

(2008) 07 GUJ CK 0046

In the Gujarat High Court

Case No : Special Civil Application No. 1325 of 2000

Vijalpore Municipality

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 08-07-2008

Acts Referred:

Gujarat Municipalities Act, 1963 — Section 101, 102, 129A, 266B(2), 99

Citation : AIR 2008 Guj 183

Hon'ble Judges : D.A. Mehta, J

Bench : Single Bench

Advocate : Zubin F. Bharda, for the Appellant; Amit P. Patel, AGP for Respondent 1, P.C. Kavina, for Respondent 2 and B.M. Mangukiya, for Respondent 3, for the Respondent

Final Decision : Allowed

Judgement

D.A. Mehta, J.—This petition has been preferred challenging order dated 18.10.1999 (Annexure-A) made by the respondent-State Government in exercise of powers u/s 99(1) of the Gujarat Municipalities Act, 1963 (the Act). The petitioner is a municipality who granted a contract for collection of octroi under provisions of Section 99(1) of the Act after passing the necessary resolution bearing No. 265 on 07.02.1998. Respondent No. 3 is the contractor who was awarded the contract on the basis of being the highest bidder. Respondent No. 3 accordingly started collecting octroi as per terms of the contract.

2. It is the say of the petitioner that respondent No. 2 has not only failed to make payment of octroi but has indulged in multifarious litigations to avoid payment of octroi. The petitioner has referred to proceedings before civil Court as well as proceedings before this Court to emphasis the aforesaid fact.

3. The learned advocate for the petitioner has assailed the impugned order on the ground that, in the first instance, the impugned order has been made by the respondent-State Government in purported exercise of powers u/s 99(1) of the

Act by granting absolute exemption without hearing the petitioner who is directly affected; and secondly, the impugned order has been made retrospectively applicable from 1995-1996, namely, from the date of commencement of commercial production and for a total period of five years without any justification for such blanket exemption. Inviting attention to the provision of Section 99(1) of the Act it was contended that the said provision does not indicate that the State Government has any powers to grant exemption of the nature stated in the impugned order dated 18.10.1999.

4. On behalf of respondent No. 3, the contractor, it was submitted that in fact respondent No. 2 was the predecessor contractor who was collecting octroi for and on behalf of the municipality till the point of time the present contract came to be awarded to respondent No. 3. Respondent No. 3 supported the petitioner in its challenge.

5. On behalf of the respondent No. 1-State Government, the learned Assistant Government Pleader submitted that the impugned order was made in exercise of powers under the Act and respondent No. 2 was considered to be "new industry" as per Octroi Rules. It was further submitted that the impugned order was made after considering the record and verification of the details on record and hence, no interference was warranted. Learned Assistant Government Pleader also made a request for time so as to file affidavit-in-reply and seek instructions.

6. Respondent No. 2-Company had preferred an independent petition being Special Civil Application No. 8321 of 1998 which came up for admission hearing on 08.12.1998 and the Court, after hearing the parties, made the following order:

Rule. The learned Counsel for the petitioner prays for interim relief and it is contended that the petitioner may be allowed to clear the goods on furnishing bank guarantee to the ijaradar. The petitioner has challenged the vires of Section 129A of the Gujarat Municipalities Act. He also relies on the ground that there is an exemption granted by the Municipality in favour of the petitioner Company. According to the petitioner, the Municipality has no authority to recover any tax/octroi from the petitioner as there is no law enacted by the Municipality according to the procedure established. The contention of the petitioner is that the Panchayat has been levying tax and when a new Municipality is formed, unless and until the new enactment is made by the Municipality, it would not be in a position to recover the tax. The contention of the petitioner is prima facie not tenable in view of Section 266B(2) of the Gujarat Municipalities Act. Therefore, we are not inclined to grant the interim relief sought for. The petitioner may pay the octroi payable by it directly to the second respondent Municipality and the Municipality may in turn keep this amount in a separate account. The payment so made will be subject to the result of this Special Civil Application.

