
(1953) 09 BOM CK 0019

In the Bombay High Court

Case No : Special Civil Application No. 864 of 1953

Vijapur Municipality

APPELLANT

Vs

State of Bombay and Another

RESPONDENT

Date of Decision : 21-09-1953

Acts Referred:

Bombay District Municipal Act, 1901 — Section 174, 180, 59, 60, 62

Constitution of India, 1950 — Article 226

Vijapur Municipality Octroi Rules — Rule 4(2)

Citation : AIR 1954 Bom 278 : (1954) 56 BOMLR 131 : (1954) ILR (Bom) 524

Hon'ble Judges : Chagla, C.J.;Dixit, J

Bench : Division Bench

Advocate : Purshottam Tricumdas and S.N. Patel, for the Appellant; M.P. Amin, General, Little and Co., R.M. Kantawalla and Amarchand and Mangaldas, for the Respondent

Judgement

Chagla, C.J.—The second opponent company is under a contract with Government to supply to it a certain number of tube wells. These tube wells are to be constructed in various districts including the district of Mehsana, and for the purpose of the construction of these tube wells the second opponent company brought within the municipal limits of the Vijapur Municipality, which is the petitioner, certain articles like engines, pumps, pulleys, fly-wheels, accessories, spare parts, etc., and the petitioner Municipality imposed octroi duty upon these articles.

The second opponent company failed to pay the octroi duty so imposed and the petitioner proceeded to attach the articles belonging to the second opponent company in order to recover the tax which had been imposed. The State of Bombay, which is opponent No. 1 before us, stepped in and issued an order on April 8, 1953, purporting to be an order issued in the exercise of the powers conferred upon it by Section 59 of the Bombay District Municipal Act, to the effect that--

"No octroi or terminal tax shall be levied on any article imported within the octroi or terminal tax limits of a municipality and no amount due or outstanding on account of such tax on the date of this order shall be recovered if--

(a) such article is imported in pursuance of or for the purpose of fulfilling a contract with the Government, and

(b) the Government certified that the contract is entered into by it for carrying out or executing any work relating to irrigation schemes and that the carrying out or execution of such work is in the national or State interest."

It is not disputed that the articles in question do fall within Clause (a) of this order of Government, and it is also admitted that the Government has Issued the necessary certificate under Clause (b) of the order. The contention of the petitioner is that this order issued by Government is invalid and beyond the powers of the State u/s 9 and the State should be prevented from enforcing this order, and therefore the necessary writ or direction is sought by this petition.

2. Now, it will be noticed that the order of April 8, 1953, which is challenged clearly falls into two parts. It prevents the Municipality from levying octroi tax on articles mentioned in that order in future and it also prevents the Municipality from collecting" amounts which are due or outstanding in respect of tax which has already been levied. So that the order seeks to prevent the Municipality not only from imposing the octroi tax in future on certain articles, but it also seeks to prevent the petitioner from recovering arrears of tax due to the Municipality by a person who has imported articles which were liable to the payment of octroi duty.

3. The power of the Municipality to impose tax is to be found in Chapter VII of the Bombay District Municipal Act, and Section 59 provides that subject to any general or special orders which the State Government may make in this behalf, any municipality may impose the taxes which are enumerated, and one of the taxes is an octroi on animals or goods or both, brought within the octroi limits for consumption or use therein. Before this tax can be imposed, the conditions laid down in Clauses (a) and (b) of Section 59 are to be satisfied, and those are (a) the procedure required by Section 60 is to be followed, and (b) the levy or imposition of impost has to be with the sanction of the State Government in the case of City Municipalities.

But It must also be borne in mind -- and that is the most important feature of this section -- that the power of the Municipality to impose a tax is subject to the overriding condition which is that any general or special order issued by the State Government may regulate, limit and control the power of the Municipality to impose a tax. Section 60 lays down the procedure which the Municipality has to follow preliminary to imposing a tax. It provides for a resolution being passed by the Municipality, making of rules, giving of details as to property, person, and the amount of the tax.

Then Clause (b) provides that after the resolution has been passed, the

Municipality has to publish the form of rules, and Clause (c) provides for objections which may be raised by any inhabitant of the municipal district objecting to the imposition of the tax, and it casts an obligation upon the Municipality to take the objections into consideration and make a report on those objections and submit it to the State Government. Section 61 gives the power to the State Government to sanction, modify and impose conditions with regard to the imposition of tax by the Municipality.

Then Section 62 provides for publication of sanctioned rules with notice, and Clause (c) deals with a case where the levy of a tax has been sanctioned for a fixed period and that clause provides that the levy shall cease at the conclusion of the period except so far as regards unpaid arrears which may have become due during that period. Section 73 deals with the power of the Government to suspend levy of objectionable taxes. If the incidence of a tax is unfair or any part of it is obnoxious to the interest of the general public, the Government may require the Municipality to remove the objection within a certain time, and if that objection is not removed, the power is given to Government by notification in the Official Gazette to suspend the levy of such tax or of such part thereof until such time as the objection thereto is removed.

