(2003) 12 BOM CK 0043

In the Bombay High Court

Case No : P.I.L. No. 46 of 2003

Ravi Rameshkumar Bhatia APPELLANT

Vs

Commissioner, Ulhasnagar Municipal Corporation and Others RESPONDENT

Date of Decision : 04-12-2003

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 455
Constitution of India, 1950 — Article 226
Octroi Ulhasnagar Municipal Corporation Rules, 1996 — Rule 17

Citation : AIR 2004 Bom 92 : (2004) 1 ALLMR 438 : (2004) 3 BomCR 661 : (2004) 2 MhLj 448

Hon'ble Judges : J.A. Patil, J;A.S. Aguiar, J

Bench : Division Bench

Advocate : Shekhar Naphade and L.M. Acharya, for the Appellant; R.M. Sawant, for Nos. 1 and 2, A.A. Kumbhakoni, for No. 3 and R.M. Patne, A.G.P. for No. 4, for the Respondent

Final Decision : Dismissed

Judgement

1. By consent rule returnable forthwith.

2. This petition under Article 226 of the Constitution of India, the petitioner has prayed for following reliefs viz.

(i) Declaration that respondent No. 3 has no authority of law to collect escort fee from the members of the public at the entry and exit points of Ulhasnagar Municipal Corporation.

(ii) Order directing respondent No. 3 to pay to respondent No. 2 Ulhasnagar Municipal Corporation the entire amount of escort fee collected by him from 25-7-2002 till the date of filing of the petition i.e. 23-4-2003.

3. The petitioner is a resident of Asalegaon, Ambernath and he carries the business of dealing in supply of building materials. He has a godown at Asalegaon, Ambernath Rural, District Thane. The petitioner takes delivery of

cement loads from the ACC company at Thane and also from Larsen and Toubro Company Limited at Urban, District-Raigad. These goods are then carried to his godown at Asalegaon, According to the petitioner his goods are therefore, required to cross the territorial limits of Ulhasnagar Municipal Corporation which is respondent No. 2 in this petition. Respondent No. 1 is the Commissioner of the said Municipal Corporation. Respondent No. 3 is the agency appointed by the respondent No. 2 to collect the octroi. Respondent No. 4 is the State of Maharashtra.

4. The petitioner has alleged that respondent No. 3 has been illegally collecting escort fee at the rate of Rs. 20/- per vehicle for the last several months and appropriating the said revenue to itself. According to the petitioner, respondent No. 3 is entitled only to collect octroi charges and nothing further. Under Rule 17 of the Ulhasnagar Municipal Corporation (Octroi) Rules, 1996 (for short "the Octroi Rules") a person in charge of goods, who wants to carry the same under escort from entrance naka to exit naka of respondent No. 2 is liable to seek a written per mission-cum-transit pass in Form 8 of the Octroi Rules popularly known as "escort fee". The respondent No. 3 is appointed as the octroi collection agent to collect the octroi charges under the provisions of Section 2(42) of the Bombay Provincial Municipal Corporation Act (for short, "BPMC Act"). As per the contract between the respondent No. 2 and 3, the latter is appointed as agent for the purpose of collection of octroi imposed and levied by respondent No. 2 on the entry of goods within the octroi limits of the corporation for consumption, use or sale. As per the contract, respondent No. 3 is required to pay to respondent No. 2 an amount of Rs. 54.40 crores which amount is described as "contract amount". The contract period is for 12 months commencing from 25-7-2002 to 24-7-2003. The petitioner has contended that respondent No. 3 has been appointed as an agent to collect octroi levy only and no other levy or cess. According to him, escort fee as contemplated by Rule 17 of the Octroi Rules is outside the purview of the term "Octroi", The petitioner submitted that escort fee can be collected by the officers of respondent No. 2 and it must go to the treasury of respondent No. 2. The petitioner has alleged that the action of respondent No. 3 of collecting escort fee and siphoning off the same to itself is clearly without authority of law and contrary to the agency agreement. Respondent No. 3 has not paid a single penny to respondent No. 2 out of the escort fee collected by it. The petitioner has pointed out that at least 3000 vehicles pass through the entry and exit points of respondent No. 2. Thus according to the petitioner, during the period of 10 months, respondent No. 3 has collected a huge amount of escort fee and appropriated the same to itself. On this ground, the petitioner has prayed for the above mentioned reliefs.

