HMM Limited and Another

Vs

Administrator, Bangalore City Corporation and Another

Civil Appeal No. 4160 of 1989

(Sabyasachi Mukharji, B. C. Ray JJ)

04.10.1989

JUDGMENT

SABYASACHI MUKHARJI, J. –

1.Leave granted.

2. This is an appeal from the judgment and order of the Division Bench of the High Court of Karnataka dated March, 24, 1988.

3. There was a notification under Section 98(2) of the City of Bangalore Municipal Corporation Act, 1949 dated March 4, 1975 levying octroi, inter alia, on food drinks (including milkfood) brought into the municipal limits of Bangalore for sale, consumption or use. On October 8, 1976, representation was submitted on behalf of the petitioners, HMM Limited, protesting against levy of octroi on "Horlicks" milkfood powder brought into the municipal limits in bulk containers (large steel drums) for being packed at the packing station in Bangalore in unit containers (glass bottles) and thereafter exported outside the municipal limits. In respect of the quantity of the goods which were exported outside the municipal limits after being bottled, the petitioners sought refund of the octroi duty as there was no use or consumption or sale of the said milkfood within the municipal limits. The respondent corporation rejected the claim on the ground that Rule 24 of the bye-law 45 framed by the Municipal Corporation had not been complied with and as such refund could not be given. The petitioners again sought on February 4, 1978, refund of octroi duty for the period 1974-75 to December 1977 amounting to Rs. 13,39,652.92 enclosing computation of the duty collected for the aforesaid period. Again, the refund was refused by the respondents in March 1978. Petitioners thereafter filed writ petition in the High Court of Karnataka challenging the levy/retention of octroi duty on "Horlicks" exported out of the municipal limits and seeking refund thereof. From April 1, 1979, levy of octroi on milkfood was totally abolished in Karnataka. Learned Single Judge of the High Court on February 1, 1984, allowed the writ petition and directed that the amount of octroi duty collected for the period commencing three years prior to the filing of the writ petition be verified within 3 months and refunded within 45 days thereof. Learned Single Judge noted that the case of the petitioners was that if it was engaged in the manufacture and sale of a malted milk product marketed under the brand name "Horlicks". The petitioner used to manufacture the said product in its two factories situated at Nabha in the State of Punjab and Rajahmundhry in the State of Andhra Pradesh and marketed these throughout the country through its bottling and marketing centres situated in different parts of the country. One such centre was situated in the city of Bangalore to which it brought its said product in bulk, then rebottled the same in small bottles of different capacities like 800 gms, 450 gms and 250 gms. It was the case of petitioners that small portion of the product, rebottled in small bottles, alone was sold within the city of Bangalore to its

dealers and the rest was exported to its agents situated in different part of the State and other nearby places of the country also. In this connection, it may be mentioned that Rules 24 to 27 of the relevant bye-laws were as follows :

> "24. On all articles on which octroi duty has been paid and which are subsequently exported beyond the octroi limits without breaking bulk, refunds shall, subject to the following rules, be granted at the rates originally charged at the time of import; provided that no such refunds shall, except in the case of timber imported and re-exported in log be granted unless such goods are exported within three months from the date on which octroi was levied.
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> 25. Any person claiming refund under the above bye-laws shall produce the goods to be exported at the Central Octroi Office, together with the original receipt for octroi duty paid thereon, and an application for refund prepared in triplicate in the from prescribed in Schedule V. He shall fill up the columns 1 to 10 of the application signing and dating the same, before he presents it at the Central Octroi Office. He shall produce for record in office a certified copy of the invoice as per which duty was paid on the article at the time of its import.
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> 26. Any person who has been exempted under bye-law 10 from production of goods at the Central Octroi Office on import shall, subject to the same conditions, be exempted from the production of goods to be exported.
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> 27. The Octroi Superintendent of the Central Octroi Office on being satisfied as to identity of the goods produced with those for which the receipt has been granted or the validity of the claim, shall fill up columns 11 to 15 and also the coupon and hand over the form to the exporter."

