

(2016) 05 RAJ CK 0067

In the Rajasthan High Court

Case No : Civil Second Appeal No. 107 of 1982

The Municipal Board, Bhawani Mandi

APPELLANT

Vs

M/s. Sutlej Cotton Mills Ltd.

RESPONDENT

Date of Decision : 04-05-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Rajasthan Municipalities Act, 1959 — Section 4(8), 86

Citation : (2016) 3 DNJ 1073 : (2017) 1 RLW 512 : (2016) 4 WLC 415

Hon'ble Judges : Mr. Mohammad Rafiq, J.

Bench : Single Bench

Advocate : Ms. Anita Agarwal, Advocate, for the Appellant; Mr. J.K. Singhi, Senior Counsel assisted by Mr. Amitabh Jatav, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Mr. Mohammad Rafiq, J.—This second appeal has been filed by the appellant-defendant against the judgment and decree dated 26.02.1982 passed by the Court of Civil Judge, Jhalawar(for short "the first appellate court") whereby appeal filed by the appellant-defendant, Municipal Board, Bhawani Mandi was dismissed and the judgment and decree dated 15.04.1976 passed by the Court of Munsif cum Judicial Magistrate, Bhawani Mandi(for short "the trial court") was affirmed.

2. Plaintiff-respondent filed a suit for permanent injunction before the trial court on the premise that it was the owner of Rajasthan Textile Mills, which is situated outside the municipal limits of Bhawani Mandi and, therefore, it was not liable to pay octroi. Facts as averred by the appellant in the memo of the appeal is that Gram Panchayat, Pachpahar had in fact served on the plaintiff a notice that its factory premise is situated within the limits of Gram Panchayat and it was liable to pay tax to the Gram Panchayat. It was prayed by the plaintiff-respondent that the defendant by decree of perpetual injunction be restrained from realising octroi on the goods brought to factory premise. The defendant, on the contrary,

asserted that it was entitled to realise the octroi from the plaintiff. While under the Notification of the Government dated 14.09.1959, whole of the area of Municipal Board Bhawani Mandi was converted into panchayat and later on the same was re-converted into Municipal Board, Bhawani Mandi by another notification dated 08.10.1960. Rajasthan Textile Mills situated within the town of Bhawani Mandi in Ward No. 6 of Municipal Area and, therefore, the plaintiff was liable to pay octroi. The learned trial court following the Octroi Bye laws, 1954 held that Rajasthan Textile Mills was not situated in municipal area of Bhawani Mandi till 18.02.1974 and the defendant cannot claim any benefit from the provisions of Rajasthan Municipal Boards(Validating) Act, 1956. Thus, the trial court vide judgment dated 15.04.1976 decreed plaintiff's suit with cost and restrained the defendant-appellant by permanent injunction from realising octroi prior to 18.02.1974. The defendant-appellant filed appeal against the aforesaid judgment and decree whereas the plaintiff filed cross objection therein. First appellate court vide judgment and decree dated 26.02.1982 dismissed the appeal filed by the defendant and allowed cross objections and held that notification dated 18.02.1974 which amended limits of the Bhawani Mandi Municipality was not in accordance with law and therefore the first appellate court modified the decree passed by the trial court and restrained the defendant from realising octroi under the limits of Bhawani Mandi Municipality in accordance with law and also issued declaratory decree in favour of the respondent-plaintiff to the effect that whatever octroi has been realised would be liable to be refunded to the plaintiff. Second appeal filed by the defendant was dismissed by this Court vide judgment dated 10.11.2006 with findings that "there is no dispute that the area in which the respondent Mill is situated was within the limits of the erstwhile Gram Panchayat and subsequently included in the municipal limits of Municipal Board, Bhawani Mandi". It was further held that area of Gram Panchayat could not have been brought into limits of Municipal Board until and unless compliance of Section 86 of the Rajasthan Panchayat Act, 1953(for short "the Act of 1953") was made. Notification dated 18.02.1974 and corrigendum dated 17.05.1974 with regard to limits of Municipal area were held to be not in accordance with law. However, it was held that the Municipal Board(appellant therein) shall be entitled to levy octroi only after the date of Act No. 31 of 1974 and octroi levied prior to notified date, as referred to above, may be refunded to the respondent-plaintiff.

