
(1978) 01 OHC CK 0023
In the Orissa High Court
Case No : O.J.C. No. 132 of 1976

Sarat Kumar Sahoo

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 12-01-1978

Acts Referred:

Orissa Municipal Act, 1950 — Section 131(1), 388, 388(3)

Citation : (1978) 45 CLT 478

Hon'ble Judges : R.N. Misra, J;N.K. Das, J

Bench : Division Bench

Advocate : R. Mohanty, N. Patra and S.K. Gajendra, for the Appellant; Addl. Standing Counsel and P. Palit, S.K. Biswal, J. Patnaik and R. Mohapatra, for the Respondent

Final Decision : Allowed

Judgement

R.N. Misra, J.—Petitioner is a foreign liquor vendor having his shop within the Talcher Town. The Notified Area Council of Talcher framed a set of Regulations u/s 388 of the Orissa Municipal Act (hereinafter referred to as "the Act") known as "The Talcher Octroi Regulations of 1965". On 7th of January, 1966, the said Regulations were duly notified. In terms of the specifications in Schedule "A", octroi tax u/s 131(1) (kk) of the Act became exigible at the rate of one per cent on foreign liquor brought into the jurisdiction of the Notified Area Council for consumption. The Notified Area Council resolved in February, 1968, to enhance the rate of octroi tax on foreign liquor to 10 per cent and asked for approval of the State Government as per Annexure-4. In September, 1969, by a fresh resolution the rate of octroi tax was again re-determined at 2 per cent on foreign liquor as per Annexure-5. In February, 1969, the State Government approved the resolution of the Council for enhancing the octroi tax to 10 per cent on foreign liquor as per Annexure-6. From January, 1972, octroi tax is being collected at 5 per cent and being subjected to octroi tax at 5 per cent, Petitioner preferred an appeal before the District Magistrate which has been dismissed. Petitioner by this

application for a writ of certiorari challenges that order as also the rate of octroi tax.

2. There is no challenge that u/s 131(1)(kk) of the Act on foreign liquor brought within the limits of the Notified Area Council for consumption, use or sale, octroi tax is exigible. Under the proviso to that Sub-section, imposition of octroi tax has to be subject to sanction of the State Government. There is no dispute that the requisite sanction of the State Government has also been obtained for the levy of the impugned octroi tax. The only point for consideration is as to whether in view of the Regulations already referred to under which the rate of tax has been prescribed as one per cent, action taken for revision of the rate of tax without altering the Regulations is sustainable. There is no dispute before us by the Notified Area Council that the Regulations of 1965, so far as levy of octroi tax on sale of foreign liquor is concerned, remains unchanged. It is, however, contended that Section 388(3) of the Act under which the Notified Area Council made the Regulations authorises for framing of Regulations for the time and mode of collecting the taxes under the Act, and rate of tax is not an aspect which is covered by Section 388(3) of the Act. Undoubtedly the Notified Area Council started collecting the octroi tax on foreign liquor on the basis of the, Regulations and by its own action it has bound itself by the provisions of the Regulations. Mr. Patnaik for the Notified Area Council rightly concedes that, when there is a conflict between a Regulation and a resolution, the Regulation would operate. The action for altering the rate of octroi tax has been by resolution while the Regulation has remained untouched. A situation has now arisen where though the Notified Area Council is still bound by Regulation of its own, by resolution it has chosen not to follow the Regulation.

3. Learned Additional Government Advocate seeks support for the stand of the Notified Area Council from a Bench decision of the Madhya Pradesh High Court being *Loonkaran Parakh Vs. State of Madhya Pradesh and Another*, That was a case where an application for permission to construct a building was made to the Municipal Corporation of Raipur. As a prerequisite to the grant of permission, Petitioner was required to pay to the Corporation a fee of Rs. 225/- under the Bye-laws. Petitioner contended that the relevant Statute did not authorise the Corporation to charge a fee for granting building permission and that what was being charged under the nomenclature of fee was indeed a tax. The Corporation in its return justified the imposition of the fee u/s 366(3) of the Madhya Pradesh Municipal Corporation Act. The Court found:

.... We have already seen that the subject of taxation in the Act is dealt with in Chapter XI. Section 132 authorises the Corporation to levy the taxes mentioned therein and Section 133 prescribes the procedure for imposition of a tax. Having regard to the scheme of the Act, the authority conferred on the Commissioner u/s 366(3) which occurs in Chapter XXXIV to charge fee for any written permission which he is authorised to give under the Act cannot be construed to be a power to impose any tax. This inference is strengthened from the fact that the fee can

be charged under this section simply by an order passed by the Commissioner without even a resolution of the Corporation and the safeguards of the procedure contained in Section 133 for imposition of a tax are not applicable, for imposition of a fee under this section....

In consideration of the aforesaid feature and by applying the principle "*ut res magis valeat quam pereat*", which means that it is better for a thing to have effect than to be made void, the Court treated the demand to be a fee. The facts are absolutely different and we are not inclined to rely on the ratio of the decision for deciding the present litigation. On the other hand, we come to the conclusion that until the Regulation is appropriately altered by following the procedure indicated by the Act, the resolution enhancing the rate of octroi tax would not be operative.

4. The writ application must accordingly be allowed. We hold that the Petitioner would be liable to octroi tax on sale of foreign liquor at the rate of one per cent as provided by the Regulation until the Regulation is appropriately revised. There would be no direction for costs.

N.K. Das, J.

I agree.

Writ application allowed.