

(2008) 11 GUJ CK 0047

In the Gujarat High Court

Case No : Special Civil Application No. 3649 of 2002

Naran Lala Ltd.

APPELLANT

Vs

A.N. Khatri and/or his Successor in Office and Others

RESPONDENT

Date of Decision : 11-11-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Gujarat Municipalities Act, 1963 — Section 258

Citation : (2009) 2 GLH 288

Hon'ble Judges : Jayant Patel, J

Bench : Single Bench

Advocate : Dhaval Vyas, for Vyas Associates for Petitioner 1, for the Appellant; Umang Oza, Assistant Government Pleader for Respondent 1, Zubin F. Bharda, for Respondent 2 and B.M. Mangukiya, for Respondent 3, for the Respondent

Judgement

Jayant Patel, J.—The short fact of the present petition is that the petitioner, who is a tax payer, had the grievance against the action of Octroi Contractor in recovering amount of octroi on and behalf of respondent No. 2 - Municipality. The Octroi Contractor is respondent No. 3 herein. Initially, the petitioner preferred Special Civil Application No. 10114 of 1999 before this Court, which came to be disposed of vide order dated 11.7.2001 and the petitioner was relegated to approach before the Collector, Navsari on the item as to whether octroi is leviable on particular goods vide Clause 30-A or 30-B and the Collector was directed to decide the same within stipulated time limits. It appears that the petitioner did approach to the Collector u/s 258 of the Gujarat Municipalities Act (hereinafter referred to as "The Act"), pursuant to the order passed by this Court. However, the District Collector took the view that there is no power with him to decide the question and therefore, he rejected the application of the petitioner, at that stage the petitioner preferred present petition.

2. It appears that pursuant to the interim order passed by this Court in the present petition, the District Collector has exercised the power u/s 258 of the Act after he had tendered apology and reheard the matter. After rehearing, the

Collector had passed order on 24.4.2002, whereby he had decided the question as to whether the item concerned would fall in the Clause 30-B or 30-A of the Schedule. He had observed that the parties to act accordingly, but there is no clear direction by him for refund of the amount and if yes, to what extent and what is the quantification of the amount. As the petition was pending, the petitioner has approached by bringing about the amendment challenging the second order of the Collector so far it relates to not giving clear direction to refund the amount. It has been also contended that items No. 76,81,97,98, and 105 as per the Schedule mentioned in the order of the Collector will be required to be charged by Navsari Municipality and not Vijalpur Municipality and therefore, it has been submitted that for such items, the Collector ought to have observed accordingly or in any case, the respondent No. 2 - Municipality or its agent - respondent No. 3 herein Octroi contractor had no power to collect the octroi and therefore, such amount should also be ordered to be refunded.

3. Heard Mr. Vyas, learned Counsel for the petitioner, Mr. Umang Oza, learned Assistant Government Pleader for the respondent No. 1, District Collector, Mr. Bharda, learned Counsel for respondent No. 2 and Mr. B.M. Mangukiya, learned Counsel for respondent No. 3 - octroi contractor.

4. It does appear from order passed by the Collector dated 24.4.2002 that the power is exercised by him in a half-hearted manner. It is true that this Court directed him to decide the question about the chargeability of the octroi under Clause 30-B or 30-A and it is also true that in the impugned order, the Collector has directed the parties to act accordingly, but such direction would not be sufficient and complete exercised of power u/s 258 of the Act. Section 258 of the Act provides that if the action of the Municipality is found as unlawful by the District Collector, the Section also provides for investing the power with the Collector to direct for restoration of the position as it existed prior to such action of the Municipality by directing status-quo ante. Such power would require the power to pass order to refund the amount, if ultimately found by the Collector that the Municipality or its agent had unauthorisedly collected the octroi from any citizen. Therefore, it does appear that the Collector to that extent has failed to exercise the power and the spirit of the order as was directed by this Court in the proceedings of Special Civil Application No. 10114 of 1999 is not properly maintained or re-enforced by the Collector.

