**(1999) 10 BOM CK 0084**

**In the Bombay High Court**

**Case No :** Criminal Appeal No''s. 778 to 802, 804 to 826 and 828 to 835 of 1999

Shri Hari Pandurang Bhave — APPELLANT

Vs

Sonba Kondiba Bankar and others — RESPONDENT

**Date of Decision :** 13-10-1999

**Acts Referred:**

Bombay Provincial Municipal Corporations Act, 1949 — Section 147, 2(42), 398, 466
Criminal Procedure Code, 1973 (CrPC) — Section 313
Pune City Municipal Corporation Octroi Rules — Rule 23, 8

**Citation :** (2000) 4 BomCR 804 : (2000) 1 BOMLR 736 : (2000) 2 MhLj 613

**Hon'ble Judges :** S.S. Parkar, J

**Bench :** Single Bench

**Advocate :** R.G. Kethar, for the Appellant; Ms. S.M. Dandekar, S.R. Shinde, Ms. R.P. Sabarwal, Ms. Usha Kejriwal, M.P. Galeria, A.M. Shringarpure, S.G. Rajput, Ms. P.H. Kantharia, I.S. Thakur, R.Y. Mirza, D.N. Salvi, F.R. Shaikh, D.P. Adsule, Ms. R. Dandekar and D.S. Mhaispurkar, A.P.Ps. and Ms. V.K. Tahilramani, Public Prosecutor, for the Respondent

## Judgement

S.S. Parkar, J.—The appellant who was Checking Naka Officer of the Pune Municipal Corporation has filed these appeals against the Judgment delivered by JMFC (PMC) Pune on 30th may 1985 in Summary Trial Cases No. 4545/79 to 4602/79 acquitting the respondents accused in all the matters in a prosecution lodged against them u/s 398 of the Bombay Provincial Municipal Corporations Act, 1949. This is a group of 56 appeals which have been preferred against the Judgment of the trial Court by the original complainant. All the cases in the trial Court were disposed of by the common judgment of the trial Court delivered on 30th May, 1985. Since the evidence is common, arising on common set of facts and involving same provisions of law, all these of appeals are being disposed of by this common judgment.

2. The brief facts leading to the prosecution of the respondents-accused are as follows:

On 28-11-1978, on the basis of information received by PSI L.K. Kaushik who was attached to Task Force, Pune that a Truck bearing No. MTD 2619 was carrying contraband articles, the PSI checked the said truck near the residence of respondent No. 2. The respondent No. 2 was the driver of the truck. The rest of the respondents, except the State of Maharashtra who is the formal party, were made accused being the owners of the goods which were found in the said truck. PSI Kaushik took a search of the truck in presence of two panchas and found that the truck was carrying bundles of clothes, ready-made garments, electronic articles, steel utensils, glassware and medicines etc. Panchanama of the contents of the truck was prepared which is at Exhibit 34. Finding that there were no contraband articles in the truck, the PSI intimated Pune Municipal Corporation on the very day for want of octroi receipts and handed over the truck along with the said goods to the Checking Inspector. The Checking Inspector Pandurang Patil P.W. 2 took charge of the goods and the truck, after verifying the goods and put his own endorsement in writing under his signature on the said panchanama Exhibit 34. The endorsement made by P.W. 2 Patil Checking Inspector below the said panchanama reads as follows:

"The goods mentioned in the panchanama and the truck No. MTD 2619 and the truck driver Sonba Kondiba Bankar were taken into our custody.

Pune: dt. 28-11-78

Sd/-xxx

28-11-78

Checking Inspector"

3. The goods along with the truck were brought to the Corporation building in Pune. As the octroi duty was not paid on the goods, P.W. 2 prepared statement under a Yadi (Exhibit 31) about the goods and also assessment of the octroi charges (Exhibit 35). Neither any of the respondents had paid the octroi duty on the goods nor the same was offered to be paid by the respondents. Hence, the sanction order was obtained on 27-5-79 from Octroi Superintendent Mr. Khale to prosecute the respondents which is at Exhibit 36 and the prosecution was lodged in the Court of JMFC, Pune against the respondents-accused.

