

(1966) 06 BOM CK 0005
In the Bombay High Court
Case No : S.A. No. 374 of 1957

Municipal Committee, Malkapur

APPELLANT

Vs

Ballabhdas Mathuradas, Lakhani and another

RESPONDENT

Date of Decision : 14-06-1966

Acts Referred:

Constitution of India, 1950 — Article 276
Government of India Act, 1935 — Section 142A

Citation : (1966) MhLj 784

Hon'ble Judges : Y.S. Tambe, C.J.; D.V. Patel, J.; D.B. Padhye, J

Bench : Full Bench

Advocate : C.P. Kalele, for the Appellant; B.R. Mandlekar and H.N. Vaidya, for the Respondent

Judgement

Y.S. Tambe, C.J.—A few facts need be stated in brief to appreciate the question that arises for our consideration. The appellant-Municipal Committee of Malkapur, a place in the Vidarbha region, had, in exercise of its power under the Berar Municipal Law, 1886, imposed a tax on the trade of ginning and pressing cotton, termed as "Bales and Boja tax". The tax imposed was 8 pies per Boja of 10 maunds and 10 pies per boja of 14 maunds. This tax was imposed by virtue of a notification issued on 21st March 1912 under the Berar Municipal Law, 1886, and was being recovered by the Municipality from various persons carrying on trade of ginning and pressing cotton. It is not in dispute that the C. P. Municipal Act, 1922 was at a later date made applicable to the Vidarbha area, and on 2nd January 1940, the Provincial Government issued another notification by which the rates were enhanced to 2 annas per boja of 10 maunds and 4 annas per boja of 14 maunds. After this notification was issued by the Provincial Government, the Government of India Act, 1935 was amended and section 142A was brought on the statute book and introduced into the said Government of India Act. Section 142A relates to tax on profession, trades, calling and employment. Sub-section (ii) thereof provided:

The total amount payable in respect of any one person to the Province or to any one municipality, district board, local board, or other local authority in the Province by way of taxes on professions, trades, callings and employments shall not, after the thirty-first day of March nineteen hundred and thirty-nine exceed fifty rupees per annum.

It would be noticed that the aforesaid sub-section (ii) of section 142A prohibited the recovery of tax in excess of Rs. 50 by any municipality from any person by way of a tax on trades after 31st day of March 1939. It may also be stated that the provisions contained in section 142A have also been incorporated in clause (2) of Article 276 of the Constitution. The limit, however, has been raised from Rs. 50 to Rs. 250.

2. On 30th April 1955, the respondents, who are the proprietors of a firm, instituted a suit for recovering Rs. 6,780 (inclusive of interest) as the amount of bales and boja tax illegally recovered by the appellant-municipal committee during the three years preceding the date of the suit. A permanent injunction was also claimed by the respondents against the appellant restraining it from recovering the bales and boja tax demanded from them for the year 1953-54. The case of the respondents-plaintiffs in short was that the aforesaid recoveries made by the appellant-municipal committee in pursuance of the aforesaid notification of 2nd January 1940 were ultra vires and illegal inasmuch, as they were in contravention of the prohibition contained in section 142A of the Government of India Act, 1935 and Article 276 of the Constitution.

3. Various contentions were raised on behalf of the municipality. Firstly, it was contended that the recoveries made by the municipality were not beyond its powers and were perfectly legal. In the alternative, it was contended that under the provisions of section 48 of the C. P. and Berar Municipalities Act, 1922, a notice had to be served upon the municipality or the officer who was acting under the orders of the municipal committee, and the suit had to be filed within six months from the date of the accrual of the cause of action." The schedule given in the plaint showed that the plaintiffs were claiming to recover back the amounts recovered from them by the defendant-municipal committee from June 1952. According to the municipal committee, any amounts recovered by the municipality earlier than the period of six months immediately before the suit were irrecoverable by the plaintiffs under sub-section (2) of section 48 of the C. P. and Berar Municipalities Act, 1922. The municipal committee prayed that the plaintiff's suit be dismissed.

4. The Trial Court decreed the plaintiff's suit excepting the amount of Rs. 750, which according to the learned Judge was recoverable by the municipal committee under Article 276 of the Constitution at the rate of Rs. 250 per year. The view taken by the learned Judge was that the recovery made by the municipal committee in excess of Rs. 750 was without proper authority. The municipal committee filed an appeal to the District Court, and the District Court allowed the appeal of the municipal committee to the extent of Rs. 1,867-4-0,

