Municipal Coporation of The City of Baroda

Vs

Babubhai Himatlal and Others.

Civil Appeal No. 1086 of 1971

(K. N. Saikia, G. L. Oza JJ)

16.08.1989

JUDGMENT

OZA J. –

This appeal, on certificate by the High Court of Gujarat, is files against the judgment of the Gujarat High Court dated April 28, 1971, holding Standing Order No. 3 framed under section 466(1)(A)(f) read with section 147 of the Bombay Provincial Corporations Act, 1949 ("Act" for short), as illegal and without the authority of law.

This Act applies to the city of Baroda and the present appellant, the Munucipal Corporation of Baroda, is governed by this Act. It is not in dispute that octroi on the import of goods is chargeable under the scheme of the Act. Before the standing order which is the subject- matter of challenge before the High Court and before us was framed, a transporter who brought goods within the limits of the Municipal Corporation, in view of section 147 of this Act, was to pay the octroi duty chargeable on the goods on the assumption that the goods had been imported for sale or consumption in the limits of the City of Baroda. Under the scheme as it was in force, if the goods were not consumed or sold within the limits of the Municipal Corporation and were taken out on the other end, and if the octroi post authority were satisfied that the goods which had entered, were being taken out, then the transporter had to get the tax which he had paid at the octroi post refunded. According to the appellant-Corporation, this procedure took time at both ends and those transporters who were carrying goods which were only in transit in the City of Baroda still had to suffer the inconvenience of paying the octroi duty when they entered the city limits and then satisfying the authorities at the post from where they went out of town and also had first to pay the tax and then claim a refund. In order to avoid inconvenience and the burden on the transporter, this Standing Order was provided so that when a transporter enters the corporation limits with goods which are only in transit and not to be unloaded for sale or consumption within the corporation limits and if the transporter so chooses, on payment of supervision fees, the transporter can carry the goods through the Corporation limits without payment of octroi under the supervision of the staff of the Corporation and, for this purpose, under this Standing Order, a fee of Rs. 2 per heavy vehicle was prescribed. It is alleged that originally the fee suggested was Rs. 5 but, on a representation made by the respondent-association itself, this was reduced to Rs. 2 per vehicle.

By the impugned judgment, the High Court of Gujarat came to the conclusion that, under section 466(1)(A)(f) of the Act, no doubt the Commissioner had the authority to frame standing orders but he could frame standing orders only in respect of goods on which octroi was payable under section 466(1) (A)(f) and, as the goods, admittedly, for which this fee was prescribed, were goods not to be imported for sale or consumption, octroi was not payable thereon and, therefore, no standing orders

could be framed under section 466 (1)(A)(f) and, therefore, a standing order providing for fees as discussed above was beyond the authority of the Commissioner under this Act.

The High Court also accepted the second contention of the respondent that, although the Corporation claims to charge the fee as a fee for the convenience of the transporter, but after examining the scheme, the learned judges of the High Court came to the conclusion that there is no quid pro quo established nor is it established that the charge and the collection made on the basis of this charge had any rational nexus with the services rendered by the Corporation. Aggrieved by this decision of the High Court, the Municipal Corporation has come up in appeal.

The main contention advanced on behalf of the appellant was that imposition of this fee by the Corporation could not be said to be an imposition as it was optional as, when a transporter brings goods and enters into the corporation limits, it was open to him either to choose to take advantage of this standing order by paying supervision fees and taking the goods straight under the supervision of the corporation authorities without the payment of octroi duty but if a transporter chooses not to take advantage of the standing order, it was not compulsory and it was open to the transporter to pay the octroi in accordance with the normal rule and follow the normal procedure by satisfying the checkpost authorities on the other end and claim refund and get it after following the due procedure. It was, therfore, contended that, in fact, this was an option given to the transporter so that, if they so choose, they may follow this standing order and save themselves from the hardship of paying the octroi and then claiming the refund and, for that purpose, stopping at the entry checkpost and again at the exit checkpost and also to satisfy the checkpost authorities that the goods which had entered the corporation limits are being taken out in the same state and it also involved handling of money by the transporter so that it may be possible for him to pay the octroi at the entry checkpost itself. It was, therefore, contended firstly that it being a option to the transporter, it could not be said to be an imposition or a tax and the question of the authority of the Commissioner does not arise. That in view of the language of section 466 (1)(A)(f), it is clearly within the authority of the Commissioner to frame standing orders and the standing orders, had the approval of the Standing Committee and also of the State Government and, therefore, it could not be said that the standing orders are not framed in accordance with section 466.

