 4 and 5 carry on the business of sale and purchase of cloth while petitioner No. 2 carries on the business of sale and purchase of Kirana goods at Tarana, district Ujjain. In Tarana, Municipal Council is constituted and is a body corporate by the name of the Municipal Council, Tarana. In the year 1969, the Municipal Council was dissolved u/s 328 of the M.P. Municipalities Act, 1961,

(hereinafter referred to as "the Act") and an Administrator was appointed. Since 7-4-1968, a schedule of rates of octroi (Annexure P/4) as published in the M.P. Raj Patra dated 7-3-1968 were in force. The Administrator vide his order dated 23-12-1969 (Annexure-P/6) passed u/s 130 increased the rates of octroi, on the suggestion made by the Revenue Inspector of the said Council. It was also ordered that it may be published u/s 130 (4) of the Act in the M.P. Raj Patra. Thus, the increase of rate of octroi tax on various commodities together with the proposal were published in the M. P. Raj Patra dated 23-1-1970 (Annexure 7). The increase of the octroi tax rates has come into force with effect from 22-2-1970 within the municipal limits of Tarana. As it appears from the return submitted on behalf of respondent No. 2 (State of Madhya Pradesh) that subsequently on special representation made from business class, the said respondent reduced the rate of octroi on cotton and silk cloth only vide order dated 21-7-1970. The petitioners have come up before this Court in the present petition challenging the increase of octroi rates being illegal and without jurisdiction and the vires of section 130 of the Act.

Learned counsel for the petitioners submitted the following points for our consideration:

(1) In view of repeal of the first proviso to section 130 by the M.P. Municipalities (Amendment) Act, 1966 (No. 9 of 1966), section 130 as it stands now is ultra vires as there is no guide-line or safeguard provided in the matter of varying the rate of octroi by the local authority. After the repeal of the proviso, municipal councils have been left with an arbitrary and capricious powers regarding increase of octroi rates.

(2) Without framing of rules by the State Government u/s 127 (2) there could be no variation in the form of increase of octroi rates as the powers to vary tax u/s 130 is subject to the limits prescribed under sub-section (2) of section 127. In this connection reference was made to Mohammad Hussain Gulam Mohammad and Another Vs. The State of Bombay and Another, .

(3) Even for increase of rates of octroi, the procedure as laid down u/s 129 for new imposition of tax must be followed. Since that was not done in the present case, the imposition of increased octroi is bad in law and in support of his point the learned counsel referred to Bhikamchand v. Municipal Committee, Chhota Chhindwara 1961 MPLJ 937 : 1961 JLJ 792 and The Town Municipal Committee, Amravati Vs. Ramchandra Vasudeo Chimote and Another,

(4) The notification (Annexure-7) does not comply with the requirement of section 130 (4) of the Act as it does not show in detail the effects of the proposal and as such it is liable to be struck down.

Learned advocate General for the respondents contended that section 130 of the Act is not ultra vires as the exercise of power is subject to the limits prescribed under subsection (2) of section 127 by making rules on the part of the State Government. He further contended that the power of the Council is not

dependant on the power to be exercised by the State Government u/s 130 and in the alternative he submitted that in the present case after the sanction of the State Government to the schedule of increased rates, it can be fairly concluded that substantial compliance of the procedure prescribed by the Act had been done. As such even in the absence of rules u/s 127 (2) prescribing the maximum and minimum limits as to the amount or rate of any tax, the power exercised by the Council for increasing the rates of octroi cannot be called illegal or without jurisdiction. He also submitted that the provisions of section 129 of the Act are applicable when there is imposition of a new tax (octroi) and not if the rates of octroi already existing are merely increased as in the present case. With regard to the invalidity of the notification (Annexure-7) on the ground that it does not comply with the requirements as detailed u/s 130 (4), he contended that since the point has not been raised in the petition, the petitioners cannot be permitted to argue it for the first time at the hearing. Thus, in the nutshell he pleaded for the rejection of the present writ petition.

Before we deal with the respective points raised by the learned counsel of the parties, it would be better to reproduce the relevant sub-sections of sections 127 and 130 (as it stood before and after the amendment by Act No. 9 of 1966). Sub-section (2) of section 127 reads as under:

(2) The State Government may, by rules made under this Act,--

(a) regulate the imposition, assessment and Collection of taxes under this Act;

(b) prevent the evasion of taxes imposed under this Act, and

(c) prescribe the maximum and minimum limits as to the amount or rate of any tax.

Sub-section (1) of section 130 as it was before the amendment (repeal of the first proviso) was as follows:

130. Abolition or variation in tax.--

A Council may abolish any tax already imposed under this Act or may within the limits prescribed under sub-section (2) of section 127, vary the amount or rate of any such tax:

Provided that in the case of an increase in the amount or rate of any tax, such increase shall not exceed one-tenth of the amount or rate of such tax leviable during the preceding year:

Provided further that--

(i) in the case of any Municipality the abolition of any tax; and

(ii) in the case of such Municipalities as are indebted to the State Government a reduction in the amount of the rate thereof;

shall be subject to the previous sanction of the State Government and shall take

effect from such date as the State Government may, by notification, specify.