but decreed the claim of the plaintiffs to the extent of Rs. 4,641-14-0. So far as the amount of Rs. 4,641-14-0 is concerned, the appellate Court held that the amount was recovered by the municipal committee in excess of its power. The municipal committee preferred a second appeal against the decision of the District Court. We are informed that the plaintiffs have also filed cross-objections against the claim of the plaintiffs disallowed to the extent of Rs. 1,867-4-0. This second appeal came up for hearing before Mr. Justice Wagle. Before him, it was contended by Mr. Jakatdar, learned counsel, who appeared for the municipal committee, that the recovery of the tax has been made by the municipal committee in pursuance of the notification dated 2nd, January, 1940 from the year 1940 onwards. The recoveries thus made by the municipal committee were made by it while acting or purporting to act in pursuance of the provisions of the C. P. and Berar Municipalities Act, 1922. The provisions of sub-section (2) of section 48 of the said Act would, therefore, come into play, and the plaintiffs would not be entitled to recover back the tax paid by them beyond the period of six months immediately preceding the date of the suit. It appears that it was urged by Mr. Jakatdar that the question raised by him has also been raised in various other cases pending in different Courts. During the course of the arguments, various decisions of this Court as well as the other Courts were pointed out to the learned Judge, and noticing the conflict in the decisions, the learned Judge took the view that this matter should be referred to a Division Bench. There were also other contentions raised both on behalf of the respondents as well as the appellant. The learned Judge, has referred all questions raised before him for decision by a Division Bench. When the matter came up before the Division Bench, the Division Bench, having regard to the conflict of decisions by the Division Benches on one of the questions involved in this second appeal, namely, the application of section 48 (2) of the C. P. and Berar Municipalities Act, 1922, had placed the papers before the Chief Justice for orders as to whether this question should be referred to the Full Bench, and it is thus that the case has come before us. The question on which there is a difference of opinion has not been formulated in the order of reference. We therefore formulate this question as under:-

Whether in respect of the recoveries, which are in contravention of the prohibitions contained in sub-section (2) of section 142A of the Government of India Act, 1935 and clause (2) of Art. 276 of the Constitution, the provisions of section 48 (2) of the C. P. and Berar Municipalities Act, 1922 apply ?

Counsel for parties agree that this is the question which has been referred to us. In our opinion, the question now stands answered by the decision of the Supreme Court in *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, .

5. The Material part of sub-section (2) of section 48 of the C. P. and Berar Municipalities Act reads thus:-

“(1) No suit shall be instituted against any committee...for anything done or

purporting to be done under this Act until the expiration of two months next after the notice in writing stating the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims, has been, in the case of the committee, delivered or left at its office....

(2) Every such suit shall be dismissed, unless it is instituted within six months from the date of the accrual of the alleged cause of action."

The aforesaid provisions clearly provide that a suit in respect of anything done or purporting to be done under the Municipalities Act by a Municipality has to be instituted after giving the statutory notice provided in sub-section (1) of section 48 and within the period of six months from the date of the accrual of the cause of action. Here, the plaintiff's suit was for recovery of the alleged amount of tax illegally recovered by the Municipality from them during the period, of three years immediately preceding the date of the suit. The suit admittedly was not brought within the period of six months of the date of the accrual of the cause of action. It is the case of the appellant-municipality that the suit is barred as to the recovery of any amount recovered by it beyond the period of six months immediately preceding the date of the suit, because the recovery of the tax, assuming that it was illegally recovered, was an act done or purporting to be done by the Municipality under this Act, inasmuch as the recoveries were made in pursuance of the notification dated 2nd January 1940 which had been issued under the provisions of the Act. The case of the respondents-plaintiffs, on the other hand, is that the recoveries made beyond the limit provided in sub-section (2) of section 142A of the Government of India Act, 1935 and clause (2) of Article 276 of the Constitution, is not an act done or purporting to be done under the Municipalities Act. The bar of limitation enacted in sub-section (2) of section 48, therefore, has no application. Exactly, an identical question had arisen before their Lordships of the Supreme Court in the aforesaid case (i. e. Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon,). Considering this aspect of the case, the majority decision of the Supreme Court held:

A suit by an assessee to recover the amount paid by him in excess of the constitutional limit would not be in respect of a matter "purported to be done" under the Act and the provisions of section 48 of the Act would not therefore apply to it. Where a power exists to assess and recover a tax up to a particular limit and the assessment or recovery of anything about that amount is prohibited, the assessment or recovery of an amount in excess is wholly without jurisdiction and nothing else. To such a case, the enactment under which action was purported to be taken, cannot afford any protection. Indeed to the extent that it affords protection, it would be bad.

The facts of the case with which their Lordships were dealing are similar to the facts of the present case. The rule laid down by their Lordships would, therefore, necessarily govern this case, and, the question which has been referred to us will have to be answered in the negative.