Section 74 empowers the Government to require the Municipality to impose taxes and Clause (c) gives the power to Government to cancel or modify any requisition made under this section and the levy of the tax or the enhancement, except as to arrears theretofore accrued due, shall thereupon cease or be modified accordingly.

Section 174 appears in Chapter XII which provides for the control by Government of Municipalities and it gives the power to the Director of Local Authorities -- and prior to the amending Act XXVI of 1953 the power was given to the Collector -- to suspend the execution or prohibit the doing of any act on the part of the Municipality, if the Director is satisfied that the doing of such an act is causing or likely to cause injury or annoyance to the public or to lead to a breach of the peace or is unlawful; and under Sub-section (2) the Director of Local Authorities has to forward this order to the State Government; and Sub-section (3) gives the power to the State Government to rescind the order or revise or modify or confirm the order or direct that the order should be continued to be in force, with or without modification, permanently or for such period as it may specify.

Section 180 gives the power to the Government, Commissioner and Collector to have and exercise authority and control over their immediate Subordinates, the power being similar to the power exercised in the general and revenue administration.

4. Now, the question that falls to be considered on this petition is, what are the powers of the State Government u/s 59? It may be mentioned that the State Government does not dispute that the octroi duty levied by the Municipality was

a lawful levy. It does not dispute what the second opponent company was liable to pay the tax, nor does it dispute that the tax was due and outstanding and that the Municipality had authority in law to collect the tax in the manner laid down under the Act.

But what is contended on behalf of the State Government is that u/s 59 it has the power not only to prevent the imposing of a tax in future, but it has also got the power to prevent the collection of a tax by the Municipality although the tax had been lawfully and validly levied. It is pointed out that the whole of Section 59 is made subject to any general or special orders which the State Government may make in this behalf, and according to the Advocate-General the general or special orders may cover not only a case of actual levy of a tax, but also the case of collection of a tax which has been duly and validly levied.

The operative part of Section 59 is "any municipality may impose any of the following taxes", and this power of the Municipality has been made subject to any general or special orders which the State Government may make. Therefore, the general or special orders must be related to the power to impose a tax. It is difficult to understand how, if a tax has already been imposed and the person upon whom the tax is imposed has become liable to pay the tax, the Government can under a special or general order issued u/s 59 prevent the Municipality from collecting that tax. The collection of a tax is entirely different from the imposing of a tax or levying of a tax, and the general or special orders referred to in Section 59 do not relate to the power of the Municipality to collect a tax which has been validly imposed. The power of the Municipality to collect a tax arises from the fact of a tax having been lawfully levied, and u/s 59 the Legislature has not conferred the power upon the State to limit or control the power of the Municipality to collect a tax duly and validly levied.

5. Two possible constructions present themselves as to the meaning of the expression "subject to any general or special orders", but either construction is opposed to the contention of the Advocate General with regard to the power of the State to interfere with the authority of the Municipality to collect a tax which is due. The one construction less favourable to the State Government is that the general or special order referred to in Section 59 must be a general or special order existing at the time when the power to impose a tax has been conferred upon the Municipality. That is the construction Mr. Purshottam asks us, to accept.

He says that u/s 59 it is not open to the State Government to issue any general or special orders after the power to impose the tax has been conferred upon the Municipality and that power has been conferred after all the formalities laid down in the statute have been carried out. Mr. Purshottam contends that logically the only construction which can be accepted is that the power to impose a tax is made subject to a general or special order and therefore the point of time which is material to consider is the point when the power to impose was conferred upon the Municipality. Mr. Purshottam says that the power to impose has been conferred once and for all; it is not conferred every time the Municipality

proceeds to levy a tax.

When the Municipality levies a tax, it levies it in the exercise of the power already conferred and if that power has not been controlled by any general or special order of the State Government it cannot subsequently be controlled by a general or special order. The other construction which it is possible to accept is that the power to impose conferred by Section 59 is capable of being displaced by any general or special order which the State Government may issue, and as the power to impose is a continuing power, that power may be taken away or controlled or limited by any general or special order. Whenever the Municipality levies a tax, it is exercising the power to impose and at the time of the levy it would be open to the Government to control that power and to make the levy subject to any general or special order.

