(1997) 01 BOM CK 0069

In the Bombay High Court

Case No : Second Appeal No. 87 of 1984

Samast Yantramag Vinkar Samaj and Others — APPELLANT

Vs

Vita Municipal Council and Others — RESPONDENT

Date of Decision : 31-01-1997

Acts Referred:

Maharashtra Municipalities (Octroi) Rules, 1968 — Rule 5(1), 5(2), 5(4)
Maharashtra Municipalities Act, 1965 — Section 105(2), 112, 2(e)

Citation : (1997) 3 BomCR 421 : (1998) 1 MhLj 315

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : R.S. Apte, for the Appellant; M.A. Rane, for the Respondent

Final Decision : Dismissed

Judgement

R.M. Lodha, J.—This second appeal preferred u/s 100 of Civil Procedure Code, 1908 is directed against the judgment and decree passed by IInd Extra Assistant Judge, Sangli on 2nd July, 1983 affirming the judgment and decree passed by Civil Judge, Junior Division, Vita on 28th April, 1982 in R.C. Suit No. 114/87 whereby the Courts below have dismissed plaintiff''s suit for declaration and injunction.

2. The background facts of this appeal in nutshell are :

Vita Municipal Council is Class-C Municipal Council under the Maharashtra Municipalities Act, 1965 (for short, Act of 1965''). In exercise of the powers conferred by sub-section (2) of section 321 read with sub-section (1) of section 105 of the Act of 1965 and all other laws enabling it in this behalf, the Government of Maharashtra made the Maharashtra Municipalities (Octroi) Rules, 1968 (for short, ''Rules of 1968'') which came into force on 14th August, 1968. By resolution dated 11-9-1968, the Municipal Council, Vita excluded levy of octroi on yarn and threads of all sorts. Thereafter by resolution dated 23rd January-1975 bearing No. 8/86 the Municipal Council, Vita decided to levy the octroi on yarn and threads falling under Entry 65 of Schedule-I appended to Rules of 1968 and the said resolution was to be effective from 1st April, 1975. It appears that the Collector, Sangli in exercise of his powers vested u/s 308 of the Act of 1965 suspended the operation of the said resolution dated 23rd January-1975. On 7th July-1975 the Municipal Council, Vita passed another resolution providing amendment in the resolution dated 23rd January, 1975 and thereby fixed the rate of octroi on yarn and threads specified at Item No. 65 of Schedule-I @ Rs. 1.20 in case the declaration in Form No. 14 was given stating that the goods have brought in for the purpose of industrial process. The notices as required under law were published on 25-7-77 and date of enforcement was fixed from September 1977. The Municipal Council, Vita accordingly started charging the octroi. The Samast Vinkar Bhagdhari, an association of various persons in representative capacity filed a suit before the Civil Judge, Junior Division, Vita praying therein that the levy of octroi over the yarn and threads pursuant to the two resolutions dated 23-1-1975 and 7th July-1975 be declared null, void and ineffective since the mandatory procedure required under law was not observed. The plaintiff also prayed for perpetual injunction restraining the Municipal Council, Vita from levying any octroi over the threads and yarn. The trial Court granted the permission to the plaintiff to sue in representative capacity. The Municipal Council, Vita opposed the claim of the plaintiffs and denied allegations that the resolutions dated 23-1-1975 and 7th July-1975 were issued and made enforceable without following the prescribed procedure under the Act of 1965 and Rules of 1968. According to the written statement filed by the Municipal Council. Vita on coming into force of the Rules of 1968 on 14th August, 1968, the Municipal Council passed resolution on 11-9-1968 levying octroi on various items and those were brought into force with effect from 1-11-68. However, keeping in view the local conditions levy of octroi on the yarn and threads was exempted in exercise of the powers under sub rule (4) of Rule 5 of Rules of 1968. The Municipal Council asserted that the provisions and the rules were followed while passing resolution dated 11-9-1968. Thereafter, the Municipal Council in its resolution dated 23-1-1975 decided to withdraw the exemption from 1st July, 75 and accordingly after following the procedure prescribed under Rule 5, the exemption of octroi on yarn and threads was withdrawn and octroi was levied. The said resolution dated 23-1-1975 was amended by the subsequent resolution dated 7th July-1975. Thus, according to Municipal Council, the octroi is charged in accordance with law and plaintiffs were not entitled to any relief.

3. The Civil Judge, Junior Division, Vita after recording the evidence dismissed plaintiffs'' suit on 28th April, 1982. Upset by the judgment and decree passed by the trial Court the plaintiffs preferred appeal and the IInd Extra Assistant Judge, Sangli by the judgment and decree dated 2nd April, 1983 dismissed the appeal with costs against the Municipal Council, Vita and affirmed the judgment and decree passed by the trial Court dismissing plaintiffs suit.