6. Mr. Kalele, learned counsel for the appellant-municipal committee, frankly conceded that it was not possible for him to distinguish this case. He, however, submitted that a doubt to a certain extent has been cast on this decision by a subsequent decision of the Supreme Court in *Kamla Mills Ltd. v. The State of Bombay* Civil Appeal No, 481 of 1963 decided on 23-4-1965. To appreciate the contention raised by Mr. Kalele, it would be necessary to state a few facts. The appellant Kamla Mills was carrying on business of manufacture and sale of textile cloth. It was a registered dealer at the material time under the provisions of the Bombay Sales Tax Act (5 of 1946). It was the case of the appellant-mills that during the material time, it sold goods inside and outside the State of Bombay, and the total value of the goods sold outside the State of Bombay was Rs. 41 fees and odd. On this amount of the sales tax outside the State of Bombay, general sales tax as well as special sales tax had been levied and recovered. The appellant instituted a suit on the Original Side of the High Court at Bombay, and claimed to recover the said amount from the State of Bombay on the ground that it had been illegally levied against it and recovered from it. Inter alia, it had been pleaded on behalf of the respondents i. e. by the State of Bombay that the suit was barred by reason of the provisions of section 20 of the Act. According to the plaintiff, that section did not bar the institution of this suit and, in the alternative, it was pleaded that if it was held that the section was a bar, the said section was ultra vires of the Constitution. The learned trial Judge held that the suit was barred u/s 20 of the Act and in this view of the matter, dismissed the suit on the preliminary ground. The appeal Court upheld the decision. The Mills took the case in (sic) to the Supreme Court. The aforesaid section 20 reads:-

20. Save as is provided in section 23 no assessment made and no order passed under this Act or the rules made thereunder by the Commissioner or any person appointed u/s 3 to assist him shall be called into question in any Civil Court, and save as is provided in sections 21 and 22, no appeal or application for revision shall lie against any such assessment or order.

Mr. Kalele has placed reliance on certain observations of their Lordships on that part of the judgment which deals with the question as to whether section 20 bars the institution of a civil suit. These observations are:-

Section 20 protects "assessment made under the Act or the rules made there under "by appropriate authorities. There can be little doubt that the clause "an assessment made" cannot mean the assessment properly or correctly made. The said clause takes in all assessments made or purported to have been made under the Act.

Reverting then to section 20 it seems to us plain that the words used in this section are so wide, that even erroneous orders of assessment made would be entitled to claim its protection against the institution of a civil suit

Mr. Shastri has also referred to the majority decision in the case of *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, . In that case, according to

the majority decision, section 84 {3) of the Central Provinces Municipalities Act, 1922 which deals with "bar of other proceedings," did not make incompetent the suit with which the Court was dealing.

According to the majority view, the bar created by this provision did not amount to the exclusion of the jurisdiction of the civil Court to entertain a claim for refund of the tax alleged to be illegally recovered because there were no words in the said provision which could be construed as excluding civil Court's jurisdiction either expressly or impliedly. The minority view, however, held that a suit for refund was barred.

We would also like to make it clear that we do not think it is necessary in the present case to consider whether the majority opinion in the case of *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, was justified in casting a doubt on certain observations made by the Privy Council in *Raleigh Investment Co.*'s case or on the validity or the propriety of the conclusion in respect of the effect of section 67 of the Income tax Act.

It is the argument of Mr. Kalele that in this case the Supreme Court has held that though the sales tax assessed, levied and recovered on outside sale was bad because it had been recovered in contravention of the constitutional provision, the suit for the refund of the illegal recovery was barred by reason of the provisions of section 20 inasmuch as the expression "assessment made" cannot mean the assessment properly or correctly made. In the instant case also, may be that the tax assessed, levied and recovered from the respondents was illegal because it was in contravention of the provisions of section 142A of the Government of India Act or Article 276 of the Constitution, it nonetheless was an assessment made or purported to have been made under the Act, and therefore, section 48 of the Act would come into operation. We find it difficult to accept the argument advanced by Mr. Kalele. Their Lordships were dealing with the bar to the institution of civil suits created by section 20 of the Sales Tax Act. The section in the Municipal Act which creates a bar against the institution of suits is section 84. Their Lordships were referred to that part of the majority decision in *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, which dealt with the question as to whether the suit was barred u/s 84 (3) of the Municipalities Act. Section 48 has no concern with the tenability of the suit. Section 48 deals with the question relating to the notice to be given to the part (sic) d of limitation within which the suit has to be brought.