5. On behalf of the respondent Nos. 1 and 2, the Deputy Municipal Commissioner Datta Nagnath Bhadakwad has filed his affidavit in reply and pointed out that respondent No. 2 came into existence in October, 1996 and that u/s 127 of the Bombay Provincial Municipal Corporations Act (for short, BPMC Act), Octroi is one of the taxes levied and collected by the Municipal Corporation. It is further

pointed out that for the levy and collection of the Octroi respondent No. 2 with the previous approval of the State Government, has framed the Octroi Rules which inter alia lay down the manner, the schedule of rates at which octroi is collected and also provides for exemption from octroi under certain circumstances. Octroi is leviable on goods which are imported within the jurisdiction of respondent No. 2, Rule 17 of the Octroi Rules provides for the procedure for dutiable goods imported which are intended for immediate export. It is stated that Rule 17 is a part of the entire scheme of collection of octroi and therefore, it has to be considered in the context of the entire scheme of the collection of the octroi. It is pointed out that from such importer, escort fee of Rs. 20/- is collected. An estimated amount in lieu of collection of escort fee recoverable by the agent for the year is included in the price of the contract. It is further stated that respondent No. 2 had taken a decision to privatize the collection of octroi in the year 1998-99 and since then, respondent No. 3 is the 5th contractor appointed. An agreement made with respondent No. 3 makes it clear that he has been appointed for collection of octroi imposed, assessed and levied by the corporation under the BPMC Act and the Octroi Rules on the entry of the goods imported within the octroi limits. It is further stated that under the said agreement the employees of the agent are entitled to perform all duties and functions of the octroi officers. It is contended in the said affidavit that the petition has been filed with some ulterior motive and it is not a genuine public interest litigation. It is alleged that the petitioner wants to put in Jeopardy the contract made by respondent No. 2 with respondent No. 3 as regards collection of octroi. It is stated that the appointment of respondent No. 3 is pursuant to the public tenders invited for the said purpose and that the period of contract with respondent No. 3 is from 25-7-2002 to 24-7-2003. It is alleged that the petitioner has filed the present petition at the fag end of the contractual period and the same is not bona fide and in public Interest. It is also pointed out that the petitioner has filed RCS No. 163 of 2003 against the respondent No. 3 in the court of Civil Judge, J.D. Ulhasnagar in respect of his individual dispute in connection with the octroi collection.

6. On behalf of the respondent No. 3, its director Suresh Ratanlal Jagaisi has filed his affidavit and raised a contention that the petitioner has no locus standi to file present petition by way of public interest litigation, It is stated that the petitioner is engaged in the business of supplying building materials and he is dealing with the transport of the said material. Therefore, he is liable to pay either the octroi or escort fee. It is contended that the petitioner has filed a private interest litigation in the guise of a public interest litigation and the same is not bona fide. It is stated in the affidavit that respondent No. 3 offered the highest amount to the tune of Rs. 54.54 cores and his bid was accepted and he was accordingly appointed as agent in respect of levy, imposition, assessment and recovery of octroi and matters incidental thereto for the period from 25-7-2002 to 24-7-2003. It is submitted that in terms of contract respondent No. 3 is entitled to perform all the duties and functions of the octroi officers and superintendents