4. Mr. Apte, learned Counsel appearing for appellants/plaintiffs strenuously

argued that the resolution dated 23-1-1975 and 7th July-1975 were illegal and void because before enforcing the said resolutions the Municipal Council did not follow the procedure prescribed under Rule 5(1) and 5(2) of the Rules of 1968. According to him the procedure contemplated under Rule 5(1) and 5(2) is mandatory and its non-compliance would render the resolutions null and void and the recovery of octroi pursuant to such resolutions would also be bad in law. In support of his contentions Mr. Apte referred to the relevant provisions of the Act of 1965 and Rules of 1968 and relied upon a judgment of this Court in Kalu Karim v. City Municipality of Broach, 1927 (Vol. XXIX) Bombay Law Reporter 1041.

5. Mr. Rane, the learned Counsel for respondent No. 1 Municipal Council, Vita in answer to the contentions raised by the learned Counsel for appellants supported the concurrent judgment and decree passed by the courts below and submitted that the resolutions dated 23-1-1975 and 7th July, 1977 were enforced in accordance with law and do not suffer from any infirmity as urged by the learned Counsel for the plaintiffs/appellants.

6. The Maharashtra Municipalities Act, 1965 was enacted to unify, consolidate and amend the law relating to the Municipalities in the State of Maharashtra. Chapter 9 in the Act of 1965 deals with the Municipal taxation including imposition of compulsory and voluntary taxes, supplementary provisions regarding taxes, stamp duty, fees, etc. Section 105 provides for imposition of compulsory taxes and according to section 105(1)(b) subject to any general special orders of the State Government, a Municipal Council shall impose octroi. Section 107 exempts C-class councils from levying certain taxes temporarily which reads :

"Section 107: If a ''C'' Class Council, by a resolution passed at a meeting by a majority of not less than two-thirds of the total number of the Councillors decides that for reasons to be specified in such resolution it cannot levy any of the taxes specified in sub-sections (1) and (2) of section 105, the State Government may exempt such Council partially or fully from levying such tax or taxes for a period to be specified by the State Government in that behalf. The Council shall not in such a case be entitled to any reimbursement of losses as provided in the last preceding section."

7. The Municipal Council may vary rates of taxes within prescribed limits u/s 112 of the Act of 1965 which reads thus :

"Section 112 : (1) Notwithstanding any rule, by-law or resolution specifying the amount or rate at which a tax is leviable, a Council may, by a resolution passed at a special meeting, decide to increase or reduce the amount or rate at which such tax is leviable and to that extent the by-laws already sanctioned by the State Government shall be deemed to have been suitably amended with effect from the date specified in the notice referred to under sub-section (2) :

Provided that-:

(a) such increase or reduction shall be within the maximum and minimum limits fixed in respect of such tax under the rules:

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(2) When a Council has by a resolution decided to increase or reduce the amount or rate at which any tax is leviable, the Council shall publish in the Municipal area the resolution together with notice specifying a date, which shall not be less than thirty days from the date of publication of such notice, from which the amount or rate at which any tax is leviable shall be increased or reduced. The tax at the amount or rate so increased or reduced shall be leviable from the date specified in such notice. 3(When the rate at which any tax is leviable is increased by publication of the resolution under this section, it shall not be necessary to give any separate notice thereof to the owners or occupiers of the properties affected thereby.)"

8. The crux of the debate in this second appeal centres round Rule 5 of Rules, 1968 which is reproduced hereunder :

"Rule 5 : Procedure preliminary to imposing octroi-nakas (1) Every Council shall, by resolution passed at a special meeting convened within sixty days from the date of the coming into force of these rules (or such further period or periods as the State Government may in any case allow),-

(a) fix the rates at which octroi-nakas shall be levied on different goods specified in Schedule I;

(aa) fix the date (which shall not be earlier than thirty-seven days and not later than fifty-two days, from the date of passing of the resolution) from which octroi shall be levied ;

(b) determine the number and location of Octroi Nakas, specify the routes by which goods intended for immediate export shall proceed from the Entrance Naka to the Exit Naka and fix a scale of deposits depending on the estimated value of the goods to be recovered at the Entrance Nakas in respect of such goods which are allowed to proceed without escort.

*(2) Within seven days of the passing of such resolution, the Council shall publish in the municipal area, a notice specifying-

(a) the rates at which and the date from which octroi shall be levied ;

(b) the number and location of Octroi Nakas the routes by which goods intended for immediate export shall proceed from the Entrance Naka to the Exit Naka and the scale of deposit fixed under clause (b) of sub-rule (1); and

(3) Subject to the provisions of section 112, a Council may, by resolution passed at a special meeting, from time to time, decide to increase or reduce the rate of octroi on any goods within the permissible limits. When the Council decides to increase or reduce the rate accordingly, it shall follow the procedure laid down in

sub-rule (2) and the rate so increased or reduced shall be applicable from the date specified by the Council for that purpose.

