

(1967) 02 GUJ CK 0007
In the Gujarat High Court

Maganlal Karsandas

APPELLANT

Vs

Bedi Gram Panchayat and Others

RESPONDENT

Date of Decision : 16-02-1967

Acts Referred:

Bombay General Clauses Act, 1904 — Section 25
Bombay Village Panchayats Act, 1959 — Section 124(1), 124(5), 176
Constitution of India, 1950 — Article 226

Citation : (1967) 8 GLR 956

Hon'ble Judges : N.M. Miabhoy, C.J.;D.A. Desai, J

Bench : Division Bench

Judgement

N.M. Miabhoy, C.J.—This is a petition under Article 226 of the Constitution of India and also purports to be under Article 227 of the same Constitution, which challenges the levy of an octroi by the Gram Panchayat, Bedi, who is respondent No. 1. Petitioner is a grain merchant, doing his business at Bedi, which was formerly a part of the territory of the former Saurashtra State. During the Saurashtra regime, the village of Bedi was a part of the territory of the municipal borough of Jamnagar, and was governed by the Municipal Boroughs Act. During that regime, however, there was in force Saurashtra Ordinance No. 57 of 1949 (hereafter called the Ordinance), which regulated the constitution and affairs of the Gram Panchayat (hereafter called the Panchayat). Section 41 of the Ordinance conferred power on Panchayats to levy, inter alia, taxes mentioned in Schedule J "in accordance with, at the rates and subject to exemptions prescribed. " Section 53 of the Ordinance conferred power upon the State Government to make rules to carry into effect the purposes of the Act. The Saurashtra State made rules u/s 53 read with Section 41 aforesaid for the levy of octroi. These octroi rules are called hereafter rules simpliciter. By Rule 3. octroi was levied on goods mentioned in the First Schedule at the rates mentioned in one of the columns of that Schedule. Petitioner is dealing in foodgrains. The octroi rate which was prescribed for foodgrains in that Schedule was two pies in a rupee. This Ordinance was in force at the time of the merger of the Saurashtra

State with the State of Bombay, and continued to be in force after the merger. The Bombay Village Panchayats Act HI of 1959 (hereafter called the Panchayats Act) came into force on 23rd January 1959 and was applied to the territories in the State of Bombay on 1st June 1959. Section 185 of the Panchayats Act repealed the Ordinance. Thus, it is an admitted position that, on the date of the coming into force of the Panchayats Act, the Panchayats Act became applicable to Bedi village and the Ordinance ceased to have effect in that area. Section 186 of the Panchayats Act, however, saved certain provisions of the Ordinance and certain other things. Clause (1) of Section 186 enacted that, any local area which was declared to be a village immediately before the coming into force of the Panchayats Act "shall be deemed to be a village under this Act. " Clause (8) saves, inter alia, a rule made "in respect of the said village and in force immediately before the commencement of this Act." However, since on the date of the coming into operation of the Panchayats Act, Bedi was a part of a municipal borough and was not a village under the Ordinance, there is no dispute that Bedi was not deemed to be a village under the Panchayats Act, or that, none of the rules which may have been framed by the former Government in regard to such villages applied to Bedi. However, on 26th of March 1960, Bedi was created a village under the power vested in the Bombay Government by Section 4 of the Panchayats Act. On 6th October 1960, a gram panchayat was established for Bedi. After the establishment of the gram panchayat, that body proceeded further to levy octroi on a number of articles including foodgrains. On 18th October 1960, respondent No. 1, the Gram Panchayat, passed a resolution, resolving that octroi "chargeable on the goods imported within our village from outside shall be according to the rules of the Jamnagar Village Panchayat Mandal. " The latter is respondent No. 2 and is also constituted under the provisions of the Panchayats Act. On the same date, first respondent published a public notice, inviting within one month objections from the public to the proposed levy of octroi. No objection was received within the above time limit. Therefore, on 18th November 1960, first respondent passed a resolution recording that no such objection had been received, and resolved to levy octroi. On 7th March 1961, first respondent published a declaration in the form of a schedule, prescribing rules of octroi on different goods and invited objections. As no objections were received, first respondent passed a resolution on 10th April 1961 levying octroi on goods as proposed. This proposal was submitted by it for sanction to the Divisional Commissioner at Rajkot. That officer, purporting to act under the powers saved by Clause (8) of Section 186 of the Panchayats Act, accorded sanction to the above levy by his order dated 14th of June 1961. The merchants of Bedi felt aggrieved by the above levy. Although, the resolutions of first respondent did not specify under what particular legal provision the octroi was being levied, it is common ground that first respondent had the power to levy octroi under Sub-section (1) of Section 124 of the Panchayats Act. We shall have occasion to notice the provisions of that sub-section in detail at the proper place. Sub-section (5) of Section 124 entitles any person aggrieved by, inter alia, the imposition of a tax to prefer an appeal, to the Panchayat Mandal. Accordingly, the