7. Thereafter, respondent No. 3 moved a Civil Application seeking modification of the aforesaid order dated 08.12.1998 in Special Civil Application No. 8321 of

1998 and the High Court on 19.08.1999 passed the following order:

1. We have heard Mr. N.D. Nanavati, learned Senior Counsel for the petitioner. The counsel for the petitioner in Special Civil Application No. 8321 of 1998, namely Company, Mr. Sanjanwala submitted that the order dated 8/12/1998 required no modification as the amount has already been directed to be paid to the Nagar Palika and the Nagar Palika alone has got right to retain the amount. It is also submitted that the contract allegedly executed by the Ezardar and the Nagar Palika has come to an end and the matter is now pending consideration in Special Civil Application No. 2029 of 1999. Even though the Nagar Palika has cancelled the contract. That order has been suspended by the learned Single Judge. As the order cancelling the contract remains suspended the Ezardar for the time being is entitled to recover the octroi. Therefore, we direct that the Vijalpur Nagar Palika should give credit to the petitioner Ezardar for whatever amount received by the Nagar Palika from the petitioner of Special Civil Application No. 8321 of 1998. This is subject to the terms and conditions of the contract entered between the Nagar palika and the Ezardar and subject to the order that may be passed in Special Civil Application by the learned Single Judge relating to this contract.

2. It is made clear that the petitioner contractor would be at liberty to formally assess the octroi payable by the petitioner in S.C.A. No. 8321 of 1998 i.e. VVF Ltd. and the amount payable by the company shall be paid to the Nagar Palika within 24 hours of the assessment so made by the Ezardar. The Ezardar shall also give Challan of assessment to the concerned officer of the Nagar Palika to enable the VVF Ltd. to pay the octroi. The trucks of the company - VVF Ltd. shall not be unnecessarily detained by the Ezardar. The company shall cooperate with the Ezardar and give all the relevant documents as and when the trucks reach the check post.

3. It is submitted by the counsel for the Company VVF Ltd. the Ezardar shall be directed to furnish for the amount given credit to by the Nagar Palika and the counsel also prays that the Ezardar shall be directed to furnish bank guarantee for the said amount. It is also submitted that a sum of Rs. 40 lacs would be approximate amount of octroi payable by the Company VVF Ltd. for the relevant period. Therefore, we direct the Ezardar to furnish solvent security of immovable property for this amount to the satisfaction of the Registrar of this Court. The Ezardar shall execute a bond to that effect in favour of the Registrar on or before 31/8/1999. This civil application is disposed of accordingly.

8. When the present petition came for hearing after issuance of notice, the Court, after hearing all the parties, admitted the petition and granted interim relief in the following manner:

Rule. Till further orders, there shall be interim relief in terms of para 9(c) with a clarification that although the Vijalpore Municipality shall not be required to refund any amount of octroi either collected through the contractor or received

by it from the industries through Udyognagar Industries Association, the Municipality shall not collect any further octroi from any of the industries within its limits for the period in question.

Since the levy of octroi has been abolished with effect from 1.5.2001, no further orders are required to be passed at this stage.

1. In the aforesaid backdrop of the position the impugned order dated 18.10.1999, which reads as under, requires to be examined and appreciated:

GOVERNMENT OF GUJARAT URBAN DEVELOPMENT AND URBAN HOUSING DEPARTMENT SACHIVALAYA, GANDHINAGAR, DATED THE 18TH OCTOBER, 1999.

:ORDER:

GUJARAT MUNICIPALITIES ACT, 1963:

NO:KV-160-99-NPL-4598-1772-M : Whereas the VVF Limited (hereinafter referred to as Company) Vejalpore manufacturer of various Shaving Creams, Shampoos, Toilet Soap noodles and toilet soaps has expanded its manufacturing operations in the year 1995-96 and has represented to the State Government to give exemption, from octroi for the expanded capacity.

AND WHEREAS on verification of the details on investment made by the Company for expanding its capacity it is found that the company has invested more than 50% in the land, buildings and plant and machinery for the expansion of its capacity of existing industrial undertaking and therefore, is entitled to be considered as "New Industry".