(4) A Council may likewise, by resolution passed at special meeting, from time to time, decide to exempt all or any of the goods specified in Part II of Schedule II, from the levy of octroi or withdraw any exemption so granted. When the Council decides to exempt such goods from the levy of octroi or to withdraw any such exemption, it shall follow the procedure laid down in sub-rule (2), and such exemption shall come into force or stand withdrawn from the date specified by the Council for that purpose.

(5) While fixing, increasing or reducing the rates of octroi under this rule, the Council shall be at liberty to fix different rates for the various goods falling under any item in column 2 of Schedule I and also for the different varieties and qualities of any of such goods."

9. There is no dispute that the Municipal Council, Vita is an old Council and it was in existence when the Act of 1965 and Rules 1968 came into force. Rules of 1968 came into force on 14-8-1968 and within sixty days from the date of coming into force of these Rules on 11-9-1968 the resolution was passed by the Municipal Council, Vita levying octroi duty and fixing the rates of the octroi on different goods specified in Schedule-I and the date from which such levy would be enforceable. However, while passing the resolution of 11-9-68 keeping in view the local conditions, the Council excluded and rather exempted the levy of octroi on yarn and threads specified in Items-65 of Schedule-I appended to Rules of 1968. After a period of more than six years when the situation changed, the Municipal Council passed the resolution in its special meeting on 23-1-1975 withdrawing exemption of yarn and threads on levy of duty and levied the octroi on yarn and threads as well specified in Item 65 of Schedule-I and made such duty applicable with effect from 1-4-1975. By subsequent resolution dated 7-7-1975, the Municipal Council amended the resolution dated 23-1-1975 and reduced the rate fixed for levy of octroi on yarn and threads. The said resolutions of 23-1-1975 and 7-7-1975 were made enforceable according to the Municipal Council, Vita after due compliance of the procedure contemplated under sub rule (2) of Rule 5. At the initial stage before me. Mr. Apte the learned Counsel for plaintiffs/appellants sought to contend that the procedure prescribed under sub rule (2) of Rule 5 was not followed before enforcing resolutions of 23-1-1975 and 7-7-1975, but when he was confronted with the observation made in the judgment of the appeal Court that it was not disputed that the procedure as laid-down in sub rule (2) of Rule 5 has been followed in publishing the notice specifying the rates and the date from which octroi on the yarn and thread was to be levied, Mr. Apte could not dispute the statement recorded in the impugned judgment. The statement made in the judgment has to be taken to be true and a party cannot be permitted to assail its correctness by raising a ground in the memo of appeal or during the course of oral arguments unless such party has taken recourse to challenge such statement by making a review application

before the concerned Court. Obviously no such step was taken and no review application was made before the first Appellate Court that the statement made in the judgment that it was not disputed that the procedure as laid-down in sub rule (2) of Rule 5 has been followed in publishing the notice specifying the rates and the date from which octroi on the yarn and thread was to be levied was not correct. This statement in the judgment, therefore, has to be taken to be correct. Sub rule (2) of Rule 5 of Rules of 1968 mandates that the Council shall publish a notice in the municipal area within seven days of the passing of resolution under sub rule (1) or (3) or (4) of Rule 5 specifying the rate of octroi and date from which it shall be levied and also the number and location of Octroi Nakas and routes by which goods intended for immediate export shall proceed from the Entrance Naka to the Exit Naka and the scale of deposit fixed under clause (h) of sub rule(1). The procedure prescribed under sub-rule (2) is necessarily compulsory and, therefore, mandatory in character. The underlying idea behind sub rule (2) is that public is made known of such resolution within seven days of its passing by the Council and they are also made known about rate, date of applicability and location of octroi Nakas etc. However in the present case there is no clear pleading to that effect in the plaint that procedure prescribed under sub rule (2) of Rule 5 was not followed. The trial Court rightly observed that entire plaint has been drafted in the nature of arguments and necessary facts have not been pleaded. It may also be observed that plaintiffs did not lead any evidence on this point. Even in the substantial questions of law formulated at the time of admission of the second appeal do not show that any challenge has been made that procedure prescribed under sub Rule (2) of Rule 5 has not been followed. Therefore, the contention raised by the appellant during the course of arguments that procedure prescribed under sub rule (2) of Rule 5 has not been followed before enforcing the resolutions dated 23-1-1975 and 7-7-1975 has no force.