3. The plaintiff-respondent filed special leave to appeal against the aforesaid judgment before the supreme Court. The Supreme Court, after granting leave to appeal, decided civil appeal (No. 4899/2008) vide order dated 31.07.2008. Although, the judgment passed by this Court in second appeal was upheld, but when notification dated 01.07.1982 was cited before the Supreme Court on behalf of the Municipal Board with regard to extension of local limits of Municipality by the State Government under Section 4 (1) (b)(c) and (d) of the Rajasthan Municipalities Act, 1959(for short "the Act of 1959"), the Supreme Court observed that this notification was not brought to the notice of the High

Court in pending second appeal and therefore no opinion on the applicability and effect of the said notification could be expressed, despite assertion of the plaintiff that subject Khasras do not fall within the said notification dated 01.07.1982. According to Municipal Board, said notification was applicable to property in question, but the Supreme Court observed that since this controversy did not arise for consideration before the High Court in the pending second appeal, therefore, the High Court needs to consider applicability and effect of the said notification in the present case. The Supreme Court remanded the matter for consideration of this Court to that extent only holding that earlier findings recorded in the main judgment shall remain intact and the appellant-plaintiff shall be entitled to refund of the octroi prior to 01.07.1982 along with interest @ 9% per annum.

4. Ms. Anita Agarwal, learned counsel for the appellant argued that stand of the plaintiff-respondent throughout the litigation has been that its factory premise is situated in the area of Gram Panchayat Pachpahar and now suddenly in the proceedings of remand made by the Supreme Court on this limited issue, the plaintiff-respondent has changed its stand by asserting that the factory premise was situated on the lands of Khasra No. 181 to 185, 348, 351 and 352 measuring 8 bigha and 3 biswa in revenue village Bhawani Mandi and that factory premise was not situated in the land of revenue village Pachpahar. Learned counsel submitted that the trial court in the present case has decreed the suit filed by the plaintiff-respondent with a finding on Issue No. 3 that mill of the respondent was not situated within the Municipal limits of Bhawani Mandi. The first appellate court in its judgment observed that plaintiff Rajasthan Textile Mills considers it to be situated in the limits of Gram Panchayat Pachpahar and asserts that the said Gram Panchayat was also asking it to make payment of tax on that premise. It is argued that the land on which the factory premise of the respondent was situated earlier formed part of Gram Panchayat Bhawani Mandi which was revenue village Bhawani Mandi and later on it was converted into Municipal Board. By virtue of sub-Section (8) of Section 4 of the Amending Act No. 31 of 1974, an area which was already included in a panchayat circle could be included into municipal board, which empowers the State Government to do so without following the procedure laid down under Section 86 of the Act of 1953. A notice was issued by the State Government on 06.05.1978 inviting objections for extending limits of Municipal Board, Bhawani Mandi and finally by notification dated 01.07.1982 it was provided that area of Pachpahar has been included in Municipal Board, Bhawani Mandi on 08.10.1960.

5. Learned counsel argued that gazette notification dated 01.07.1982 was produced by the Municipal Board with their counter affidavit filed in the Supreme Court in the aforesaid SLP. It was stated therein that stand of the plaintiff that there is no formal notification issued by the Municipal Board, Bhawani Mandi to change the municipal limits of Pachpahar is falsified from the gazette notification dated 01.07.1982 issued after amending the Act of 1974. Notification dated 01.07.1982 included revenue villages of Pachpahar, Guglana and Lambi within