NOW, therefore, in exercise of the powers conferred by Sub-section (1) of Section 99 of the Gujarat Municipalities Act, 1963 (Guj. XXXIV of 1964) the Government of Gujarat hereby makes the following order, namely:

No octroi shall be levied from the VVF Limited Vejalpore, District Navsari on the raw-materials, semi-finished goods or any other goods specifically brought within the octroi limits of Vejalpore Municipality for consumption or use for its expanded capacity. The exemption is granted for a total period of five years from the date of commencement of commercial production i.e. from the year 1995-96. The amount octroi to be exempted shall have to be worked out on the basis of audited figures of raw materials and any other materials brought by the Company, as well as any ad hoc amounts paid towards the octroi.

These orders are issued as per the existing Government policy. This is without prejudice to the Special Civil Application No. 8321/98 filed by the V.V.F. Limited.

By order and in the name of the Governor of Gujarat.

Sd/- B.R. Patni Under Secretary to the Government. Urban Development and Urban Housing Department

10. On a plain reading of the impugned order it is apparent that respondent No.

2 appears to have made some representations to respondent No. 1- State Government to grant exemption from octroi on the basis of so-called expanded capacity of respondent No. 2-Unit. The impugned order further records that respondent No. 2 can be considered as "new industry" on verification of details of investment made by the Company for expanding the capacity. Lastly, the impugned order states that the order has been issued as per the existing Government policy, and the order is without prejudice to Special Civil Application No. 8321 of 1998 filed by V.V.F. Limited i.e. respondent No. 2.

11. The order, when read as a whole, does not indicate that the petitioner-Municipality was granted an opportunity to meet with the case put up by respondent No. 2-Company who was seeking exemption from the octroi levied by the petitioner-Municipality in accordance with law. Respondent No. 1- State Government cannot be presumed to be oblivious of the fact that the direct result of the impugned order would affect the finances of the petitioner-Municipality. In the circumstances, before making any order which on the face of it would operate adversely qua the petitioner-Municipality it was incumbent upon respondent No. 1-State Government to grant an opportunity of hearing to the petitioner-Municipality.

12. Similarly, the State Government was aware (as noted in the order) that in the writ petition preferred by respondent No. 2 the High Court had: not only not granted interim relief, but directed respondent No. 2 (the petitioner therein) to make direct payment of octroi to the Municipality. The State Government could not have ignored the order made by this Court and passed the impugned order.

13. The impugned order states that the same has been made in exercise of powers conferred by Sub-section (1) of Section 99 of the Act. The said section appears in Chapter VIII relating to MUNICIPAL TAXATION and dealing with Part-(1) which talks about Imposition of Taxes. The relevant extract of the said provision reads as under:

99. (1) Subject to any general or special orders which the State Government may make in this behalf and to the provisions of Sections 101 and 102, a municipality may impose for the purposes of this Act any of the following taxes, namely:

On a plain reading it becomes apparent that the provision relates to the taxes which may be imposed by a municipality subject to the municipality complying with the requirements of Sections 101 and 102 of the Act. Section 101 prescribes the Procedure preliminary to imposing a tax. The said section enjoins a municipality to pass a resolution as provided by the section and have the Rules framed for imposition and collection of octroi or other taxes that may be imposed. u/s 102 of the Act the State Government is vested with powers to either approve, with or without modification, or send back the Rules submitted for approval to the municipality for further consideration. Thus, on a conjoint reading of Sections 101 and 102 of the Act it becomes apparent that the powers