5. However, Mr. Mangukiya, learned Counsel for the respondent No. 3 as well as Mr. Bharda, learned Counsel for the respondent No. 2, submitted that against the order of the Collector dated 24.4.2002, the respondent No. 3 has preferred revision before the State Government and the said Revision is not decided by the Secretary on the ground that the writ petition is pending before this Court. It was also submitted that in the said proceedings, the respondent No. 3 has challenged the jurisdiction of the Collector u/s 258 of the Act to pass impugned order. It was submitted that if the appeal is directed to be decided within stipulated time limits, the question shall be finalized and thereafter, only the matter can be

considered for giving further directions. The learned Counsel for respondents No. 2 and 3 also contended that if the petitioner had any grievance against the order passed by the Collector dated 24.4.2002, it was required for the petitioner to prefer revision before the State Government by challenging the said order and as the same has not been undertaken by the petitioner, this Court may not give direction to the Collector as if the Revisional Authority or the Appellate Authority. It was submitted that the contention raised for chargeability of the octroi in respect to the certain items as mentioned in para 10-B would be essentially subject matter of the revision, which in any case not preferred by the petitioner and therefore, no direction may be issued by this Court, which results into upsetting the findings on merits regarding chargeability of the octroi. The learned Counsel for the respondent No. 3 also submitted that the petition is vague and it constitutes no relief, which deserves to be granted. Mr. Mangukiya, learned Counsel also submitted that the petition is like a money decree for monetary claim and therefore, this Court may not entertain the petition under Article 226 of the Constitution.

6. Had it been a case of exercise of power by the Collector u/s 258 of the Act in absence of any order passed by this Court, it might stand on a different footing. If the Collector has exercised the power u/s 258 and if there is no proper exercise of the power by the Collector, it would rather be a case to be examined by this Court in its writ jurisdiction itself. It is hardly required to be stated that if the order of this Court is not properly complied with, the complaint can be made to this Court for its implementation and it would not be proper to throw away the petition on the ground that the person concerned has alternative remedy and as is not exhausted, the petition may not be entertained. The reference may be made to the decision of the Apex Court in the case of Ramachandra Ganpat Shinde and another Vs. State of Maharashtra and others, , more particularly the observation made at para 11. Therefore, I cannot accept the contention of the learned Counsel for the respondents No. 2 and 3 that as the order of the Collector is not challenged before the Appellate Authority or Revisional Authority by the petitioner before the State Government, the petition should not be entertained.

7. The aforesaid is coupled with the peculiar circumstances, that pending the petition in pursuance to the interim direction given by this Court, the Collector has passed the order on 24.4.2002 and since such order has been passed pending the petition pursuant to the interim direction and the grievance raised by the petitioner in the present proceedings is against the very order passed by the Collector pending petition, it would be just and proper to examine the grievance if any, on merits and not to throw away the contention on the ground that the petitioner has remedy before the State Government by way of revision or appeal against the order of the Collector, more particularly when the matter is considered at final disposal.

8. It is true that the District Collector while exercising the power u/s 258 of the

Act has found in favour of the petitioner to the extent of chargeability of octroi as per the Clause 30-B or 30-A of the Schedule and it is also true that the Collector has observed in operative portion by directing the party to act accordingly. But it appears that the Collector ought not to have ended with the exercise of the power by leaving the matter is at that stage and ought to have further directed for refund of the amount by Municipality or its agent, as the consequence of his final decision of chargeability of the octroi. It is hardly required to be stated that if the octroi is collected from any citizen, not warrant under the law, the same is required to be refunded. If the Municipality or its agent has collected any octroi from any citizen which was not warranted or has collected more amount, then as required in the schedule, the same is required to be refunded to the citizen concerned. In the impugned order, it is apparent that the Collector has found that in respect of the certain items, chargeability of the octroi is of particular category and the grievance of the petitioner is that the octroi collected is more than as per the said Clause of the Schedule. Under these circumstances, with a view to exercise the power u/s 258 of the Act, it was required for the Collector to direct the Municipality to order of restoration of the position as it existed prior to the action, which is found as unlawful. Such in the present case, would mean to direct for refund of the amount of excess octroi collected from the petitioner by the respondent No. 2 - Municipality or the respondent No. 3 being octroi contractor in capacity as agent of the Municipality. As the Collector has failed to exercise the power, to that extent the order of the Collector deserves to be modified by the appropriate direction.