In this view of the case, the power to control the imposing of a tax need not necessarily be exercised only at the time when the power is originally conferred upon the Municipality, but it can be exercised at any subsequent time so long as the power exists and the levy is in the exercise of that power. Looking to the whole scheme of the Act and looking to the wide powers conferred upon the State Government, we are inclined to accept the latter of the two constructions. The principle underlying the Bombay District Municipal Act is that the Municipality, which is the creature of the statute, must act and function under the general powers, control and supervision of the State Government, and it is consistent with that principle that the State Government should have the power at any time to impose limitations and restrictions upon the power of taxation of the Municipality.

Mr. Purshottam says that the Legislature has given express powers to the State Government u/s 73 to suspend a levy of an objectionable tax. Section 73 requires a certain procedure to be followed before the levy of a tax can be suspended. The procedure may take time, in certain cases it may be cumbrous, and it is not proper to assume that because the Legislature has provided for a specific case u/s 73 it has not conferred general powers upon the State Government, nor is it necessary to assume that the general powers conferred upon the State Government u/s 59 are powers which would be normally and ordinarily exercised by Government.

6. Therefore, in our opinion, as far as the first part of the order of April 8, 1953, is concerned, viz., the prohibition issued by Government against the Municipality to levy in future octroi tax on the articles mentioned in that order, was a legitimate exercise of the power of the Government u/s 59. But the position is entirely different when we come to the second part. As already stated, the second part when analysed is nothing more than a direction by the State Government to the Municipality not to collect the arrears of tax. We should have thought that the power of control given to the Government over Municipalities would be in order to see that the Municipalities collect arrears of tax.

It would indeed be a strange control that the State Government should ask the Municipality not to collect a tax which has been properly levied and which is due and outstanding and has not been paid. Therefore, we must require very clear and explicit language in the statute which would induce us to hold that such a power has been-conferred upon the State Government and the State Govt. was acting in the exercise of that power in issuing the second part of the order of April 8, 1953. As already pointed out, as far as Section 59 is concerned, the general or special order must have a relationship to the imposing of a tax, and the second part of the order of April 8, 1953, does not in any way deal with the imposing or levying of a tax. It deals with collecting of arrears of tax and therefore clearly that part of the order cannot fall within the purview of Section 59.

7. The Advocate General has relied on a decision of a division bench of this Court in -- Emperor Vs. Dema Mahadu Amberkar, . There Mr. Justice Broomfield and Mr. Justice Wassoodew were considering identical provisions of law in the Bombay Local Boards Act of 1923, and the Advocate General relies on a passage in the judgment of Mr. Justice Broomfield at p. 378. The observation is "obiter", but certainly entitled to respect, and what Mr. Justice Broomfield says is that u/s 99, which corresponds to Section 59 of the Bombay District Municipal Act, when the Legislature has used the language "subject to any general or special orders", the Government has been given wide and unrestricted powers.

Now, there the question that came to be considered was that a certain tax was sanctioned for a particular duration and Government by an order extended the period, and what was argued was that it was not competent to Government to extend the duration of the tax by a general or special order u/s 99 and that argument was rejected by the Court. With respect, we are prepared to accept the view taken by this Court in Emperor Vs. Dema Mahadu Amberkar, that the power conferred upon Government u/s 59 is a very wide and unrestricted power.

But even so, however wide and unrestricted the power may be, the power must be confined to the subject-matter of the section itself. The wide and unrestricted power to issue a general or special order must be related to the subject-matter of the imposing or levying of a tax. The wide and unrestricted power cannot possibly be availed of in respect of a subject-matter which is foreign to the ambit of Section 59, and what the State Government has attempted to do here is to use its wide and unrestricted power u/s 59 to control the imposing or the levying of the tax for the purpose of prohibiting the Municipality from collecting the tax.

8. Then the Advocate General points out that u/s 174 it was open to the Collector, and it is now open to the Director of Local Authorities, to prohibit the Municipality from collecting a tax. But that power is subject to certain limitations and that power can only be exercised provided in the opinion of the Collector or the Director of Local Authorities the act of the Municipality is likely to cause injury or annoyance to the public or to lead to a breach of the peace or is unlawful. It is not suggested that the collection of the tax by the Municipality

from opponent No. 2 is an act which falls in any of these categories. Further, it is not the case of the State Government that any order has been issued u/s 174. But the Advocate General relies on Section 174 in order to ask us to read Section 59 bearing in mind the wide powers conferred by the Legislature upon the State Government u/s 174.

But even considering Section 174 it is impossible to hold that because the Government has been given power in certain cases to prevent the Municipality from acting and even though in those cases the Municipality may be prevented from collecting a tax, it therefore follows that u/s 59 by issuing a general or special order the Government can prevent the Municipality from collecting a tax which it has lawfully and validly levied.

