

(1981) 02 KAR CK 0037
In the Karnataka High Court
Case No : RSA 234 & 235/78

Town Municipal Council Lakshmeswar

APPELLANT

Vs

Siddalingappa

RESPONDENT

Date of Decision : 10-02-1981

Acts Referred:

Karnataka Municipalities Act, 1964 — Section 284

Citation : (1981) 1 KarLJ 345

Hon'ble Judges : M. P. Chandrakantaraj Urs, J

Judgement

1. These two appeals by the Town Municipal Council, Laxmeshwar, are against the concurrent findings of the courts below in two separate original suits filed in the court of the Munsiff at Laxmeshwar. These two appeals are disposed of by the following common order, as the questions of law raised are substantially the same and the facts of the case are similar. The parties to these appeals in the course of this order will be referred to by the rank and position assigned to them in the trial court.

2. The facts leading to these appeals are briefly summarised as follows:

The defendant Town Municipal Council proposed to levy octroi in the town limits of Laxmeshwar under the Karnataka Municipalities Act, 1964 (hereinafter referred to as "the Act"). Accordingly by a resolution passed by the Town Municipal council dated 9-5-70 it proposed to levy octroi under the Act. The proposal was sent to the State Government through the Divisional Commissioner for the necessary sanction. The Divisional Commissioner sent it back proposing certain amendments. The Town Municipal Council accepted the amendments and sent back the proposal for levy of octroi for approval and sanction of the Govt. The State Government by its order No. HMA 142 TBR 74 dated 23-12-1974 accorded sanction to the proposal of the Town Municipal Council. Thereafter the Chief Officer of the defendant-Town Municipal Council got a notification published in the Karnataka Gazette together with the Government order, in its issue dated 16th January, 1975. The notification indicated that octroi would be levied with

effect from 1-4-75 under the Act. It is necessary to state that till then the levy of octroi was under the provisions of the repealed Bombay District Municipal Boroughs Act.

3. The plaintiffs who were traders filed O.S. No. 36 and 37 of 1975, in the court of the Munsiff at Laxmeshwar seeking a mere injunction against the Municipality restraining them from collecting the octroi proposed under the aforementioned notification dated 16th January, 1975. It was the plaintiff's case in O.S. No. 36/1975 that the Municipality had not prepared the required Bye-laws and Rules for the levy and collection of octroi and therefore without such preparation of Bye-laws duly approved and sanctioned by the Government, they could not levy and collect octroi in the Town. Hence, an injunction was prayed for restraining the defendant-Town Municipal Council from collecting the levy of octroi. The defendant entered appearance in that suit and resisted the same on the ground that the Municipality had prepared the draft Bye-laws and Rules and forwarded the same to the Government for its approval, that the Municipality had the right to send such proposal along with the draft Bye-laws to be published in the official gazette dated 17-9-70 for information of general public and no objections had been received from any body and the same was sanctioned by the Government on 23-12-74 and the same was published on 16-1-1975. The defendant Town Municipal Council took the stand that the suit was not maintainable in as much as the plaintiff had not availed himself of the remedies available under the provisions of the Act itself. The suit having been filed for mere injunction it was not maintainable.

4. In O.S. No. 37/75 the plaintiff was also a merchant of Laxmeshwar. In the plaint it was alleged that the defendant-Town Municipal Council prepared the draft-Bye-laws and the Schedule in the year 1966 and that on 17-9-70 it published the Bye laws calling for objections from the general public and thereafter submitted the Bye-laws and the Schedule to the Government for its approval through the Divisional Commissioner, Belgaum Dn. Belgaum. But, the Divisional Commissioner, Belgaum, directed the defendant Town Municipal Council to effect some amendments in the Schedule and to re-submit the same for approval. The defendant Town Municipal Council, at its general body meeting held on 17.1.74, passed a resolution bearing No. 313 incorporating the suggested amendments but sent the incorporated amendments only for approval of the Government and the Government therefore accorded sanction for the amendments only and not for the whole of the proposal. The entire procedure prescribed under Ss. 94, 95 and 96 of the Act not being followed, the resultant levy of octroi in accordance with the notification dated 16-1-75 was illegal and invalid. Therefore, the defendant should be restrained from enforcing the levy of octroi by an injunction. The defendant-Town Municipal council resisted the suit denying the allegations that there was no compliance of the procedure laid down in the Act under Ss. 95, 96 and 97 of the Act. The defendant-Municipality had a right to levy octroi on the commodities as per the existing Rules, that the schedule and the Bye-laws published on 16-1-75 inviting objections had been

duly approved by the Government on 23.12.74 and the same had been published on 16-1-75. In the written statement it was alleged that the suit was not maintainable for a mere injunction because the mandatory requirement of S. 284 of the Act requiring any person to give 60 days notice had not been complied with. On the above pleadings of the plaintiff and the defendants, substantially the same issues were framed by the trial Court. It would be sufficient to extract the issues framed in O.S. No. 37/1975.