of octroi as defined in the Octroi Rules. It is further stated that charge of escort fee is a part and parcel of the entire scheme of levy, Imposition, assessment and recovery of the octroi. It is stated that recovery of escort fee is inseparable part of the scheme. It is further submitted that payment of escort fee is not compulsory for a transporter bringing goods and entering into the territorial limits of respondent No. 2. It is open for such a transporter to pay the octroi in accordance with the normal rule and to follow the normal procedure by satisfying the check post authority of respondent No. 3 at the point of exit and claim refund of the octroi paid by following due procedure. However, if the transporter does not want to avail this option of taking escort, he has to pay octroi first at the point of entry and then claim the refund thereto at the point of exit and for that purpose he has to stop at the entry check post as well as the exit check post to satisfy the check post authority that the goods brought in the corporation limit are being taken out. It is further stated that to avoid following all such procedure and inconvenience caused in handling the cash and spending time, facility of providing an escort is made available as set out in Section 147 of BPMC Act and the Octroi Rules. It is therefore, contended that providing of escort and charging of fee for that purpose is only a facility accorded to the transporter for carrying his goods in transit through the limits of respondent No. 2 and it is in lieu of payment of and refund of octroi. It is further submitted that imposition of the escort fee is for the services rendered by the respondent No. 2 to the transporter who has not to pay the octroi at the entry point and claims its refund at the exit point. It is contended that respondent No. 3 is therefore, entitled to appropriate the amount of escort fee recovered in the same manner on collection of octroi. It is denied that the escort fee can be collected only by the officers of respondent No. 2 and that such fee must go to the treasury of respondent No. 2. It is further stated that while offering the amount of Rs. 54.54 crores, respondent No. 3 had taken into consideration the collection of escort fee as component. If respondent No. 3 were not to collect the escort fee, then it would not have offered to make payment of such a huge amount of Rs. 54.54 crores to respondent No. 2.

7. We have heard the learned counsel for all the parties. The present petition is filed and styled as public interest litigation but according to the respondent No. 1 to 3 it is in fact private interest litigation and that the petitioner has no locus standi. It is true that the petitioner deals in building materials and he has his godown at Asalegaon, Ambernath Rural and that for the purpose of taking and giving delivery of the building materials, he is required to transport the same through the octroi limits of respondent No. 2. Surely, he feels affected by the imposition of escort fee which is recovered by respondent No. 3. In our opinion, this limited personal interest of the petitioner in the subject-matter of the petition does not make it altogether a private litigation. As pointed out by Shri Shekhar Naphade, petitioner has not claimed any relief for himself. The reliefs sought by him against the respondent No. 3, if granted, will benefit all the transporters who take their goods through the octroi limits of respondent No. 2. The possible benefit of the petitioner is incidental only. Moreover, the reliefs

claimed by the petitioner aim at preventing the respondent No. 3 from appropriating the amount of escort fee to itself and require him to deposit the same in the treasury of respondent No. 2. Considering from this point of view, the public interest involved in this petition is apparently larger than the personal interest of the petitioner. We are therefore, unable to entertain the preliminary objection of locus standi raised by respondent No. 1 to 3.

8. The next objection of the respondent is that the petition is mala fide and that the petitioner is actuated to file this petition out of personal animosity against the respondent No. 3. Two facts are pointed out in this connection. The first is that the petitioner has already filed a Civil Suit against, respondent No. 3 in the court of Civil Judge, J.D., Ulhasnagar. There is no dispute of this fact. Shri Naphade has produced a copy of the plaint in that suit i.e. RCS No. 163 of 2003 which shows that the petitioner filed the said suit against the respondent Nos. 2 and 3 on 6-3-2003 for declaration and injunction against them. However, the said reliefs are in connection with the detention of the petitioner''s goods which according to the petitioner is illegal and unauthorised. It is therefore, clear that the said suit for personal cause of action of the petitioner. The present petition however, as indicated above, is for the interest of the public at large. In the said suit, the petitioner has no doubt made allegations against the respondent No. 3 of causing harassment in the matter of carrying goods through the octroi limits of respondent No. 2. It is however, not possible to conclude that the petitioner is actuated with animosity against the respondents. As a citizen, he is entitled to maintain the present action on the ground that appropriation of escort fee recovered by respondent No. 3 is not proper and against the interest of respondent No. 2 itself.