4. While pending the prosecution, respondent No. 2 had filed Civil Suit No. 88 of 1979 in the Court of Civil Judge, Senior Division, Pune claiming damages against the Pune Municipal Corporation for not returning the goods to the owners and allowing them to perish. That civil suit was decreed by the Civil Court and the Corporation was directed to pay a sum of Rs. 34,000/-towards the damages payable to the respondent No. 2 the owner of the truck. The said order was challenged in appeal before this Court in First Appeal No. 860/84. The said first appeal was allowed partly and the Pune Municipal Corporation was directed to pay a sum of Rs. 17, 000/- to the respondent No. 2-the owner of the truck.

5. Before the trial Court three witnesses were examined on behalf of the prosecution. P.W. 1 is Hari Pandurang Bhave, Checking Naka Officer of the Pune

 

Municipal Corporation. P.W. 2 is Pandurang Patil who was Checking Inspector of the P.M.C. who had taken charge of the truck and goods from the police sub Inspector. P.W. 3 is P.S.I. Kaushik who on the information had gone and attached the truck and the goods from the custody of the respondent Nos. 1 and 2. The defence of the accused, as disclosed in the written statement filed u/s 313 of Cri.P.C. is that the goods were not brought on that day i.e. 28-11-78, the day of incident, when they were seized by the authorities but were imported prior to 27-11-78 on payment of octroi duty as stated in the beginning of para 2 of the said written statement which is at Exhibit 55. The said written statement is filed on behalf of the respondent Nos. 1 and 2 i.e. truck driver and owner of the truck. So far as the other accused are concerned they are the owners of the goods found in the truck. They had admitted that they had brought their respective goods in the said truck within the limits of P.M.C.

6. After considering the entire evidence on record the learned J.M.F.C. by his judgment and order dated 30th May 1985 acquitted the respondents-accused on the ground that there was no demand made by the Corporation and without there being any demand there was no question of octroi duty. Secondly, it has been held that Rule 23 of the Octroi Rules of the Pune Municipal Corporation was not complied with by the appellant and, therefore, no offence was committed by the respondents. The said order is under challenge in these appeals.

7. Mr. Ketkar, the learned Counsel appearing on behalf of the appellant, took me through the evidence of the prosecution witnesses, the contents of the seizure panchanama (Exhibit 34), Yadi (Exhibit 31) the Written Statement filed by respondent Nos. 1 and 2 (Exhibit 55) and the 313 statement of the accused so also the reasoning of the judgment of the trial Court recording the verdict of acquittal and contended that the respondents have been acquitted on the grounds which are not sustainable in law. As against that Ms. Dandekar appearing for respondent Nos. 1 and 2 contended that there was no demand made for payment of octroi duty and, therefore, there was no question of prosecution u/s 398 of the Bombay Provincial Municipal Corporations Act, 1949. She further took me through 313 statements of the accused and contended that the goods were not being unloaded but loaded at the time of seizure for the purpose of distribution. She further contended that there is no evidence to show that the goods were brought in Pune on that day and, therefore, the offence was not proved. She mainly relied on answer to Question No. 8 in the 313 statement given by driver-respondent No. 1 that the truck along with the goods was at the godown of respondent No. 2 and the goods were not imported from outside but were brought from Pune Market only and so there was no question of payment of octroi duty.

8. So far as the truck in question is concerned it was found with the goods, a list whereof was prepared by P.W. 2, which is not in dispute. In fact, respondent No. 2 had himself relied on the said list for claiming damages before the Civil Court which he had filed against the Corporation for not returning the goods to him and

 