9. Mr. Kantawalla who appears for opponent No. 2 wants to satisfy us that the levy of the tax by the Municipality is unlawful because according to him the articles on which the octroi duty has been levied falls in the class of exemptions enumerated in by-law No. 4 of the Vijapur Municipality sanctioned by Government on April 26, 1952. Reliance is placed on Clauses (c) and (f) of by-law No. 4. Clause (c) exempts goods which are the property of the public authority and are imported for the bona fide use of such authority and are not for sale to the public or to any private person and are accompanied at the time of import with an invoice endorsed with a certificate and declaration in terms of Schedule "B" which is annexed to that clause.

Clause (f) exempts seeds, manure and implements imported for agricultural purposes. When we turn to the form annexed as Schedule "B", the form is not in conformity with Clause (c) because whereas Clause (c) requires two conditions before the goods can be exempted, viz., that they should be the property of the public authority and should be imported for the bona fide use of such authority, the form mentions details of goods, and goods belonging to: (1) Government, Municipality or Local Board, or (2) Are required in fulfilment of a specified contract made with Government. Now, this "or" is obviously a mistake and that is clear when we turn to the Gujarati rule which does not mention the "or" and requires both the conditions to be satisfied.

10. Mr. Kantawalla relied on a certain letter written by the Collector of Mehsana on October 24, 1952, to the President of the Vijapur Municipality. By that letter the Collector enclosed a certain certificate issued by Government to which we shall presently refer, and in para. 2 of the letter he states:

"Government considers that the articles should actually have been exempted as those covered by Rule 4 (2) (f) of the Octroi Rules of the Vijapur Municipality as being required for the Tube Wells Scheme, which is hundred per cent for agricultural purposes."

And in para. 3 he states:

"You are, therefore, requested to grant the exemption and release all the goods

of the National Tube Wells, immediately, under intimation to this office."

What is urged by Mr. Kantawalla is that this letter constitutes an order u/s 174, and the Collector having taken the view that the articles fell under Rule 4 (2) (f), the Municipality was acting contrary to law in imposing an octroi duty, and therefore the Collector was prohibiting the Municipality from collecting the tax and was exercising its power u/s 174. This is indeed a very bold argument because it is not the case of the State Government that any order was issued by the Collector u/s 174, nor does Government rely on the letter of October 24, 1952, as an order u/s 174. It is impossible to accept the contention of Mr. Kantawalla that every letter written by a Collector, merely because it contains an opinion of Government, necessarily constitutes an order under the District Municipal Act.

But what is more is that Government when it issued the order of April 8, 1953, issued it on the clear assumption that the levy by the Municipality was a lawful levy and in its affidavit its case is that the second opponent company is exempt from paying any octroi tax by reason of the aforesaid resolution of April 8, 1953. This is a clear admission that but for the resolution of April 8, 1953, the second opponent company was liable to pay-octroi duty. Therefore, it is by reason of the Government purporting to exempt the second opponent company by the resolution of April 8, 1953, that the Municipality has been prohibited from collecting the tax.

11. Then turning to the exemption certificate under Rule 4 (2) (c) which is sent along with that, letter and to which reference is made in the Collector's letter of October 24, 1952, the certificate follows the form in the by laws and the Government certified that the goods are required in fulfilment of a specified contract made with Government, and obviously the view taken by the Collector, which is entirely insupportable in law. was that the goods of the second opponent company, because they were required in fulfilment of a specified contract made with Government, fell under the exemption provided by Rule 4 (2) (c).

He overlooked the fact that the rules specifically-state that before the exemption applied the goods must be the property of a public authority, and as already pointed out it is not disputed and cannot be disputed that in this case the goods do not belong to a public authority but were the goods of the second opponent company which is a limited company and not a public authority. But in this petition we are only concerned with considering the legal efficacy of the order issued by the Government on April 8, 1953.

We are not called upon to consider whether the goods fell under any of the classes of exemptions provided by by-law 4 (2). It would be perfectly open to the second opponent company, after it has paid the tax which has been levied upon it under protest, to agitate this question if it is so advised, by filing a proper suit claiming refund of this tax. It would then not be bound by any view taken by the Government as to the legality of the levy. But as far as the present petition is

concerned, the petitioner is entitled to rely upon the admission of Government that the levy of the tax is legal and valid, and it is on that basis and that assumption that we have to consider the power of the Government u/s 59 to prohibit the Municipality from collecting the tax imposed upon the second opponent company.

12. In our opinion, therefore, the order is bad to the extent that it prohibits the petitioner from recovering the amounts due or outstanding on account of the octroi tax on the date of this order which has already been imposed and levied, and we will therefore issue a, direction against the Government from preventing the petitioner from collecting the tax levied by the petitioner upon the second opponent company in respect of the goods which were imported within the jurisdiction of the Vijapur Municipality.

13. The opponents to pay the costs of the petitioner.

14. Order accordingly.