(1) Whether plaintiff proves that the defendant-Municipality has failed to follow the mandatory procedure as laid down in the Karnataka Municipalities Act, 1964, regarding the levy of octroi duty?

(2) Whether the plaintiff proves that the defendant-Municipality has not obtained the approval of the Government in respect of Bye-law and schedule with regard to the levy of octroi duty before starting to recover octroi duty?

(3) Whether the plaintiff proves that the actions of the defendant Municipality starting to recover the octroi duty is not legal and valid?

(4) Whether the plaintiff proves that the resolution of the defendant Municipality passed on 29-12-74 regarding the levy of octroi duty is null and void?

(5) Whether defendant-Municipality proves that the suit in the present form is not maintainable?

(6) Whether the suit is bad for want of notice under section 80 CPC?

(7) Whether the suit is bad for want of notice under sec. 284 of the K.M. Act 1964?

(8) Whether the suit is not maintainable in view of O.S. No. 36/75 filed in this court for similar relief?

(9) Whether the suit is not maintainable before exhausting all the remedies as laid down in sec. 306 of the K.M. Act 1964?

(10) Whether the plaintiff is entitled to the permanent injunction as sought?

(11) What decree and what order?

Practically all the issues were held against the defendant and in the result the suits were decreed and injunction granted. Aggrieved by the Judgments in the two original suits, the defendant Town Municipal Council appealed to the Civil Judge, Gadag in two separate appeals. The lower appellate court also disposed of the two appeals by separate judgments in R.A. No. 43/76 and R.A. No. 44/76. Aggrieved by the judgments and decrees of the lower appellate court, these two second appeals are preferred.

5. One of the specific issues raised in the suits was whether the suit was maintainable in spite of non-compliance with the requirements of S. 284 of the Act. It must also be mentioned here that the learned counsel for the defendant-

appellant has raised the question whether the judgments and decrees were not bad in as much as an issue whether a suit for mere injunction in the circumstances of the case would lie had not been raised though pleaded.

6. A decision of this court on the first mentioned issue above would go to the very root of the matter of jurisdiction. If I have to find in favour of the defendant on a proper construction of S. 284 of the Act, that a prior notice was a mandatory requirement and the suit was not maintainable for non-compliance of that requirement, then the courts below would have proceeded to dispose of the suits and the appeals without jurisdiction and therefore all the findings recorded by the courts below would have to be set aside. The arguments were therefore invited only on this question of law.

7. Mr. R.U. Goulay, learned counsel appearing for the appellant-defendant Town-Municipal Council, has drawn my attention to the decision of the High Court of Allahabad in the case of Municipal Board, Faizabad v. Edward Medical Hall, AIR 1976 All. 349, wherein a learned Judge of that High Court had occasion to consider the scope of S. 326 of the U.P. Municipalities Act (2 of 1916) which also required prior notice of 60 days in a suit against the Municipality. The learned Judge after considering a number of authorities on that proposition held that the levy of octroi by a Municipality could be restrained by an injunction only if there was compliance with S. 326 of the Act, as the same would have application to any suit brought for that purpose. In para 10 of the judgment it is seen that sub-sec. (1) and sub-section (4) of Section 326 of the U.P. Municipalities Act are in pari materia with sub-sections (1) and (2) of S. 284 of the Act. Apart from that fact, in the Allahabad case even the suit filed was for injunction to restrain the levy and collection of octroi. Even on first principles and plain reading of that section the requirement of S. 284(1) of the Act is mandatory unless it falls within the exception provided in sub-sec. (2) thereof. The Courts below have taken the view that the suits were for injunction and therefore were automatically exempted from the compulsion of issuing notice to the municipality. I am afraid that this was a wrong approach made by the courts below. S. 284 of the Act reads as follows:

"284. Previous notice for suits, etc.-(1) No suit shall be instituted against any municipal council, officer, servant or any person acting under the order or direction of such municipal council, officer or servant in respect of any act done or purporting to have been done in pursuance of this Act or any rule or bye-law made thereunder until the expiration of sixty days next after notice in writing, stating the cause of action, the nature of the relief sought, the amount of compensation claimed, the name and place of residence of the intending plaintiff and the relief which he claims, has been in the case of a municipal council delivered or left at its office, and in the case of such officer, servant, or person, delivered to him or left at his office or place of residence and unless the plaint contains a statement that such notice has been so delivered or left.