the municipal limits of Bhawani Mandi, but the plaintiff now pleads that the mill does not fall in any of the aforesaid revenue villages. In fact, the respondent-plaintiff was aware that production of notification dated 01.07.1982 would mean accepting that up to 31.06.1982, Municipality was not properly constituted and therefore, the mill premise falls outside the Municipal Board, Bhawani Mandi, but thereafter, Municipal Board could levy octroi. Giving the historic background of the formation of Bhawani Mandi as Municipality, learned counsel argued that Bhawani Mandi town was a part of former State of Jhalawar. Erstwhile ruler of Jhalawar State fixed the limits of Bhawani Mandi vide its Rules dated 13.03.1936. According to said rules, limits of Bhawani Mandi were up to Chhota Nala in south. Textile mill of the plaintiff-respondent was situated beyond the above Nala towards south. After the formation of the State of Rajasthan, the Municipal Board, Bhawani Mandi framed its Octroi Bye-laws in the year 1954 and it reiterated the above limits of Bhawani Mandi Municipality for the purpose of levy of octroi. As per the Octroi Bye-Laws of 1954, while Bhawani Mandi remained municipality up to 13.09.1959, but vide notification dated 14.09.1959 it was converted into a Panchayat. On 25.04.1960, the Government of Rajasthan proposed to convert Bhawani Mandi Panchayat again into a municipality and as such the Government invited objections. The Government of Rajasthan vide notification dated 08.10.1960 declared the town of Bhawani Mandi to be Municipality and in pursuance of sub-section (2) of Section 4 of the Act of 1959 directed that the limits of Panchayat area shall be the limits of municipality.

6. Learned counsel for the appellant has referred to Section 4 of the Amending Act No. 31 of 1974 as also Section 86 of the Rajasthan Panchayat Act, 1953 and argued that a conjoint reading of both the provisions shows that after amendment, the Municipality has now been given power to issue notifications under Section 4 of the Act redetermining its limits by excluding any area from panchayat circle and including the same within its limits, without there being any requirement of following the procedure prescribed under Section 86 of the Act of 1953. On that very basis, notification was issued by the State Government on 06.05.1978 inviting objections for extending limits of Municipal Board Bhawani Mandi and finally by notification dated 01.07.1982 it has been declared inter alia that the area of Pachpahar has been included in the Municipal Board, Bhawani Mandi. By virtue of this notification, Municipal Board would be competent to realise octroi at least from 01.07.1982 till the abolition of octroi in the year 1998. Learned counsel referred to Writ Petition No. 306/1991 filed by the plaintiff-respondent against Municipal Board, Bhawani Mandi and submitted that in para 5 of memo of that writ petition, it has been mentioned by them that the land of the respondent's mill/factory falls under the panchayat circle Pachpahar and Gram Panchayat Pachpahar was also claiming the tax from it. The aforesaid writ petition was disposed of by this Court vide judgment dated 10.11.2006 observing that since the controversy as raised in the writ petition has duly been considered by this Court in S.B. Civil Second Appeal No. 107/1982, i.e. present second appeal, no further consideration is required to be made by this Court in the writ

petition. The plaintiff-respondent filed two more writ petitions, i.e. Writ Petition No. 166/1999 and 36/1999 in which its stand was that Municipal Board Bhawani Mandi is not a municipality in eye of law and still it is a gram panchayat and there was no proper notification under Section 4 of the Act of 1959. A finding was recorded that, "there is no dispute that the area in which the respondent mill is situated was within the limits of erstwhile Gram Panchayat and subsequently included in Municipal Board Bhawani Mandi." The respondent is now estopped from changing its stand to contend that their mill was not situated in the jurisdiction within the area of gram panchayat of Pachpahar. The appellant is therefore lawfully entitled to recover octroi from the respondent for the period after 01.07.1982 till octroi was abolished in 1998.

7. Mr. J.K. Singhi, learned Senior Counsel appearing on behalf of the plaintiff-respondent opposed the writ petition and argued that notification dated 01.07.1982 was for the first time filed by the Municipal Board by way of counter affidavit during pendency of the proceedings before the Supreme Court to contend that area of mill of the respondent fall in the municipal limits of Bhawani Mandi. This shows that the earlier backbone of the contention of the Municipal Board based on the notification dated 18.02.1974 and 17.05.1974 was given up by them. Objection was raised by the plaintiff-respondent before the Supreme Court that this notification dated 01.07.1982 was never relied by the Municipal Board before this Court. Learned Senior Counsel has relied upon the certificate of the Tehsildar, Pachpahar dated 11.04.2007 produced on record with affidavit, in which it is specifically mentioned that mill of the respondent is outside the revenue village of pachpahar. The notification dated 01.07.1982 could not be relied as the Municipal Board never moved an application for production of notification on record nor any such permission was sought from this Court under Order 41, Rule 27 C.P.C. presumably because it knew that it had no case and that an additional document of this nature could be produced at the stage of second appeal only when the Court requires the same for effective decision of the case. Mill of the respondent does not fall in any of the three villages namely Pachpahar, Guglana and Lambi. Notification dated 01.07.1982 states that under Section 6(1) of the Act of 1959, it was intended to increase the limits of the Municipality, as such objections were invited vide notification dated 06.05.1978 which was published in Rajasthan Gazette dated 18.08.1978, but no such notification has been produced on record. Therefore, aforesaid notification cannot be accepted as correct. While the notification is said to be issued for extending the limits of the Bhawani Mandi Municipality whereas no such Municipality was lawfully in existence and Bhawani Mandi continued to be validly constituted gram panchayat. The word "extension" could be used to extend the limits of a municipality only if it was in existence whereas there was no valid existence of a municipality. Notification was issued on 06.05.1978 inviting objections and it was published in Gazette on 18.08.1978 after a period of more than 90 days, which is violative of provisions of Section 6 of the Act which requires submissions of objections to the proposal within 30 days from the date of publication. It is