9. The second ground on which the petition is branded as mala fide is the delay in filing the same. There is no dispute of the fact that respondent No. 2 took decision to privatise the collection of octroi in the year 1998-99 and that respondent No. 3 has been 5th contractor appointed since then as agent of respondent No. 2 for the collection of octroi. Admittedly, such contracts are given on yearly basis and that the contract period of respondent No. 3 commenced on 25-7-2002 and has in fact come to an end on 24-7-2003. The present petition was filed on 23-4-2003 i.e. about 3 months prior to the expiry of the contract period of respondent No. 3. It is true that the petitioner Could have filed this petition earlier and challenged the right of respondent No. 3 or any of his predecessors to collect and appropriate the amount of escort fee to themselves. It cannot however, be ignored that the petition is filed before the expiry of the contract with respondent. No. 3. Moreover, failure of the petitioner to file petition earlier is of no consequences because simultaneously, he has prayed for a direction requiring the respondent No. 3 to deposit the estimated amount of escort fee Rs. 1,68,00,000/- with respondent No. 2. It may be noted that the petitioner filed his personal suit against the respondent Nos. 2 and 3 in March, 2003. At any rate it cannot be said that there is unreasonable delay for which the petition can be straightway rejected.

10. In this petition, the petitioner has not challenged the validity of the escort fee but he has questioned the authority of respondent No. 3 to recover it and appropriate the same to itself. The escort fee is connected with the octroi which is imposed by respondent No. 2 on the goods, which are brought, within its local limits for the purpose of consumption, use and sale. At this stage it will be advantageous to refer to some of the relevant provisions of the BMPC Act as well as the Octroi Rules framed by respondent No. 2 under it. Section 127 obliges the corporation to impose certain taxes including octroi. u/s 2(42) define "octroi" as a cess on the entry of goods into the limits of a city for consumption, use or sale therein. Section 149(1) inter alia requires the Corporation to decide to levy any of the taxes specified in Section 127(2), to make detailed provisions in the form of Rules for certain matters including the method of recovery in the collection of taxes. Section 456(1) states that the Government may at any time require the Corporation to make rules u/s 454 in respect of any purpose or matter specified in Section 457. Section 457 contemplates certain matters in respect of which rules may be made and one of such matters is municipal taxes, which include a tax leviable u/s 127(2). It is an admitted fact that respondent No. 2 has accordingly framed Ulhasnagar Municipal Corporation (Octroi Rules, 1996), Rule 17 prescribes procedure for dutiable goods imported which are intended for immediate export.

11. At this stage, reference may be made to the definition of "export" and "import", as given in Rule 2(g) and (i) respectively. The terms "export" means taking out or movement of any goods from any place within the octroi limits of the Corporation to any place outside such limits. The word "import" means bringing or entry of any goods into the octroi limits of Corporation from any place outside such limits. Now coming back to Rule 17, it provides as under :--

"(1) Goods imported by rail, sea air or road and intended for immediate export shall be dealt with according to this rule.

(2) The person-in-charge of the dutiable goods imported within the octroi limits which are intended for immediate export shall on their arrival at the Entrance Naka apply to the Octroi Officer for a written permission-cum-transit pass for conveying the goods without escort, via the route from the Entrance Naka to the Exit Naka''s specified under Clause (c) of Sub-rule (1) of Rule 5. He shall at the same time pay at the Entrance Naka a deposit, calculated by the Octroi Officer in accordance with the scales of deposits fixed under Clause (c) of Sub-rule (1) of Rule 5 for that purpose. On payment of the fees, if any, as determined by the Commissioner and approved by Standing Committee for written permission-cum-transit pass and if considered necessary by the Octroi Officer, on presentation of a declaration-cum-application in Form 2, the Octroi Officer shall issue a written permission-cum-transit pass in Form 7 to the said person and allow that person to proceed with the goods without escort.