It was also contended that the affidavit filed in the High Court by the appellant clearly shows that this fee is collected and spent for the purpose of giving a facility to the transporter for carrying the goods in transit under the supervision of the corporation authorities so that they have not to suffer the inconvenience and it was contended that, in substance; therefore, the requirement of a quid pro quo is satisfied and, in fact, the fee is charged only to facilitate the transporter in carrying the goods in transit without payment of octroi and without undue detention in the process of payment of octroi at the entry and claiming a refund at the exit. It is alleged that a notice was issued suggesting this procedure as prescribed in the standing orders, a representation was made by the respondent-association accepting the suggestion of the Corporation but suggested that Rs. 5 per vehicle suggested by the Corporation would be too much and that it should be reduced to Rs. 2 and it was on this representation that, in fact, the Corporation, the present appellant, chose to reduce the supervision charges to Rs. 2 per vehicle. It was, therefore, contended that now it is not open to the respondent-association to say that this is not in accordance with law.

Learned counsel for the respondent stated that although a representation about the supervision fee was made by the association, it could not be said that there was any agreement entered into by the association nor could it be said that the association could enter into such an agreement with the Corporation. It was contended that the High Court was right in reaching the conclusion that the

Commissioner had no authority under section 466 and that, in fact, a quid pro quo is not satisfied as no service is rendered to the transporter. Learned counsel for parties referred to the decisions of this court on the question of fee and the principle of quid pro quo.

Section 466(1)(2)(A)(f) reads :

> "466. (1) The Commissioner may make Standing Orders consistent with the provisions of this Act and the rules and bye-laws in respect of the following matters, namely :...
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> (f) determining the supervision under which the routes by which and the time within which goods intended for immediate exportation shall be conveyed out of the City and the fees payable by persons so conveying the goods;"

This contemplates the authority of the Commissioner to make standing orders consistent with this Act, rules or bye-laws in respect of the Act. Clause (f) talks of supervision under which and the routes by which and the time when goods introduced for immediate exportation shall be conveyed out of the City and the fee is payable by the person carrying the goods. It is, therefore, clear that this clause (f) contemplates that the Commissioner may, by a Standing Order, prescribe the procedure for the goods which are introduced in the city limits, for immediate exportation and also the fees which could be charged. It is, therefore, clear that the provision which confers authority on the Commissioner to frame Standing Orders does not talk of goods on which octroi is payable. But section 466 pertains to collection of octroi. Sub-section (2) of this section provides :

> "(2) No order made by the Commissioner under clause (A) of sub-section (1) shall be valid unless it is approved by the Standing Committee and confirmed by the State Government, and no order made by the Commissioner under clause (B) or paragraph (e) of clause (c) of sub- section (1) shall be valid unless it is approved by the Standing Committee."

It is not in dispute that these Standing Orders have been approved by the Standing Committee and confirmed by the State Government which is clear from the notification which read as under :

BARODA MUNICIPAL CORPORATION

> "The Standing Orders made by the Municipal Commissioners, Baroda, Municipal Corporation, Baroda, under section 466(1)(A)(f) of the Bombay Provincial Municipal Corporations Act, 1949, vide his Order No. 2441 dated August 16, 1969 and approved by the Standing Committee under its Resolution No. 882 dated November 28, 1969, and confirmed by the Government under their Resolution P.H.D. No. BMC 4470-160 P. dated the March 12, 1970."

Section 147 of this Act reads :

> "Until the contrary is proved any goods imported in the City shall be presumed to have been imported for the purpose of consumption, use or sale therein unless such goods are conveyed from the place of import to the place of export, by such routes, within such time, under such supervision and on payment of such fees therefore as shall be determined by the Standing Orders."