damaging the goods. It is not in dispute that the receipts were not produced for payment of octroi duty in these cases. As regards the question as to from where the goods were brought it is stated in answer to Question No. 8 by accused No. 1 in his 313 statement that they were brought from Pune Market. This statement is obviously contrary to what is stated in their written statement that goods were imported prior to 27-11-78 on payment of duty. It is pertinent to note that respondent No. 1, in answer to question No. 14 admits that the Yadi of the goods and truck was prepared and is on the record at Exhibit 31. It is also admitted by him in answer to question No. 15 that the said truck along with the goods was checked by PSI Kaushik near Apsara apartment. Even the attachment of the goods under the panchnama by PSI is admitted by respondent No. 1 in answer to question No. 17 in his 313 statement. The owner of the truck, respondent No. 2, has replied in answer to question No. 9 in his 313 statement that the truck was being unloaded at his godown which is near Apsara Theatre and not loaded as contended by defence advocate. In answer to question No. 25 in his 313 statement the respondent No. 2 stated that he was going to file his written statement and accordingly that written statement is filed at Exhibit 55. As stated earlier, in the beginning of para 2 of the said written statement, it is stated that the goods were imported by accused No. 1 prior to 27-11-78 for accused No. 2 on payment of octroi duty. Thus, when in the written statement it is admitted that goods were imported but prior to 27-11-78 and on payment of octroi duty, nothing prevented the respondents from producing those receipts for payment of octroi duty.

9. The evidence of the prosecution witnesses and the panchanama Exhibit 34 and Yadi Exh. 31 leave no doubt that the goods in question were attached on 28-11-78. It is not understood then why the goods were kept in the truck upto 28-11-78 if they were brought in Pune limits before 27-11-78. If the goods were brought on payment of octroi duty as sought to be made out in the written statement which is signed by both the accused respondent Nos. 1 and 2 on which reliance was placed by the respondent No. 2 in his 313 statement, nothing prevented the respondents-accused to produce the receipts for payment of octroi duty which would have closed the matter then and there only. It is pertinent to note that in the civil suit filed by the respondent No. 2, the owner of the truck, for damages caused to the goods while in the custody of the Corporation, he had deposited the octroi duty in the Civil Court and not relied on or produced any receipts for having paid the octroi duty earlier. The evidence of the prosecution witnesses and the seizure panchanama cannot be doubted. Ms. Dandekar''s argument that seizure panchanama cannot be relied on because the panchas were not examined or the same was not prepared either in the presence of P.W. 1 or P.W. 2, the Octroi Inspectors of the Corporation, devoid of any substance. The seizure panchanama was admittedly prepared by P.S.I. Kaushik, who is examined as P.W. 3. The goods and truck were handed over thereafter to P.W. 2 the Octroi Inspector who has made endorsement below the panchanama while taking the custody of truck and goods in his possession. The seizure of the truck

 

also is not denied, on the contrary, it is admitted by all the respondents accused.

10. The only defence of the accused seems to be that the goods were imported earlier on payment of octroi duty which cannot be accepted in the absence of production of receipts by the respondent Nos. 1 and 2 for payment of octroi duty. So far as the seizure panchanama Exhibit 34 is concerned, it is not necessary that panch should be examined in each and every case. The P.S.I who attached those goods under the panchanama has been examined and his evidence is not assailable. That evidence is supported by the deposition of Octroi Inspector P.W. 2 and endorsement made by him below the seizure panchanama. Moreover the seizure of the goods also is not denied on that very day on behalf of the respondents-accused. The examination of panch to the panchanama is not necessary if other evidence is reliable. The P.S.I, who, on prior information, went to the place near the house of respondent No. 2 and seized the goods and the truck under the panchanama had no axe to grind against the accused in the prosecution which was lodged by the Corporation and not by the police.

11. This leaves the only question to be dealt with as regards the demand to be made by the Corporation for payment of octroi duty. The trial Court has observed that there was no demand made under Rule 23 of the Octroi Rules for payment of octroi duty and, therefore, respondents were not liable to pay. That does not seem to be the correct position in law. Section 2(42) of the Bombay Provincial Municipal Corporations Act, 1949 defines what is octroi. According to the said definition "octroi" means a cess on the imported goods into the limits of the city for consumption, use or sale. Section 127(2)(a) of the said Act empowers the Corporation to impose octroi duty. u/s 147 of the said Act any goods imported in the city are presumed to have been imported for the purposes of consumption, use or sale unless they are shown to be under transit as per the rules. The Corporation is empowered to do so u/s 466(f) of the said Act. Pursuant to the provision u/s 466(f) of the Act, the P.M.C. has issued standing orders. Under Standing Order 4 it is the duty of the Municipal Corporation to stop the vehicle at the Import Naka for checking. Standing Order 5 casts similar duty on the driver of the vehicle. Standing Order 8 casts a duty on every person in charge of the goods while importing the goods within the octroi limits to make a declaration in the form prescribed as per Schedule "A". Under Standing Order 9 the Import Naka Officer is empowered to demand the octroi duty from the person who imports the goods and issue octroi receipt in the form prescribed as per Schedule "B" to the said standing order. If the respondents accused had paid the octroi duty, as sought to be made out in the written statement, the Import Naka Officer was duty bound to issue receipt. No such receipt is produced by the respondents nor it is their case that after payment of the octroi duty the receipt was not issued to them. There are different provisions in the standing orders made with regard to the goods which are imported for the purpose of immediate export. The different forms are given in schedules. Standing Order 15 prescribes the routes to be adopted for the purpose of re-export of the goods in respect of the in-transit goods as per Schedule "F". Standing Order 16(3) makes provision for