contended that the plaintiff-respondent filed Writ Petition No. 306/1991 against the Municipal Board, Bhawani Mandi seeking declaration that the premise of the respondent are situated outside the limits of Municipal Board, Bhawani Mandi. In the reply filed thereto by the Municipal Board, copy of notification dated 01.07.1982 was filed. It was contended that entire area of village Pachpahar, Guglana and Lambi are now included within the limits of Municipal Board, Bhawani Mandi. This Court decided that writ petition with the simple observation that since the controversy as raised in the writ petition has duly been considered by this Court in second appeal, no further consideration was required to be made in that writ petition. Now, the aforesaid notification dated 01.07.1982 cannot be relied by the Municipal Board to claim realisation of octroi from the respondents. Scope of remand made by the Supreme Court to this Court is only to decide the applicability and effect of notification dated 01.07.1982 and therefore, objection can be validly raised by the respondent. Mill of the respondent is situated on the land bearing Khasra No. 181, 182, 184, 185, 348, 359 and 362 of village Bhawani Mandi which is even otherwise not included in the revenue village Pachpahar. It is, therefore, prayed that instant writ petition be dismissed.

8. I have given my thoughtful consideration to rival submissions and carefully perused the material on record.

9. Perusal of the judgment dated 15.04.1976 passed by the trial court indicates that stand of the plaintiff respondent M/s. Satlaj Cotton Mills Limited before the trial court was that their mill was situated outside the boundaries of Bhawani Mandi Municipality and the Municipality without notification of the State Government has on its own illegally altered its boundaries by affixing the boundary stone up to Ganesh Bagh. Further stand of the plaintiff-respondent was that Gram Panchayat Pachpahar has also served on the plaintiff a notice that their mill was situated in their jurisdiction and they were liable to pay octroi or tax to the gram panchayat. Witness of the defendant, Shanti Lal(P.W.4) stated that Gram Panchayat Pachpahar considers its boundary up to limit of Bhawani Mandi Municipality towards southern side. The trial court on Issue No. 3, therefore, recorded a finding that since the Mill was situated outside the boundaries of Municipality, it was not liable to pay octroi and accordingly decreed the suit restraining the Municipality from realising octroi from the plaintiff's mill prior to 18.02.1974. This judgment was challenged before the first appellate court by both the parties which vide its judgment dated 28.02.1982 made injunction absolute in the terms that so long as boundaries of the Municipal Board, Bhawani Mandi are not decided in accordance with law, it shall not be entitled to recovery of octroi from the plaintiff respondent and whatever octroi has been recovered, the same shall be refunded. The matter reached this Court in the second appeal filed by the Municipal Board, Bhawani Mandi. This Court, while deciding the second appeal, vide judgment dated 10.11.2006 recorded a categorical finding that the area in which the respondent mill was situated was within the limits of erstwhile Gram Panchayat Bhawani Mandi and subsequently, included in the municipal limits of Municipal Board, Bhawani Mandi. Area of Gram