It is clear from this section that, when any goods are brought within the corporation limits, a presumption arises that they have been brought in for the purpose of sale or consumption and that the burden lies on the person who imports the goods to prove that they are not for sale or consumption and it is on the basis of the language of section 147 that the normal procedure, before this Standing Order was introduced, was that when goods entered into the corporation limits they have to stop at the checkpost and pay octroi duty on the goods as provided by the rules. For getting out of the local limits, the transporter has to satisfy the checkpost authorities that the goods on which he has paid octroi and imported are being exported out of the city and it is only after satisfying the authorities that the goods on which octroi is paid are being exported that the transporter can claim refund of the octroi duty already paid. It is, therefore, clear that the language of section 147 in the scheme of the octroi clearly indicates a presumption which is a rebuttable presumption. The burden, however, lay on the transporter to establish that the goods are not for consumption or sale. So far as this scheme before the introduction of disputed Standing Order is concerned, there is no controversy. The only controversy is about the standing order which has been introduced. It is also clear that so far as this Standing Order No. 3 is concerned wherein the transporter is to pay a supervision fee, it is not compulsory as it is the option of the transporter to take advantage of this Standing Order if he so chooses or otherwise to follow the normal procedure of payment of octroi and claiming refund as is clear from the affidavit filed before the High Court by the appellant's Officer, i.e., Octroi Superintendent. Paragraph 14 of this affidavit reads :

> "Thus the system of clearing the through traffic on charging normal supervision fees is really in the larger interest of the importers. As I have pointed out hereinabove this is not obligatory but purely voluntary and optional. Those who do not want to avail of this facility need not avail of it and may follow the other procedure already indicated hereinabove."

It is, therefore, clear that there is no compulsion on the transporter to pay a supervision fee. It is only an option so that if the transporter wishes to take advantage of this scheme and save time,he can choose to follow it.

It is thus clear that so far as the authority of the Commissioner under section 466 of the Act is concerned and the manner in which the Standing Orders are framed, it is clear that the Commissioner had the authority and the Standing Orders have been framed in accordance with the procedure prescribed under section 466 and, therefore, on that count, the judgment of the High Court could not be sustained.

The High Court took the view that the State Legislature could enact section 466 only if it can be brought within the ambit of entry 52 of the State List as, that is the only entry which authorises the State Legislature to impose a tax on entry of goods into a local area and the learned judges felt that as under section 466 and under the Standing Order in question, a supervision fee is charged on goods which are not for sale or consumption in the local limits, this could not be justified under entry 52. The learned judges, therefore, took the view that Standing Orders which the Commissioner could frame under section 466 could be in respect of goods on which octroi is payable and not pertaining to goods on which the octroi is not payable. It appears that, while taking this view, the High Court was examining the fee prescribed as a tax and it is on the basis of this that the High Court took the view that no such tax could be levied on goods on which no octroi is payable. So far as the question as to whether this fee could be said to be a tax is concerned, there is no difficulty as even learned counsel appearing for the appellant do not contend that it can be said to be a tax and, as it is not a tax, the imposition could not be said to be bad because the State

Legislature had no authority to impose it. It was tended by learned counsel that, in view of section 147 quoted above, any import within the local limits would draw a presumption that it is for comsumption or sale and, therefore, octroi duty on the goods becomes payable. By this standing order, the Corporation has attempted to make it convenient to the transporter not to involve himself in the payment of octroi duty at the entry and after satisfying the authorities at the exit and claim the refund of the octroi paid, thereby the Corporation intended to help the transporter in saving time and also in payment of the octroi at one end and later on claiming a refund at the other end. This, in fact, was service rendered by the Corporation for the benefit of the transporter and the fee which was charged was just to meet the approximate expenses that the Corportion may have to incur to provide this facility as has been clearly stated by the Corporation Officer in his affidavit before the High Court and, in fact, even the Corporation accepted the suggestion of the petitioner-association when the association to the appellant-Corporation to reduce the fee from Rs. 5 to Rs. 2 which is clear from the letter written by the association to the Corporation dated March 31, 1970. As regards this aspect of the matter, the learned judges of the High Court came to the conclusion that there was quid pro quo established which could justify the levy of this fee as a fee for the services rendered, in the interest of the transporter. In Southern Pharmaceuticals and Chemicals v. State of Kerala [1982] 1 SCR 519, 541; AIR 1981 SC 1863, this court, after considering the various decisions, distinguished fee from tax in these words (at page 1874 of AIR 1981 SC) :

> Be the amounts paid for a privilege, and are not an obligation, but the payment is voluntary. Fees are distinguished from taxes in that the chief purpose of a tax is to raise funds for the support of the Government or for a public purpose, while a fee may be charged for the privilege or benefit conferred, or service rendered or to meet the expenses connected therewith. Thus, fees are nothing but payment for some special privilege granted or service rendered."