Now by virtue of the amending Act No. 9 of 1966, for provisos in sub-section (1) of section 130, the following proviso has been substituted:

Provided that--

(i) in the case of any Municipality the Abolition of any tax; and

(ii) in the case of such Municipalities as are indebted to the State Government a reduction in the amount or the rate thereof;

shall be subject to the previous sanction of the State Government and shall take effect from such date as the State Government may, by notification, specify.

(The amended Act came into force w. e. f. 6-3-1966). Sub-section (4) of section 130 reads as under:

(4) If the proposal is to increase the amount or rate of any tax, the Council shall publish in the Gazette and in such other manner as it may deem fit a notice showing in detail the effects of the proposal and the date, which shall not be earlier than 30 days from the date of such publication, from which it is proposed to bring such increased amount or rate of tax into force.

As regards the first point raised on behalf of the petitioners, we find it difficult to hold that section 130 is ultra vires even though the first proviso has been deleted by the M.P. Municipalities (Amendment) Act, 1966 (No. 9 of 1966). A bare reading of the section shows that the power of the Council to vary the amount or rate of tax is subject to the limits prescribed under subsection (2) of section 127. This sub-section enjoins upon the State Government to make rules prescribing the maximum and minimum limits as to the amount or rate of any tax under clause (c). The Council, therefore, could vary the existing rate of octroi making an increase subject to the maximum prescribed under the rule so framed. Thus, the Legislature by deleting the first proviso to sub-section (1) of section 130 has not given unbridled powers to the Council to increase the tax or to say vary the same as it may choose to do. In our opinion, under the delegated legislation, the Legislature in requiring the State Government to make rules for the purpose under clause (c) of subsection 127 (2) has provided ample safeguards against any arbitrary exercise of power for increasing the rates of octroi and is a fetter on the power of the Municipal Council to impose octroi not in excess of a particular rate created by a rule made by the State Government. It is a different matter that so far the State Government has not made any rule under sub-section 127 (2) but that would not lead us to hold that section 130 is ultra vires as further contended on behalf of the petitioners in the absence of any rules. There is no substance in the point raised which we reject and hold that section 130 as it stands after the amendment by Act No. 9 of 1966 is not ultra vires.

The second point raised on behalf of the petitioners is that the Council (Administrator) had no jurisdiction to increase the rates of octroi, since the State

Government has not made any rules under clause (c) of sub-section (2) of section 127. In our opinion, it has much force. The Council has power under sub-section (1) of section 130 to increase the rates of octroi, but the said power is subject to the limits prescribed under sub-section (2) of section 127. This means unless the State Government makes rules for the purpose, the Council would not be in a position to increase the rate of octroi by exercising the powers under section 130. It is only under the rule making power when the State Government has made rules for the purpose by prescribing maximum and minimum limits, the Council can exercise the power to increase the rate of octroi and levy the said rate u/s 130. Thus, it is quite apparent that there are two restrictions on the powers of the Council before it embarks to increase the rates of octroi. The first is that the maximum must be prescribed by the rules made under the rule-making power of the State Government and the second is that the increase of levy must be confined to the limits prescribed under the rules. Since no rules have been framed for the purpose as admitted by the learned Advocate General, we are of the opinion that the increase of rates of octroi vide order dated 23-12-1969 (Annexure-P-6) and the Gazette notification with the schedule of rates of tax (Annexure-P 7) was wholly without legal authority and as such without jurisdiction and not enforceable. We may refer here to the decision of the Supreme Court in *Mohammad Hussain Gulam Mohammad and Another Vs. The State of Bombay and Another*, in support of our point of view wherein it has been held as under:

.....However, it is not in dispute in this case that maximum has not been specified in any rule and Rule 53 itself leaves it open to the Market Committee to prescribe such rates as may be specified in the bye-laws. We have already said that it would not be possible for the Market Committee to prescribe any fees u/s 11 through bye-laws till the State Government prescribes the maximum u/s 11. As no such maximum has been prescribed in the rules, the contention that fees which are being charged under the bye-laws for the purposes of section 11 are ultra vires of that section, must prevail.

The contention of the learned Advocate General is that since in the present case the State Government gave sanction to the schedule of increased rates, it can be fairly conceded that that was substantial compliance of the procedure even though no rules have been made and in support of his submission he referred to us a decision of a Division Bench of this Court in *The Municipal Council, Raigarh Vs. Pahawa Trading Co., Raigarh and Others*, . We do not agree with his submissions. An executive act of the State Government can never be equated with the legislative function which is a well-settled rule of law. The legislature delegated the power to the State Government to make rules for prescribing the maximum limit for the increase; that being so, in the absence of rules not made for the purpose, an executive sanction on the part of the State Government to the schedule of increased rates of octroi would be useless and cannot cure the lack of authority of the Council (Administrator), in the present case, as it would be against all the intent and purpose of the delegation. The delegated authority

can be exercised only in a manner as prescribed and in no other way. As such we are unable to agree with the submissions of the learned Advocate General. Even the decision relied upon by him does not support his contention. In that case also the State Government sanctioned the proposal for changes in the rates of octroi levied on different commodities as also the draft rules and the rules were published along with the notification in the gazette. We do not read anywhere in the said decision a support to the proposition as tried to be canvassed before us by the learned Advocate General.