available u/s 99 of the Act are in relation to the taxes which a municipality may impose, the compliance with statutory safeguards provided by Sections 101 and 102 of the Act, the mode and manner in which such taxes may be imposed by a municipality, etc. The opening portion of Section 99 of the Act which speaks about the powers of the municipality to impose taxes for the purposes of the Act subject to any general or special orders which the State Government may make in this behalf itself indicates that such special or general orders have to be in connection with or in furtherance of requirements of the necessity to impose taxes for the purposes of the Act, the necessity to comply with the provisions of Sections 101 and 102 of the Act and such like requirements. Prima facie it is not possible to accept the contention on behalf of respondent No. 1-State Government that in exercise of powers u/s 99(1) of the Act it is open to the State Government to grant any blanket exemption. The powers available u/s 99(1) of the Act are required to be exercised so as to ensure that a municipality imposes taxes, as specified in accordance with the requirements of the Act and such imposition is subject to general or special orders which the State Government may make, but such general or special order cannot extend to granting of exemption when the provision itself relates to the taxes which may be imposed by a municipality.

14. The contention on behalf of respondent No. 1 State Government that the impugned order has been made in accordance with Octroi Rules is required to be stated to be rejected. The impugned order itself does not indicate any reference to any Rules. The impugned order, as noted hereinabove, states of having been issued as per existing Government policy but no such policy has either been pointed out or brought on record despite the fact that the impugned order was made on 18.10.1999, notice was issued on 22.03.2000 and Rule was issued on 17.07.2001. In the circumstances, belated request for granting time to file affidavit-in-reply is not accepted.

15. In the result, the petition is allowed. Impugned order dated 18.10.1999 (Annexure-A) is hereby quashed and set aside. The octroi collected by the petitioner-Municipality, in accordance with order dated 17.07.2001 made by this Court, shall be retained by the petitioner-Municipality and appropriated in accordance with law. Rule made absolute. There shall be no order as to costs.

16. At this stage, after the judgment was dictated in open Court, Mr. P.C.Kavina, learned advocate for respondent No. 2 appears and prays for time to prepare himself and make submissions. In the circumstances, the matter shall be listed at 4:30 p.m. on 08.07.2008.

DATED : 08.07.2008

17. It was contended on behalf of respondent No. 2 that the petitioner-Municipality has not raised any ground as to lack of opportunity of hearing in the petition and hence, it is not permissible to the Court to undertake the said exercise and record any finding. That merely making a statement in Paragraph

No. 3 of the petition and Paragraph No. 4-(b) of the petition that the impugned order has been made behind the back of the petitioner cannot be equated with violation of principles of natural justice. That in fact there are no pleadings to the said effect and, therefore, the oral contention raised on behalf of the petitioner has no basis. It is furthermore stated that even if there is violation of principles of natural justice the Court is required to examine as to whether such violation has resulted any prejudice to the person complaining of such violation. Furthermore, it is stated that the principle of Audi alteram partem is required to be culled out from the provisions of the Act, more particularly Section 99 of the Act and every administrative order does not necessarily require application of the said principle. That in fact the petitioner-Municipality has no such right and the provision does not require any such opportunity of hearing to be granted to the municipality. It was further pointed out that the impugned order was a policy decision based on a Government policy as recorded in the order and it was not open to the Court to examine validity of a policy as per settled legal position. In support of the submissions reliance has been placed on the Apex Court decision in case of M.J. Sivani and Ors. v. State of Karnataka and Ors. (1995) 6 SCC 269 with special reference to Paragraph No. 31 and 32 and BALCO Employees Union (Regd.) Vs. Union of India and Others, with special reference to Paragraph Nos. 45, 46, 47 and 92.

It was further pleaded that Section 99 of the Act merely provided for which taxes may be imposed by a municipality but the same was subject to any general or special orders which the State Government may make and, therefore, the impugned order was justified and valid.

18. The aforesaid contentions do not merit acceptance for the simple reason that the respondent-State Government has not sought to support its order on any of the grounds pleaded by respondent No. 2. In fact the petitioner had made the same grievance before the respondent-State Government much before approaching this Court when it addressed communication dated 26.10.1999 (Annexure-E) to the State Government. The petitioner-Municipality had specifically pointed out how the impugned order would adversely affect the finances of the municipality. Hence, no change or modification is called for in the judgment and order made yesterday i.e. 07.07.2008.

19. Accordingly, the petition is allowed Rule made absolute. There shall be no order as to costs.