merchants preferred the above appeal under Sub-section (5) of Section 124 of the Panchayats Act. Second respondent dismissed that appeal by its order, dated 29th November 1961. Petitioner also challenges this appellate order, and prays for a writ of certiorari for quashing that appellate order.

2. Now, in order to understand the submissions made by Mr. Shah in support of this petition, it is necessary to quote first the relevant part of Section 124, Sub-section (1) of the Panchayats Act under which the octroi has been levied. That sub-section is as follows:

124. (1) It shall be competent to a panchayat to levy all or any of the following "taxes...at such rates as may be decided by it (but subject to the minimum and maximum rates which may be fixed by the State Government) and in such manner and subject to such exemptions as may be prescribed, namely:

(i) ...

(ii) octroi;

...

Section 176 confers power upon the State Government to make rules for carrying into effect the purposes of the Act, and Sub-section (2) thereof enacts that, in particular but without prejudice to the generality of the above provisions, the State Government may make rules on the topics mentioned in the various clauses mentioned therein. Amongst the clauses is Clause (xxvi), the relevant part of which is as follows:

176. (1)

(2) In particular but without prejudice to this generality of the foregoing provisions, the State Government may make rules:

...

(xxvi) u/s 124 laying down the maximum and minimum rates and the manner in which...taxes...specified in the section shall be leviable.

Now, reading Section 124, Sub-section (1), it is quite clear that it confers power on the panchayats to levy, amongst others, an octroi tax in such manner as may be prescribed. It is also quite clear that, that sub-section enables the panchayat to decide the rates at which the octroi is to be levied. The latter power, however, is made subject to "the minimum and maximum rates which may be fixed by the State Government. " Now, Mr. Shah's contention is that, the impugned levy of octroi is incompetent for more than one reason. In the first instance, it is urged that, under Sub-section (1), octroi can be levied only in such manner as may be prescribed. It is common ground that, by the date on which the octroi was levied, the State Government had not prescribed any rules whatsoever under the power vested in it u/s 176, already noticed. That being so, the Government had also not prescribed any minimum and maximum rates fixing the floor and ceiling

rates for such a levy. The first submission of Mr. Shah is based on this central fact, namely, the absence of any rules by the State Government u/s 176 of the Panchayats Act at the relevant time. Therefore, the contention is that, there being no provision as to the manner in which the tax was to be levied prescribed by any rule, the levy was incompetent. Secondly, it is contended that, the fixation of the floor and the ceiling rates is a condition precedent and, in the absence of any such prescription by the Government in regard to these two matters, the levy was incompetent too. These two contentions form the subject matter of the first submission of Mr. Shah. Now, already indicated, first respondent did follow a certain procedure before levying the octroi. It is common ground that, the procedure which first respondent followed was the one prescribed by the rules under the Ordinance. The second submission of Mr. Shah is based on this fact. His submission is that, the rules under the Ordinance did not survive the repeal of the Ordinance and, in any case, did not survive for the benefit of a village which was not in existence at the date of the repeal of the Ordinance "and, on the admitted facts, Bedi being not such a village, the saving provision contained in Clauses (1) and (8) of Section 186 of the Panchayats. Act did not apply. This forms the second submission of Mr. Shah. The third submission of Mr. Shah is based on an assumption that the rules under the Ordinance applied and that a tax could be levied thereunder. The tax which first respondent has levied on foodgrains is at the rate of one anna per rupee. The tax which was permitted by the former State of Saurashtra on these goods was two pies in a rupee. Mr. Shah contends that, if the rules under the Ordinance apply, then, the levy in excess of two pies in a rupee is bad. Therefore, Mr. Shah has formulated the following three submissions for our decision:

(1) first respondent has no power to impose the octroi unless the State Government prescribes rules u/s 176 of the Panchayats Act in regard to the manner of the levy and fixes the maximum and the minimum rates as required by Sub-section (1) of Section 126 of the Apt read with Section 176, Sub-section (2), Clause (xxvi) of the Panchayats Act;

(2) the imposition of the octroi is bad, because, it is so done under the rules framed under the Ordinance, both of which stood repealed and were not saved by Section 186, Clause (8); and

(3) that, in any case, the imposition of an octroi at the rate of one anna per rupee is bad as the rules under the Ordinance enable first respondent to levy octroi at the rate of two pies in a rupee and no more.

3. Now, from the above discussion, it is quite clear that, the main point which arises for determination in the present petition is whether the rules framed under the Ordinance survived the repeal. At one time, Mr. Hathi placed reliance upon Clause (8) of Section 186 of the Panchayats Act. That clause does save the rules framed under the Ordinance, but, it so saves only in respect of villages which are deemed to have been saved under Clause (1) of Section 186 of the Panchayats Act. On the admitted facts of the present case, Bedi village did not become a

village under the Panchayats Act since that village had not been declared to be such under the Ordinance. Therefore, Mr. Hathi, later on, conceded that Clause (8) aforesaid did not apply to the facts of the present case. Mr. Hathi, how ever, places strong reliance upon Section 25 of the Bombay General Clauses Act, 1904 (hereafter called the Clauses Act). That section applies when an Act is repealed and re-enacted by a Bombay Act with or without modifications. It has not been disputed by Mr. Shah that, the Ordinance which was repealed was a Bombay Act within the meaning of the Clauses Act and that, that Act was re-enacted by the Panchayats Act. Therefore, it is not disputed that Section 25 of the Clauses Act would apply. That section enacts that, in the above circumstances, amongst others, rules made under the repealed Act "shall, so far as it is not inconsistent with the provisions re-enacted, continue in force and be deemed to have been made...under the provisions so re-enacted unless and until it is super seded by rule made...under the provisions so re-enacted. " Therefore, u/s 25, there is no doubt whatsoever that the rules under the Ordinance would survive. Not only these rules would continue to be in force, but, they must be deemed to have been made under the Panchayats Act- Under the circumstances, in our Judgment, the challenge contained in the first part of the first submission must be negatived. We have already pointed out that, it is not disputed by Mr. Shah that the impugned octroi was levied after following the procedure laid down under the rules framed under the Ordinance. Petitioner has never challenged the levy of the impugned octroi on the ground that any of the provisions contained in those rules had been violated. The challenge was based only on the ground that the State Government had failed to prescribe rules as to the manner in which the levy of an octroi had to be made. Under the circumstances, inasmuch as the octroi was levied after following the procedure laid down in the rules under the Ordinance which are to be deemed to have been made under the Panchayats Act, the levy of the octroi cannot be challenged on the ground that the manner of the levy, as fixed by the rules, had not been followed. For the same reason, the second submission of Mr. Shah must be rejected too. Having regard to the fact that the above rules are to be deemed to have been made under the Panchayats Act, it cannot be said that the levy is bad on the ground that the rules under the Ordinance were followed. Therefore, the first part of the first submission and the whole of the second submission of Mr. Shah must be rejected.