The third contention of the learned counsel for the petitioners that even if an increase is made in the existing rates of octroi by the Council, the procedure prescribed u/s 129 must be followed before the increased levy is enforced is devoid of any force. That section is applicable only when initially imposition of a new tax is levied and not to the increase in the existing one. Here, there were already rates of octroi levied on the commodities specified in the schedule and now what was done was only an increase in the rates. For that purpose the provisions of section 130 (4) are clear. All that is required to be done for that purpose is to publish the proposal in the gazette and in such other manner as it may deem fit a notice showing in detail the effects of the proposal and the date. This date should not be earlier than 30 days from the date of such publication from which it is proposed to bring such increased rate of tax into force. Since the Legislature has prescribed the procedure for the purpose u/s 130 (4), it would be incorrect to follow the procedure as detailed u/s 129 for initial imposition of taxes. The Legislature having itself made a distinction in the manner of procedure to be followed when a new impost is to be initially levied and the increase is to be effected in the existing tax, then it is not open to say that for the increase of the existing rates of octroi tax, the procedure which is applicable for initial imposition of a fresh tax ought to have been followed. Therefore, we are clearly of the opinion that whenever the Council wants to make increase in the existing rates of tax, the procedure as laid down u/s 130 (4) alone has to be followed and not that as detailed u/s 129. We accordingly reject this contention of the learned counsel for the petitioners.

At this stage we would like to refer to the decisions relied upon by the learned counsel for the petitioners in support of his contention, on the premises that the levy of a tax at an enhanced rate is not a mere continuance of the levy at the original rate but is, in substance, the imposition of a new tax, and, therefore, the procedure as laid down in section 129 would be applicable. The first case is *Bhikamchand v. Municipal Committee, Chhota Chhindwara*. That was the case under the C.P. & Berar Municipalities Act, 1922, relating to terminal tax and it was held by the Division Bench of this Court that the procedure u/s 68 for the increase of tax is substantially the same as that prescribed in section 67 for the imposition of a tax for the first time and that shows that the levy of a tax at an enhanced rate is not a mere continuation of the levy at the original rate but is in substance the imposition of a new tax. But as we see here under the M.P. Municipalities Act, 1961, the procedure for levy of enhanced tax is quite different

from initial imposition of a tax and, therefore, it cannot be held that the enhancement of rate of octroi (tax) is imposition of a new tax. Besides that, we may also point out that there was no section under the C.P. & Berar Municipalities Act, 1922, like section 130 of the M.P. Municipalities Act, 1961. The other decision referred to is that of the Supreme Court in *The Town Municipal Committee, Amraoti Taluq v. Ramchandra Vasudeo Chimote and another* (supra). This was also a case under the C.P. & Berar Municipalities Act, 1922, wherein by the same notification new articles were included for the levy of terminal tax and besides the rate of tax on the previously existing items was also increased. Even this decision is clearly distinguishable for the reasons that there was no similar section like section 130 of the M.P. Municipalities Act, 1961, which the learned counsel for the petitioners did not dispute. As such, the aforesaid two decisions cannot be relied upon for holding that the variation in the existing rate of tax u/s 130 of the M.P. Municipalities Act, 1961 amounts to imposition of a new tax so that the procedure as prescribed u/s 129 of the Act must be followed. If that view is to be taken, the procedure prescribed by the Legislature u/s 130 (4) for the case of increase of the amount or rate of tax would become futile which is, in our opinion, not permissible and would be contrary to the rule of interpretation on the face of the specific provision for the purpose as enacted by the Legislature.

For the fourth and the last contention of the learned counsel for the petitioners regarding the invalidity of the notification published in the gazette (Annexure-P-7) on the basis that it does not comply with the requirements of section 130 (4), we uphold the objection of the learned Advocate General that since this point has not been raised in the petition, which fact was not disputed by the other side, the petitioners cannot be permitted to raise the same at the hearing. We accordingly refused to accord permission and did not permit the learned counsel for the petitioners to argue that the above notification was invalid as not showing in detail the effects of the proposal.

For the reasons stated in answer to point No. 2, this petition is allowed with costs. The order dated 23-12-1969 (Annexure-P-6) passed by the Administrator and the notification with schedule of increased rate of octroi as published in the M.P. Rajpatra dated 23-1-1970 (Annexure P-7) are quashed. The respondents are hereby restrained from enforcing the increased rates of octroi as per the aforesaid notification. Counsel's fee Rs. 200/- if certified. The outstanding security amount, if any, shall be refunded to the petitioners.