(3) On arrival of the goods at the Exit Naka, without having broken bulk during the journey and on surrender of the written permission-cum-transit pass, the

Octroi Officer shall verify the entries therein with the goods and refund to such person the deposit as entered in the said pass if the particulars of the goods as specified in the said pass tally with the goods which arrive at the Exit Naka.

(4) For granting refund inter Sub-rule (3) the Commissioner shall give sufficient advances to the Octroi Officers-Charge of the Exit Naka according to their requirements.

(5) The person receiving refund of deposit shall sign on receiving the refund in the space reserved for the purpose on the written permission-cum-transit pass. The counterfoils of all such passes issued and the original shall be sent to the Central Octroi Officer at the time fixed by the Commissioner of the Superintendent of Octroi. The Superintendent of Octroi or the officer appointed for the purpose shall compare the counterfoils with the originals and the registers and satisfy himself that they tally and shall then pass an order to recoup the advance. Any irregularity discovered shall be reported immediately to the Commissioner.

(6) Where the Corporation has got arrangement for providing escort and person-in-charge of the dutiable goods agrees to carry the goods under escort, via route from the Entrance Naka to the Exit Naka''s specified under Clause (c) of Sub-rule (1) of Rule 5 for that purpose, he shall; on ah application made in that behalf and on payment of the fees, if any as determined by the Commissioner and approved by Standing Committee be granted a written permission in Form 8, to carry such goods under escort. In such cases, the Octroi Officer at the Exit Naka shall, on surrender of the written permission, allow the said person to pass through the Naka with the goods; and the escort shall satisfy himself that the goods have actually been carried outside the octroi limits:

(7) The fees to be specified for issue of written permission-cum-transit pass referred to in Sub-rule (2) and for issue of written permission to carry goods under escort referred to in Sub-rule (6) shall in no case exceeds rupees twenty in each case."

12. Normally octroi is leviable on all goods which are brought within the octroi limits of a Municipal Corporation for the purpose of consumption, use and sale within that limit. It is therefore, obvious that the goods which are brought in the octroi limits of Corporation not for the purpose of the consumption, use or sale thereof within those limits but only for the purpose of onwards transport outside the octroi limits of that Municipal Corporation, are not liable for payment of octroi. However, Section 147 creates a presumption that any goods imported in the city are for the purposes of consumption, use or sale. Such presumption can be rebutted only when the goods are conveyed from the place of import to the place of export by such routes, within such time, and under such supervision and on payment of such fees therefore as shall be determined by the standing orders. Shri Kumbhakoni, the learned counsel for respondent No. 3 relied upon the decision in Municipal Corporation of the City of Baroda Vs. Babubhai Himatlal,

in which the Supreme Court had the occasion to consider standing order framed u/s 466(1)(A)(f) read with Section 147 of the BPMC Act. By the said order supervision fees were charged on the transporters who wanted to pass through the octroi limits of the Municipal Corporation. The Supreme Court pointed out that in order to avoid Inconvenience and the burden on the transporter standing order was provided so that when a transporter enters the Corporation limits with goods which are only in transit and not to be unloaded for sale or consumption within the Corporation limits and if the transporter so chooses on payment of supervision fees, the transporter can carry the goods through the Corporation limits without payment of octroi under the supervision of the staff of the Corporation, It was further pointed out that by the standing order the Corporation had attempted to make it convenient to the transporter not to invoke in the payment of octroi duty at the entry and after satisfying the authority at the exist and claim the refund of the octroi paid, thereby the Corporation intended to help the transporters in saving time and also in payment of the octroi at one end and later on claiming a refund thereon. The escort fee provided by Rule 17 in the instant case is almost identical to supervision charges with which the Supreme Court was dealing. The said decision lays down that the supervision charges constitute fee and not tax. Needless to say that the Supreme Court upheld the validity and enforceability of the standing order issued by the Municipal Corporation of Baroda.