4. Mr. Shah, however, contends that, even if this be so, the challenge on the ground of the non-prescription of the minimum and the maximum of the rates survives. Before considering this challenge, in our judgment, it will be better if we consider the challenge contained in the third submission, because, it will be noticed that the submission is based on a ground inconsistent with the ground on which the second part of the first submission is based. The third submission assumes that the rules under the Ordinance prescribe the maximum rate of two pies in a rupee for foodgrains. If this submission is correct, then, the second part of the first submission, at least so far as it is based on the non-prescription of the maximum rate, must be rejected. Now, Mr. Hathi's submission is that, the

rules under the Ordinance do not prescribe the maximum rate of two pies in a rupee. In our judgment, Mr. Hathi's contention is right. It is, no doubt, true that, the relevant schedule in the rules prescribes the rates of two pies in a rupee as the rate of octroi on goods not otherwise provided for. There is no dispute that this entry would include foodgrains. But, turning to Rule 3 and reading it along with Sections 41 and 53 of the Ordinance, there is no doubt whatsoever that the power which is conferred on the rule-making authority, that is, the Government, is the power of prescribing the rate at which octroi is to be levied. Section 41 did not confer any power on the State Government to fix the maximum rate, nor was there any provision in Section 53 conferring any such power. The only power which was vested in the State Government was the power of prescribing rates. It is in exercise of this particular power that Rule 3 and the schedule have been framed. Now, turning to Sub-section (1) of Section 124 of the Panchayats Act, there is no doubt whatsoever that the power of deciding the rates is conferred on the Panchayat. Therefore, even though the rules under the Ordinance may have fixed a particular rate, when first respondent purported to exercise the power conferred upon it u/s 124, Sub-section (1), its power of fixing the rate was untrammelled by any rate which might have been prescribed by the previous authority. It is true that, if under the provisions of the Ordinance or the rules a maximum had been fixed by the State Government, then, that provision would survive u/s 25 of the Clauses Act. But, there being no such power and no such provision having been enacted, it is not possible to say that the above provision was a provision fixing the maximum rate and not merely determining the rate of octroi. Under the circumstances, in our judgment, the third submission of Mr. Shah must be rejected too.

5. Therefore, the submission which survives for consideration is the second part of the first submission, and that submission is that, the octroi is bad because the State Government has not prescribed the minimum and the maximum rate for the levy of octroi. Now, in this connection, before we proceed further, it is to be noticed that, Sub-section (1) of Section 124 does not use the verb "prescribed" in connection with the minimum and maximum rates, but, uses the verb "fixed." It is true that, in Section 176, power has been given to the State Government to prescribe by rules the minimum and the maximum rates. Therefore, it is reasonable to hold that, the fixation of the minimum and the maximum rates may be made by the State Government by rules. But, it is possible to take the view that, that is not the only mode in which the State Government may exercise the power vested in the relevant part of Sub-section (1) of Section 124. It is possible to take the view that, besides prescription, the Government has the power of fixing the minimum and the maximum rates by fixing them by an order and not necessarily by rules. Now, that brings us to the main question of the construction of Sub-section (1) of Section 124 of the Panchayats Act. Now, Mr. Shah is right in contending that, in construing that section, we must bear in mind the fact that the section is a taxing section and, therefore, must be strictly construed and that, in any case, if there is any doubt in the construction of that