 

undertaking to be given by the Importer in respect of transit fees in form prescribed under Schedule "G". On payment of transit fee importer is entitled to transit pass as per form prescribed under Schedule "H" of the standing order. It is true, under Octroi Rule 8 the octroi is payable by the person in charge of the goods on demand made in that behalf. However, no question arises for making the demand for the octroi as per Rule 8 unless and until declaration is made in that behalf by the owner or carrier of the goods in the form prescribed in Schedule "A" under Standing Order 8.

12. Thus, the Act, the Octroi Rules and the standing orders lay down the procedure for demand and payment of octroi duty. If any party like the respondents were to import the goods within the Municipal limits clandestinely and without disclosing about the same to the authorities by making a declaration in a prescribed form as per Schedule "A" under Standing Order 8, there is no question of making any demand for the payment of octroi duty. In case no such declaration is made, there is no question of making any demand under Rule 23 of the Octroi Rules as held by the trial Court. In the above set of provisions of law which lay down clearly in unambiguous terms the procedure to be adopted by the authorities and the duty cast on the Importers of the goods with regard to the payment of octroi duty, there is no room for doubt from the evidence and material brought on record that the respondents had evaded payment of octroi duty on the goods imported within the Municipal limits of P.M.C. on 28-11-78 as per the list or Yadi Exhibit 31 and panchanama Exhibit 34. The respondents had evaded the payment of octroi duty to the P.M.C. with the intention of defrauding the Corporation and therefore, penalty u/s 398 of the Act was attracted and the respondents- accused were liable to be convicted.

13. The respondents on conviction u/s 398 of the Act are liable to be punished with fine which may extend to ten times the amount of octroi or to two hundred and fifty rupees, whichever is greater. Mr. Ketkar appearing for the appellant submits that the accused No. 2 the owner of the truck was previously also involved in evasion of payment of octroi duty to the P.M.C. and, therefore, he was prosecuted and convicted u/s 398 of the Act. Mr. Ketkar brings to my notice the judgment of this Court in the case of Dnyanoba Vithoba Thigle v. Ashok Eknath Saste and others, reported in 1993 Mh.L.J. 1304 decided on 9/12/13-10-1992 in which the respondent No. 2 among others was convicted u/s 398 of the Bombay Provincial Municipal Corporations Act and the fine of Rs. 250/- was imposed and in default to undergo S.I. for 15 days. On the other hand Ms. Dandekar appearing for the respondent Nos. 1 and 2 submitted that the incident is of November 1978 and, therefore, leniency should be shown in the matter and minimum penalty should be imposed. Though the respondent No. 2 was previously convicted for the said offence, in view of the passage of time, I am inclined to impose the minimum penalty of Rs. 250/- prescribed u/s 398 of the Act.

14. Accordingly, all the appeals are allowed. The order of acquittal recorded by

 

the J.M.F.C. (P.M.C.) Pune all the respondents-accused, who are served, is set aside. The respondents-accused are convicted u/s 398 of Bombay Provincial Municipal Corporations Act, 1949 and each of them is directed to pay a fine of Rs. 250/- in default to undergo S.I. for 15 days.

15. On the application of Ms. Dandekar the respondents are granted time upto 31-12-1999 to deposit the fine amount in the lower Court. On the payment of fine amount the bail bonds of the respondents-accused shall stand cancelled.

16. On the application of Mr. Ketkar issue of certified copy is expedited.

17. Appeals allowed.

 