As regards the principle of quid pro quo rule in the same judgment, it was observed (at page 1874 of AIR 1981 SC) :

> "That is because the Constitution did not contemplate it is to be an essential element of a fee that it should be credited to a separate fund and not to the consolidated fund. It is also increasingly realised that the element of quid pro quo stricto sensu is not always a sine qua non of a fee. It is needless to stress that the element of quid pro quo is not necessarily absent in every tax."

In the light of these observations, if the affidavit filed on behalf of the appellant-Corporation explaining the amount expected to be collected and spent in the process of supervision is examined, it could not be said, as was stated by the High Court, that it did not satisfy the quid pro quo principle. It is in this background that the question that this Standing Order does not impose a compulsory levy but it only gives an option to the transporter to take the advantage of this provision make it further clear that it is not a levy or an imposition of tax but merely a fee charged for the privilege or service rendered to the payer. In Sreenivasa General Traders v. State of Andhra Pradesh [1983] 3 SCR 843; AIR 1983 SC 1246, this court considered a series of decision on the question and observed (at page 1262 of AIR 1983 SC) :

> "There is no generic difference between a tax and a fee. Both are compulsory exactions of money by public authorities. Compulsion lies in the fact that payment is enforceable by law against a person in spite of his unwillingness or want of consent. A levy in the nature of a fee does not cease to be of that character merely because

> there is an element of compulsion or coerciveness present in in it, nor is it a postulate of a fee that it must have direct relation to the actual service rendered by the authority to each individual who obtains the benefit of the service. It is now increasingly realized that merely because the collection for the services rendered or grant of a privilege or licence are taken to the Consolidated Fund of the State and not separately appropriated towards the expenditure for rendering the service this is not by itself decisive, presumably, the attention of the court in the Shirur Mutt's case, AIR 1954 SC 282, was not drawn to article 266 of the Constitution. The Constitution nowhere contemplates it to be an essential element of fee that it should be credited to a separate fund and not to the Consolidated Fund. It is also increasingly realized that the element of quid pro quo in the strict sense is not always a sine qua non for a fee, it is needless to stress that the element of quid pro quo is not necessarily absent in every tax : Constitutional Law of India by H. M. Seervai, volume 2, 2nd edition, page 1252, para 22.39."

It is, therefore, clear that, in order to establish a quid pro quo concept, it is not necessary to establist exactly that the amount collected is spent on the services rendered as it was further observed in this decision (at page 1261 of AIR 1983 SC) :

> "The traditional view that there must be actual quid pro quo for a fee has undergone a sea change in the subsequent decisions. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as part of a common burden, while a fee is for payment of a specific benefit or privilege although the special advantage is secondary to the primary motive of regulation in public interest. If the element of revenue for the general purpose of the State predominates, the levy becomes a tax. In regard to fees there is, and must always be, correlation between the fee collected and the service intended to be rendered. In determining whether a levy is a fee, the true test must be whether its primary and essential purpose is to render specific services to a specified area or class; it may be of no consequence that the State may ultimately and indirectly be benefited by it. The power of any Legislature to levy a fee is conditioned by the fact that it must be 'by and large' a quid pro quo for the services renderede. However, correlationship between the levy and the services rendered expected is one of general character and not of mathematical exactitude. All that is necessary is that there should be a 'reasonable relationship' between the levy of the fee and the services rendered."

It is, therefore, clear that so far as the charging of supervision fees is concerned, it reasonably appears to be a charge for the services rendered, from the affidavit filed by the Officers of the appellant-Corporation and, therefore, the High Court was not right in coming to the conclusion that this fee was not justified as it is not established that it reasonably satisfies that it is in consideration of the services of privilege conferred on the transporter on goods in transit.

In our opinion, therefore, the judgment of the High Court could not be sustained. The appeal is, therefore, allowed. The judgment of the High Court is set aside and it is held that Standing Order No. 3 passed by the appellant-Municipal Corporation is valid and enforceable. The appellant shall also be entitled to costs of this appeal. Costs quantified at Rs. 5,000.

Appeal allowed.

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