section, the doubt must be resolved in favour of the citizen. But, that does not mean that the Court must not make an effort in the first instance to find out what precise meaning of that section is,. The principle cannot apply if there is no doubt created in one's mind on reading the section itself, and if, the provision is found to be clear and exact in its direction. Now, analysing the above section, there is no doubt whatsoever that it confers power upon the Panchayat to levy, amongst others, an octroi duty. That power is conferred by the statute directly on the Panchayat. The restriction which is placed by the statute itself on that power is as to the manner and subject to the exemption as may be prescribed. As regards the rates, what the section says is that, the decision in regard thereto is to be taken by the Panchayat. Therefore, whilst conferring power on the Panchayat to levy a tax, the rates of the tax are left to be decided by the panchayat itself. But, this decision is made subject to the fixation of the minimum and the maximum rates by the State Government. It will be important to notice that, the latter restriction is not on the power to levy the tax, but, that restriction is on the power to take the decision which is undoubtedly conferred by the section upon the Panchayat. Therefore, the scheme which emerges on a study of Sub-section (1) of Section 124 is as follows: The power to levy a tax is conferred upon the Panchayat. That power is to be exercised in the manner prescribed by the rules, and the power is subject to such exemptions as may be prescribed. But, so far as the fixation of the rates is concerned; it is left to the decision of the Panchayat. But, that decision is controlled or restrained by the power given to the Government of fixing the minimum and the maximum rates. In that view of the matter, in our judgment, the provision regarding fixation of the minimum and the maximum rates cannot be regarded as a restriction on the power to levy the tax. It appears to be a control on the exercise of the power to fix the rates. In other words, in our judgment, if and when the Panchayat fixes rates of a tax and if there is any minimum or maximum rate fixed by the State Government, either by rule or by a specific order in regard to a particular Panchayat, then, the Panchayat is bound to act within the floor and ceiling rates fixed by the State Government. But, if there is no such fixation by the State Government, then, in our judgment, the power of the Panchayat to fix any rate of the tax is not in any way affected. In other words, in our judgment, the power of the Panchayat to fix the rate of a tax is not made dependent upon the exercise of the power by the State Government of fixing the minimum and the maximum rates. In our judgment, this construction of Sub-section (1) of Section 124 is, to a certain extent, reinforced by the provision contained in Section 128 of the Panchayats Act. Sub-section (1) of Section 128 confers power upon the Panchayat Mandal to give directions to the Panchayats to increase their income. It further says that, if such a direction is not carried at all or to the extent required by the Mandal, then, "the Panchayat Mandal may require it to levy any of the taxes or fees specified in Section 124 or increase the rate at which any of such taxes and fees is levied. " Pausing here for a moment, it is clear that, no restriction is placed upon the power of the Panchayat Mandal to require a Panchayat to levy a tax or to increase the rate thereof. Then comes the proviso,

which is as follows:

Provided that the Panchayat Mandal shall not compel the Panchayat to levy any tax or fee or increase the rate thereof beyond the maximum rate prescribed in this behalf.

It will be noticed that, this proviso disables the Mandal from requiring a panchayat to increase the rate beyond the prescribed maximum rate. But, it does not disable the Mandal from increasing the rate beyond the fixed rate. If there is a general prescription by rule, that is, by a rule which will have the force of law, then, the Mandal is prevented from requiring a Panchayat to increase the rate beyond the maximum. But, if the State Government has not acted by prescribing a rule but by only fixing a maximum for a particular Panchayat, then, the Mandal has the power of requiring the Panchayat to impose a rate higher than the maximum and thereby bringing the matter to the notice of the Government for deciding as to whether it should or should not relax the maximum rate fixed by it u/s 124, Sub-section (1), in regard to that particular Panchayat. Under the circumstances, in our judgment, reading Sub-section (1) of Section 124 as a whole, the proper construction appears to be that, the power of the Panchayat to decide the rate at which a tax is to be levied is not made dependent upon the fixation or prescription by the State Government of the minimum and the maximum rates. To a certain extent, this construction is further reinforced by two facts. One is that, the power of the Government of fixing the minimum and the maximum rate is put in parenthesis and there is the conjunction "but" between the clause which confers the power to decide on the Panchayat and the expression which gives power to the State Government to fix the minimum and the maximum rates.

6. Mr. Shah, however, contends that the matter is no longer *res Integra*. He submits that a provision in *pari materia* has been construed by their Lordships of the Supreme Court and the construction is the one for which Mr. Shah contends. Mr. Shah relies upon the decision of their Lordships of the Supreme Court in *Mohammad Hussain Gulam Mohammad and Anr. v. The State of Bombay and Anr.* reported in (1963) 2 G.L.R. 21. In this case, their Lordships were called upon to construe Section 11 of the Bombay Agricultural Produce Markets Act, 1939 (hereinafter called the Markets Act). That section is as follows:

The market committee may subject to the provisions of rules and subject to such maxima as may be prescribed levy fees on the agricultural produce bought and sold by licensees in the market area.