Panchayat could not be included in the limits of Municipal Board until and unless compliance of Section 86 of the Act of 1953 has been made. This Court held that notification dated 18.02.1974 and corrigendum dated 17.05.1974 issued in regard to the limits of Bhawani Mandi Municipal Board were not in accordance with law and the appellant therein was entitled for levy of octroi only after the amending Act No. 31 of 1974 was made effective. This Court, however, directed that any octroi, if realised prior to the notified date as referred above, shall be refunded to the contesting respondents. However, the appellant shall be free to utilise the amount recovered as per interim order of this Court in accordance with law. It is this last part of the direction issued by this Court which was challenged before the Supreme Court by the plaintiff-respondent. The Supreme Court has upheld the judgment of this Court on all other aspects with the direction that the appellant would be entitled to refund of octroi duty paid by it prior to 01.07.1982 with interest @ 9% p.a. up to the date of payment subject to necessary adjustments, if any. So far as effect and applicability of notification dated 01.07.1982 is concerned, the Supreme Court, while remanding the matter to this Court for consideration in accordance with law, kept the contentions of both the parties expressly open.

10. Now when cognizance of statutory notification dated 01.07.1982 has already been taken by the Supreme Court, this Court is not inclined to entertain the argument of the plaintiff-respondent that said notification should not be considered or seen as it has not been produced without recourse to Order 41, Rule 27 C.P.C. and without permission of this Court. Therefore, while rejecting such objection, I shall now proceed to consider applicability and effect of the aforesaid notification. This Court, while upholding the judgments passed by the trial court and first appellate court by its judgment dated 10.11.2006 relied on its earlier judgment dated 07.12.1984 passed in S.B. Civil Writ Petition No. 1439/1975, Municipal Board, Bhawani Mandi v. State of Rajasthan & Others and decision dated 01.08.1978 in S.B. Civil Writ Petition No. 1252/1975, Gram Panchayat Shialawas Khurd v. State of Rajasthan & Ors. In those judgments, it was held by this Court that the area of Gram panchayat could not have been included in the limits of Municipal Board until and unless compliance of Section 86 of the Rajasthan Panchayat Act has been made. It is only after exclusion of the area from the boundaries and jurisdiction of gram panchayat, as provided under Section 86 of the Rajasthan Panchayat Act that the same can be included in the municipal limits. Section 86 of the Act of 1953 provides that the State Government may at any time, after one month's notice published in the prescribed manner (either on its own motion or) at the request of the Panchayat or of the residents of any Panchayat Circle, village or other area and by notification in the official gazette, (a) include any area in a Panchayat circle; (b) exclude any area from a Panchayat circle or (c) transfer any area from one panchayat circle to another. This Court in Gram Panchayat Shialawas Khurd(supra) held that Section 4 of the Rajasthan Municipalities Act cannot be interpreted in such a manner so that an area already included in a panchayat

circle would be included into a Municipal Board without following the procedure laid down in the Section 86 of the Rajasthan Panchayat Act. This judgment was followed by this Court in *Municipal Board, Bhawani Mandi v. State of Rajasthan*(supra) wherein it was held that Bhawani Mandi Municipality cannot be said to be properly constituted for the period between 14.07.1971 to 22.05.1973 because the area included therein continued to remain part of panchayat circle. In that case, this Court observed that after decision of this Court in *Gram Panchayat Shialawas Khurd*(supra), the provisions of Section 4 of the Rajasthan Municipalities Act were amended by the Amending Act No. 31 of 1974 and sub-section (8) was added to Section 4, with the result that thereafter upon the issuance of a notification under sub-section (4) of Section 4 of the Municipalities Act, any area earlier included in a panchayat circle would automatically cease to be a part of the Panchayat area and would be lawfully included in the municipality as declared under sub-section (1) of Section 4, but the Amending Act No. 31 of 1974 is prospective in its application and cannot apply in respect of a period prior to its promulgation in September, 1974.

11. While deciding present second appeal vide judgment dated 10.11.2006, this Court agreed with that view that Amending Act No. 31 of 1974 was only prospective in its application and cannot apply retrospectively for the period prior to its promulgation, but this Court in that judgment did not notice that notification dated 01.07.1982 was brought on record in connected writ petition and omitted to consider its applicability and effect. It is for this limited purpose that the matter has been remanded to this Court by the Supreme Court. The findings recorded by the courts below were upheld by this Court on the premise of non-compliance of the procedure prescribed in Section 86 of the Rajasthan Panchayat Act. Now with the issuance of notification dated 01.07.1987 sub-section (8) to Section 4 of the Rajasthan Municipalities Act subsequent to promulgation of such amendment, that lacuna would stand removed and there would be no need for simultaneous compliance of the procedure contained in Section 86 of the Act of 1954. Sub-section (8) added to Section 4 of the Rajasthan Municipalities Act which reads as under:

"4. Delimitation of Municipalities

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(8) When an area comprised in a village is specified as, or when any area is excluded from the village and included in, a municipal area then with effect from the date on which such area is so specified or is so included the following consequences shall ensue, namely)

(a) Such area shall cease to be a (village)

(b) (Until elections are held) under subsection (1) or the term (xxx) of the Board expires under this Act, whichever is earlier the Sarpanch, up-sarpanch and the member or members representing the area of the (village) so included in or declared as a municipality shall be deemed to be the additional members of the

municipality in which such area of the (village) is included or the Chairman, Vice Chairman and the members respectively of the municipality declared for such area, as the case may be.

(c) the whole of the assets vesting in, and of the liabilities subsisting against the Panchayat so declared to be municipality or in case where only a part or whole of a (village) is so included in a municipality, such portion of the said assets and liabilities as the State Government may direct, shall devolve upon the municipality in State Government may direct, shall devolve upon the municipality in which such area of the Panchayat circle is so included;

(d) Until new rules, notifications, order, any bye-laws are made or issued under this Act, the rules, notifications, orders and bye-laws applicable to the municipality, in which any such area is included shall continue to apply to the area so included.

(e) the municipality so established by the inclusion of any area of a Panchayat circle therein or by the declaration of a (village) as a municipality, shall levy or continue to levy such of the taxes as are lawfully imposed under the Act;

(f) any such area shall cease to be subject to all rules notifications, order and bye-laws made under the Rajasthan Panchayat Act, 1953 (Raj. Act XXI of 1953); and

(g) the municipality in which such area is included or the municipality declared for such area shall exercise jurisdiction over such area and the Panchayat established for such area shall cease to function therein."

12. According to Section 4(8)(e) of the Act of 1959, the municipality so established by inclusion of any area of a Panchayat circle therein or by the declaration of a village as a municipality, shall levy or continue to levy such of the taxes as are lawfully imposed under the Act. The argument advanced on behalf of the respondent-plaintiff that since Bhawani Mandi Municipality was not lawfully constituted, notification extending its boundaries would have no meaning, cannot be accepted for the simple reason that the very premise on which the suit of the plaintiff was decreed was non-compliance of Section 86 of the Act has now ceased to exist and that requirement has now been done away with by newly added sub-section (8) of Section 4 of the Act. And the argument now sought to be developed on behalf of the respondent-plaintiff before this Court that their mill was situated in revenue village Bhawani Mandi, which was not part of the revenue village Pachpahar is, in fact, diametrically opposite to their earlier stand when they were claiming that their mill was not situated in the limits of Bhawani Mandi, but rather suggested that it was situated within the area of Gram Panchayat Pachpahar and that Gram Panchayat was demanding tax from them. And their alternative argument was that Gram Panchayat Bhawani Mandi was not duly constituted as a Municipal Board. Surely, Plaintiff-respondent cannot be permitted to approbate or reprobate. They cannot blow hot and cold at the same time. In either case, constitution of Municipal Board Bhawani Mandi being

lawfully made and the area of revenue village Pachpahar having now been included in the municipal limits of Bhawani Mandi by virtue of Section 4(8) of the Rajasthan Municipalities Act, they are liable to pay octroi from 01.07.1982. Even if the mill of the respondent is situated in revenue village Bahwani Mandi itself, the respondent-plaintiff cannot escape the liability to pay the octroi at least from the date of notification, i.e. 01.07.1982 till the octroi system was abolished in 1998. However, it is made clear that if the amount of octroi recovered from the respondent-plaintiff for the prior period has not yet been refunded pursuant to the judgment of the Supreme Court, it shall be entitled to adjustment of the same as against the amount which the plaintiff-respondent shall be required to pay to the appellant-Municipal Board, Bhawani Mandi in compliance of this judgment from the period from 01.07.1982 till octroi system was abolished in 1998.

13. The question referred for decision of this Court on remand thus stands answered and matter is decided in these terms.

14. Appeal is disposed of accordingly.