In other words, section 48 deals with matters which arise when a suit itself is a competent suit. That part of the judgment had not been referred to their Lordships in *Kamla Mills case Civil Appeal No. 481 of 1963 decided on 23-4-1965*, It is, therefore, difficult to agree with Mr. Kalele that in *Kamla Mills case Civil Appeal No. 481 of 1963 decided on 23-4-1965* a doubt is cast on the majority decision which deals with the question as to the applicability or otherwise of section 48 of the Municipalities Act to a suit instituted by a taxpayer for refund of the tax recovered from him in excess of the limit prescribed

by section 142A of the Government of India Act, 1935 and Article 276 of the Constitution. We may in this context mention that when this matter had come up before the Full Bench of which I was a party, it had been stated at the Bar that a review application had been filed in the Supreme Court against its decision in Bharat Kala Bhandar's case 1966 Mh. L. J. 185 : A. I R. 1066 S. C. 249. We had, therefore, adjourned this case till their Lordships decided the review application. We have now been informed that the review application has been dismissed by the Supreme Court on 13th September 1965. It would be reasonable to assume that the counsel appearing must have brought to the notice of their Lordships the Kamla Mills case Civil Appeal No. 481 of 1963 decided on 23-4-1965 if at all it had cast any doubt on the correctness of the majority decision. In view of the clear statement of law of their Lordships in Bharat Kala Bhandar's case 1966 Mh. L. J. 185 : A. I R. 1066 S. C. 249 and the dismissal of the review application, as already stated, the answer to the question referred to us will have to be in the negative.

7. It is necessary to mention that Mr. Kalele had also referred us certain observations of their Lordships explaining the meaning of the word "purport" occurring in Azimunissa and Others Vs. The Deputy Custodian, Evacuee Properties, District Deoria and Others, . The observations are at page 370 of the Report. They are:

The word "purport" has many shades of meaning. It means fictitious, what appears on the face of the instrument; the apparent and not the legal import and therefore any act which purports to be done in exercise of a power is to be deemed to be done within that power notwithstanding that the power is not exercisable... Purporting is therefore indicative of what appears on the face of it or is apparent even though in law it may not be so. This means that at the time when the Act purported to vest the property in dispute in the Custodian even though the power was not exercisable, section 8 (2-A) by giving a retrospective effect to section 8 (2) of the Act makes the vesting as if it was vesting u/s 8 (2) of the Act and therefore the attack on the ground of invalidity cannot be sustained.

It is the argument of Mr. Kalele that the Supreme Court has clearly stated the meaning of the word "purport" and laid down that the act which purports to be done in exercise of the power is to be deemed to be done within that power notwithstanding that the power is not exercisable. The municipality has a power to levy a bale and boja tax. It may be that that power was not exercisable beyond a certain constitutional limit placed on it by section 142A of the Government of India Act, 1935 and Article 276 of the Constitution, but the material on record shows that the excess tax has been assessed, levied and recovered in exercise of the power of the municipality to levy a tax. The assessment, levy and recovery of the tax thus, on the principle laid down by their Lordships was an act purporting to have been done under the Act. Whatever may be the merits of this argument, in our opinion, it is not possible

for us to uphold the contention of Mr. Kalele in view of the clear statement of law laid down by their Lordships in the Bharat Kala Bhandar's case 1966 Mh. L. J. 185 : A. I R. 1066 S. C. 249.

8. Mr. Kaleje (sic) argued that the suit itself is barred by reason of the combined effect of sections 83, 84 and 85 of the Municipalities Act. This question has not been argued either before the learned single Judge who made a reference to the Division Bench or before the Division Bench. This matter therefore, does not arise for our consideration. It is open to the appellant to agitate this question before the Division Bench to which the learned single Judge has referred this appeal for disposal on merits. Mr. Kalele also urged before us that the levy of the tax itself was not bad and was not in contravention either by reason of section 142A of the Government of India Act, 1935 or Article 276 of the Constitution. It is his argument that though the tax assessed, levied and recovered is in excess of the limit imposed by sub-section (2) of section 142A or by clause (2) of Article 276, the levy is saved by the proviso to sub-section (2) of section 142A and the proviso to clause (2) of Article 276 and under the provisions of Profession Tax Limitation Act, 20 of 1941. Again this matter does not appear to have been agitated either before the learned single Judge or before the Division Bench and has not been referred to us for our decision. It may also be stated that it has not been brought to our notice that there is any conflict of decision on the aforesaid two questions which Mr. Kalele wanted to raise before us, namely the question as to the tenability of the suit and the question as to the validity of the tax. We may make it clear that the only question which we are deciding is, as regards the applicability of section 48 to the facts of the present case on an assumption that the assessment, levy and recovery of the tax is in contravention of the provision of section 142A of the Government of India Act, 1935 and/or Article 276 of the Constitution. We do not intend to decide and have not decided any other questions. The other questions which the appellant desires to agitate, may be raised before the Division Bench that will decide their case on merits.

9. The answer to the question is in the negative. Costs in the appeal. Let the case be put up before the appropriate Bench for decision.