The Markets Act confers power upon the State Government to make rules for the purpose of enforcing the provisions of the Act. Clause (e) of Sub-section (2) of Section 26 thereof confers specific power of making rules prescribing "the management of the market, maximum fees which may be levied by the market committee in respect of agricultural produce..." In accordance with the powers conferred by Sections 26 and 11, the State Government had framed rule No. 53

which rule provided that the market committee shall levy and collect fees on agricultural produce brought and sold in the market area at such rate as may be specified in the bye-laws. In the above case, this Rule 53 was challenged as ultra vires on the ground that it did not "conform to Section 11 of the Market Act". Their Lordships struck down Rule 53 on the above ground and held that, in the absence of any prescription of maximum rate by the State Government, the market committee had no power to levy a fee. At page 27 of the report, their Lordships made the following observations in connection with the challenge:

Besides this however, it is also contended that Rules 53 and 54 which provide for levying of fees u/s 11 are ultra vires, as they do not conform to Section 11 of the Act. It will be noticed that Section 11 provides for levy of fees to be fixed by the market committee, subject to such maxima as may be prescribed by the Rules and this fee is to be charged on the agricultural produce bought and sold. There are thus two restrictions on the power of the market committee u/s 11; the first is that fee fixed must be within the maxima prescribed by the Rules and naturally till such maxima are fixed it would not be possible for the market committee to levy fees....

Their Lordships described the attack on Rule 53 in the following words:

The first attack therefore on the Rules is that it will not be open to the market committee to prescribe any fee u/s 11 till the State Government prescribes the maxima by the Rules, which it has not done so far.

At a later stage, their Lordships expressed their conclusion in the following words at page 28:

As we read Section 11, there is no doubt that the State Government is expected to specify the maxima within which the market committee shall fix fees and until such maximum is specified by the State Government in the Rules it would not be possible for the market committee to fix any fees u/s 11.

After reaching the above conclusion, in the next paragraph their Lordships proceeded to consider the validity of the construction which was sought to be placed by the State Government on Section 11. According to respondents in that case, the true construction of Section 11 was that, if maximum were prescribed by the rules, the fees would be fixed by the market committee within the maxima, but, that if no maxima were fixed under the rules, it would be still open to the market committee to prescribe any fees it thought proper under its power u/s 11. Their Lordships rejected this construction and gave two reasons for the same. In the first instance, their Lordships said that, that construction meant adding the words "if any" after the word "maxima" in Section 11. Secondly, their Lordships observed that, the above provision was in the nature of a controlling provision which was in the line with the other controlling provisions given to the State Government in regard to the power of taxation conferred on local authorities. Thereafter, their Lordships observed that, if the construction contended for by respondents were to be accepted, then, it would be tantamount

to the State Government abdicating its power to the market committee. Their Lordships say at page 29: "The State Government cannot practically abdicate that power as it seems to have done under rule S3 by leaving it to the committee to fix any rates it likes. "

7. We have given our careful thought to the above decision. In our judgment, though we are bound to follow with great respect all that their Lordships have stated in regard to the construction of Section 11, we must, at the same time, not ignore certain distinguishing features of the provision that we have to construe. In the first instance, it is important to notice that, the language which their Lordships had to construe as used in Section 11 is different from the language as used in Section 124, Sub-section (1), which we have to construe. The scheme of Section 11 is different from the scheme to be found in Section 124. u/s 11, the power to levy itself is made subject both to the rules and to the maxima to be prescribed. Such is not the case u/s 124. The provision which makes the decision of the rates subject to the minimum and the maximum rates to be fixed by the Government is put in parenthesis and is preceded by the conjunction "but". The proviso to Section 128, which we have noticed above, has also to be taken into account. In our judgment, the reason that the construction contended for by respondents in the above case would require the addition of the words "if any" to the clause under consideration does not apply to Section 114, Sub-section (1). In our judgment, the clause, as it stands, is capable of this construction that the minimum and the maximum rates may or may not be fixed by the State Government. u/s 11, the clause is capable of being so construed as to throw an obligation on the Government, at the time when framing the rules or before the exercise of the levy, to prescribe the maxima. In our judgment, it is not possible to hold that Sub-section (1) of Section 124 casts any such duty upon the Government. The Government may, if it so chooses, prescribe the minimum and the maximum. If the Government does not do so, then, the power to decide the rate remains uncontrolled. Under the circumstances, in our judgment, the ratio of Mohammad Hussain's case is not applicable to the facts of the present case and, in our judgment, the second part of the first submission of Mr. Shah must be rejected too.

For the above reasons, in our judgment, the petition must fail and must be dismissed with costs.

8. Rule discharged with costs in favour of respondent No. 1.