10. The only question that remains now to be examined is: whether the resolutions dated 23rd January-1975 and 7th July-1975 are void being in contravention of Rule 5(1) of Rules of 1968. According to the learned Counsel for appellants the resolution dated 23-1-1975 and the subsequent resolution dt. 7-7-1977 levying octroi on yarn and threads have not been passed within 60 days from the date of coming into force of Rules of 1968 and, therefore, it is bad in-law and secondly though the resolution was passed by the Council on 23-1-1975 it was made effective from 1st April-75 whereas under Clause-(aa) of Rule 5(1), the Council is required to fix the date not earlier than 37 days and not later than 52 days from the date of passing of the resolution and fixing the date on 1-4-75 was obviously later than 52 days. The contentions aforesaid are superficial and without any substance and rather fallacious. The first resolution was passed by the Municipal Council after coming into force of Rules of 1968 was on 11-9-1968 whereby octroi on different goods was levied. The said resolution was passed within 60 days from the date of coming into force of Rules of 1968. However, at that time yarn and threads specified in Item 65 of Schedule-I were

excluded from levy of octroi. Obviously, therefore, while passing the resolutions on 23-1-1975 and 7-7-1975, Rule 5(1) was not attracted. When Rule 5 (1) was not applicable to the notifications dated 23-1-1975 and 7-7-1975 apparently time prescribed therein for fixing the date not earlier than 37 days and not later than 52 days was also not attracted. The resolutions dated 23-1-1975 and 7-7-1975 were issued under sub-rule (4) and sub-rule (3) of Rule 5 respectively. Sub rule (4) of Rule 5 provide that a Council by resolution passed at special meeting decide to exempt all or any of the goods specified in Part II of Schedule-II from the levy of octroi or withdraw any exemption so granted. It further provides that when the Council decides to exempt such goods from the levy of octroi, or to withdraw any such exemption, it shall follow the procedure laid-down in sub rule (2) and such exemption shall come into force or stand withdrawn from the date specified by the Council for that purpose. The exemption from levy of octroi on yarn and threads initially in the resolution dated 11-9-1968 was by the Council in exercise of its power under sub rule (4) of Rule 5. The withdrawal of the exemption vide resolution dated 23-1-1975 too was under sub rule (4) of Rule 5. Clause(5) of Part-II of Schedule-II specifies any other goods and that has not excluded goods specified in the Entry-65 of Schedule-I. Similarly the Council may by resolution passed at special meeting decide to increase or reduce the rate on the octroi of goods and while doing so, Council has to follow the procedure prescribed under sub rule (2) of Rule 5. By resolution dated 7-7-1975 the rate which was fixed by resolution dated 23-1-1975 was reduced and the said resolution became applicable after following the procedure under sub rule (2) of Rule 5 since before the first Appellate Court there was no dispute that procedure prescribed under sub rule (2) of Rule 5 was not followed while enforcing resolutions dated 23-1-1975 and 7-7-1975 and there is neither any specific pleading regarding thereto.

11. Kalu Karim''s case (supra) cited by the learned Counsel for the appellant and relied upon does not help the appellant at all. In Kalu Karim''s case, Division Bench of this Court was considering levy of terminal taxes on certain commodities brought within the limit of Municipal Council, Broach, and, the question was whether such levy has been fixed after following the procedure laid-down by section 16 of the Bombay District Municipal Act (Bom. Act 111 of 1901), by publishing the draft rules and scale of tax and inviting objections of the public to levy of tax, and, the Division Bench held thus :

"It seems to me then that a question of principle is involved here. To start with, no subject can be taxed except in pursuance of statutory power to that effect. The statute in question is quite clear u/s 59, that it is only after observing the preliminary procedure required by section 60 and with the sanction of the Governor-in-Council that taxes may be imposed. Admittedly, here fruits had never been taxed, Admittedly, they were not taxed by the Schedule E which Government sanctioned on April 18, 1923. They are claimed to be taxed under the subsequent Resolution of July 3. But the preliminary procedure required by section 60 was not observed prior to the latter Resolution, for no fresh notices were issued to the public. This seems to me a point of substance, for if once there is a formal Government Resolution declining in effect to tax a particular article and if subsequently that Resolution of Government is to be challenged or altered then surely the parties affected, namely, in the present case the fruit merchants should have an opportunity of making their representations to Government on the point."

12. In the present case also as observed above, I have held that procedure contemplated under Rule 5(2) of the Rules of 1968 is mandatory but on facts the appellants did not dispute before the first Appellate Court that the procedure prescribed under sub rule (2) of Rule 5 was not followed while enforcing Rules dated 23-1-1975 and 7-7-1975 nor there is any specific challenge to that effect in the pleadings.

13. In view of my aforesaid discussion, it cannot be said that courts below committed any error in dismissing the plaintiffs'' suit. The levy of octroi on yarn and threads specified in Entry No. 65 of Schedule-I by the Municipal Council, Vita vide impugned resolutions cannot, therefore, be said to be illegal.

14. Second appeal accordingly has no merit and is dismissed with no order as to costs.