(2) Nothing in this section shall be deemed to apply to a suit in which the only

relief claimed is an injunction of which the object would be defeated by the giving of notice or the postponement of the institution of the suit."

While the language of sub-sec. (1) of S. 384 of the Act leaves no doubt, it is mandatory in nature, the case law on the subject is exhaustive and the reason for such notice is that the State and the Local Bodies alike do require sufficient time to defend actions against them without which it would be a handicap. Normally, the State or the Local Body would not litigate with its constituents. The time required is for settling the dispute or the claim, if any, directly and if it is to be disputed, then it should have time to prepare its defence. However, sub-section (2) of S. 284 of the Act makes an exception when the action of the local body in any given case is likely to bring hardship and danger to the person and property of one of its constituents, the giving of notice or the lapse of time would not be effective or belated. For example, if the Municipality passes an order with or without notice to pull down a building either in a case when it is in a very dilapidated condition and therefore dangerous to the occupants and the neighbours or when a construction is not authorised by the Municipality, then the giving of notice and the lapse of time would enable the Municipality to bring down the construction of the building as the case may be rendering it futile for the aggrieved person or affected person to file a suit for injunction restraining the proposed action. It is only in such cases of extreme urgency and particularly having regard to the nature of relief sought that one has to construe the exemption provided in sub-sec. (2) of S. 284 of the Act, not as a general exemption to all injunction suits. Having regard to the peculiar circumstances and urgency and the facts and the nature of injunction sought for sub-sec. (2) of S. 284 should be understood. The trial court was in error in holding that non-compliance with sub-sec. (1) of S. 284 of the Act was not fatal to the suits on the facts of the cases on hand.

8. Shri C.M. Desai, learned counsel appearing for the plaintiff-respondents has strongly contended that the liability to pay octroi was an instant recurring liability affecting the trader in his day to day activity and therefore a suit for injunction restraining the defendant-Municipal Council from levying the illegal octroi should fall into class of cases in which the lapse of time or the giving of notice would frustrate the injunction which may ultimately be issued. I am unable to accede to this contention for the following two reasons:

(1) As already noticed, the Gazette Notification of the Municipal Council was published on 16-1-75 that the levy of octroi was to come into effect on 1-4-1975. There has been no explanation from either of the plaintiffs as to what they were doing between the date of publication in the gazette and 1-4-1975. If they knew well before 1-4-1975 that levy of octroi had been introduced then they had ample time to give notice and file the suit. Not having done so, it is now not open to them to contend that it is a recurring liability which would affect their day to day commercial transactions irreparably damaging their trade prospects.

(2) Illegal levy of tax by authority competent to levy such tax is not unknown.

Except in very special circumstances when the levy is ex-facie illegal, normally, the courts will not stay the collection of taxes under the relevant law. If ultimately it is found that the the levy of tax is illegal, it is always possible to direct refund of the illegal levy of taxes and no damage is done to the plaintiffs and the like of them.

9. In fact, in the Allahabad decision referred to by me, the learned Judge has applied the theory of balance of convenience in order to decide which are the injunction suits referred to in sub-sec. (4) of S. 326 of the U.P. Municipalities Act corresponding to sub-sec. (2) of S. 284 of the Act. It must be noticed that octroi duty paid by a trader is not paid out of his pocket but is transferred to the consumers.

10. In the view I have taken, it is unnecessary to go into the merits of the findings on other issues. If the trial court had no jurisdiction to entertain the suits for want of notice under S. 284(1) of the Act then the findings recorded by the courts below in the suits are illegal and without jurisdiction and are liable to be set aside. Accordingly all findings recorded by the trial court are set aside as also the findings of the lower appellate court in the two appeals with which we are concerned. The suits are dismissed for the reason I have given. In the circumstances of the case, there will be no order as to costs.