13. As stated earlier, the petitioner does not challenge the validity of the escort fee nor does he challenge the validity of Rule 17. His grievance is about the right or authority of respondent No. 3 to recover the same and appropriate it for itself. As per the provisions of Rule 17, it is the respondent No. 2 who is supposed to collect the octroi and the escort fee. However, in view of the decision taken by respondent No. 2 in 1998 to privatise the collection of octroi, this work is entrusted to contractor on yearly basis. The person making the highest bid is appointed as the agent of respondent No. 2 for such purpose as per the terms and conditions of the contracts entered with him. Clause 6 of the contract entered between respondent Nos. 2 and 3 Inter alia, states : "The agent will be at liberty to appoint his own employees for collection of octroi, who shall be entitled to perform all the duties and functions of octroi officers and superintendent of octroi, as defined under the UMC Octroi Rules, 1996." It is not disputed before us that respondent No. 3 has appointed his employees for the collection of octroi. In view of this fact there is no substance in the contention that respondent No. 3 has no authority to recover the escort fee.

14. According to the petitioner, respondent No. 3 does not deposit the escort fee collected by it with respondent No. 2 and appropriate the same for itself. In this respect Shri Naphade, the learned counsel for the petitioner has referred to the provisions of Section 82 of the BPMC Act, relating to constitution of municipal funds. The relevant part of this Section reads as under :--

Section 82 : Constitution of Municipal Fund : Subject to the provisions of this Act and the rules and subject to the provisions of Section 44 of the Bombay Primary Education Act, 1947,--

(a) All money received by or on behalf of the Corporation under the provisions of this Act or any other law for the time being in force, or under any contract,

(b) to (c).............

(d) all moneys raised by any tax levied for the purposes of this Act,

(e) to (h)..............; shall be credited to a fund which shall be called "the Municipal Fund, and which shall be held by the Corporation in trust for the purposes of this Act, subject to the provisions herein contained."

15. There is no dispute of the fact that octroi is a tax. It is specifically so mentioned in Section 127(2)(a) of the BPMC Act, which does not speak about any escort fees. It is seen from the scheme of recovery of octroi as stated in Rule 17 that escort fee is a part of the same scheme. In the case of Municipal Corporation of the City of Baroda Vs. Babubhai Himatlal, the Supreme Court has clearly laid down that supervision charges (which are akin to the escort fee in the present case) constituted fee and not tax. Therefore, escort fee, not being the tax levied by respondent No. 2, is not required to be credited to the municipal fund. However, it cannot be denied that the escort fee is received on behalf of respondent No. 2 under the contract made with respondent No. 3. Therefore, u/s 82(a) it is liable to be credited to the municipal fund. Shri Naphade submitted that escort fee is public money and therefore, authority is required for utilisation of that money, which according to him respondent No. 3 lacks. The affidavits filed on behalf of respondents 1 to 3, however, make it clear that the estimated collection of escort fee recoverable by the agent for the year is included in the amount of contract. In other words, the amount of Rs. 54.54 crores offered, by respondent No. 3 is not only the estimated collection of octroi for the period from 25-7-2002 to 24-7-2003 but it also includes the amount of the estimated escort fee during the said period. The petitioner''s estimate about collection of escort fee for such period is of Rs. 1.68 crores but the same is covered by the amount of Rs. 54.54 crores, which respondent No. 3 has under the terms and conditions of the contract offered to pay to respondent No. 2 by installments. In view of this fact, it cannot therefore, be said that respondent No. 3 is appropriating to itself the amount of escort fees.

16. From the foregoing discussion, it is clear that the challenge given by the petitioner in this petition has no merit and therefore, the petition has to be dismissed.

17. Accordingly, the petition is dismissed with no order as to costs. Rule is discharged.

18. Interim order dated 23-7-2003 stands vacated.