9. The aforesaid will be the position for exercise of the power by the Collector u/s 258 of the Act, its scope and ambit thereof. However, this does not mean that the findings of the Collector under the Schedule for chargeability of the octroi as per the Clause 30-B or 30-A would stands confirmed by this Court. As the grievance has been raised on behalf of the respondent No. 3 against such findings before the State Government against the order of the Collector, it would be just and proper to leave such question open to be decided in the revision preferred by the respondent No. 3. It is an admitted position that the Revision is preferred by the respondent No. 3 and the same is pending before the State Government. Therefore, said aspect may be agitated by the respondent No. 3 as well as respondent No. 2 and the petitioner may also raise contention as may be availed in law on the aspect of chargeability of the octroi under Clause 30-B or 30-A of the Schedule of the Octroi. It appears that as the appeal is pending, no view deserves to be expressed regarding the order passed by the Collector on such aspect and it would be just and proper to leave the matter to be considered by the State Government in the appropriate revisional proceedings.

10. If the impugned order of the Collector is to operate with the direction to refund the amount of excess octroi collected, then also the question may be required to be examined about the quantification of the amount. The petitioner has quantified the amount of Rs. 5,32,643.47Ps., but such quantum of the amount is not admitted by the respondent No. 2 and 3. No material is produced

or available on record to show that it is undisputed position that the amount recoverable would be Rs. 5,32,643.47Ps. Therefore, even the direction of the Collector to refund the amount is to operate, it would be required for the Collector to examine the record as may be produced before him by the petitioner or respondents No. 2 and/or respondent No. 3 as the case may be and thereafter to exactly quantify the amount to be refunded by the respondent No. 3 and such exercise would also be required to be undertaken by the Collector, in the event, the order of the Collector is held valid regarding chargeability of the octroi as mentioned in the impugned order. Since such aspect may be required to be undertaken later to the decision of the State Government or otherwise, in the revisional proceedings, no further discussion may be required at this stage, but suffice it to observe that exercise of quantification of the amount will be also required to be undertaken by the District Collector at the appropriate stage.

11. In view of the aforesaid, following directions are given:

The impugned order of the Collector dated 24.4.2002 shall stand modified to the effect that the respondent No. 3 therein directly and the respondent No. 2 herein indirectly through the respondent No. 3 shall be required to refund the amount of the octroi collected from the petitioner. It would be open to the petitioner to approach before the Collector by producing the detail of the exact amount already collected in excess and the Collector shall examine the record after giving opportunity to the respondents No. 2 and 3 and shall quantify the amount to be refunded by the respondent No. 2 indirectly and respondent No. 3 directly to the petitioner.

The aforesaid directions shall not operate as a bar to the State Government in deciding the revision preferred by the respondent No. 3 in accordance with law on the aspect of chargeability of the octroi, whether under Clause 30-B or 30-A of the Schedule. However, the State Government will not be in a position to decide the question of jurisdiction of the Collector, u/s 258 of the Act, in view of the findings recorded by this Court in the present order. The revision may be heard by the State Government and may be decided preferably within a period of two months from the receipt of the order of this Court.

After the decision of the State Government, unless there is any prohibitory order of any competent Court, the directions for quantification of the amount shall continue to operate. However, if the State Government has modified the order or has set aside the order of the Collector on merits about the chargeability of the octroi, the parties may resort to remedy as available in law and the rights shall stand governed accordingly.

12. The petition is allowed in terms of aforesaid directions. Rule is made absolute accordingly. No order as to costs.