4. There is not dispute that on the entire quantity of the goods brought within the municipal limits, octroi was collected from the petitioner. It claimed for refund only in respect of those quantities which were rebottled and exported from the city to outside places. This was refund. The contention of the petitioners was that only that portion of the goods which was imported in drums and was rebottled in bottles and exported outside the city was not liable to duty of octroi. It was contended before the learned Single Judge that portion of the goods was not dutiable to octroi as these did not fall within the term "sale, consumption or use" within the local area of the city of Bangalore. When the petitioner approached the High Court, Rule 24 aforesaid of the bye-law 45 was in force. Octroi was, however, abolished with effect from April 1, 1979. The question that was canvassed before the learned Single Judge of the High Court was that when the product was imported in bulk in the city only for rebottling and rebottled in small bottles for the consumer requirements and marketed, there could not be consumption or sale of that product. On the other hand, it was contended that in any event, it is a case of 'use' to attract levy of octroi. The Horlicks powder remains the same even after packing, as was held by Mittal, J. of the High Court of Punjab in C.W.P. No. 19873 of 1977. In that case, the Horlicks powder in drums was sold direct to bulk consumers. It was held that the Horlicks powder remains the same after packing. It does not become different commodity. It also cannot be held that it acquired distinct commercial utility, according to Mittal, J. Therefore, in that context, Mittal, J., held that the packing of the Horlicks powder in small bottles does not fall within the ambit of the word 'use' and, therefore, the petitioner in that case was not liable to the charge of octroi for its import within the limits of the city. This decision was affirmed by the Division Bench. It was contended that in the judgment before Mittal, J., packing was entrusted to a separate agency,

but it does not make any difference, according to the learned Single Judge of Bangalore. Therefore, the learned Single Judge in this case found that only on that quantity of milk product imported by the petitioner in bulk but rebottled in small bottles at its Bangalore bottling station and exporting from the city to other places for sale in those places and not using the same in Bangalore city, was not dutiable to octroi till that levy was in force. The learned Single Judge, therefore, held that the amounts so levied and collected as octroi for a period of three year prior to the presentations of the writ petition only and not beyond that are refundable by the respondents to the petitioner. He directed refund and pursuant to this direction, the learned Single Judge further directed that the same may be verified. We were informed that the same has been verified.

5. There was an appeal to the Division Bench of the High Court. The question before the Division Bench was whether the Corporation was liable to refund that part of the amount of octroi duty paid by the petitioners on the quantity of the Horlicks powder imported into the city of Bangalore on the petitioners' informing the Corporation that they had despatched that part of the same from to time by filling the same in bottles to places outside the city of Bangalore even though petitioners had not followed the procedure prescribed in Rules 24 and 25 of bye-law 45 framed by the Corporation and even though they had not even informed of such despatches as and when these were made ?

6. Item 17 of the Notification dated March 4, 1975, as mentioned before, so long as it continued, was as follows :

> "17. Confectionary, biscuits, toffee, chocolates, food essence, food colours, aerated water and soft drinks, food drinks other than milk in condensed form bottled or canned arecanuts both scented or plain.
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> 2 per cent. of ad valorem 0.06 ps. 10 kg."

7. The Division Bench noted that in terms of the aforesaid levy, the petitioners were paying octroi on the basis of the total quantity of Horlicks imported into the city of Bangalore. Then a letter was addressed on October 8, 1975 to the Corporation of the city of Bangalore, which was set out in the judgment of the Division Bench. In the said letter, it was, inter alia, stated that the petitioners were not bringing the goods within the municipal limits for use or consumption therein and as such the imposition of octroi was illegal and unwarranted and that the petitioners had paid under protest the amount claimed the refund. The petitioners claimed only the octroi paid on the goods which were exported outside the city of Bangalore and not used or consumed within the city. The petitioners further stated, inter alia, as follows :

> "The petitioner is willing to differentiate the goods intended to be used or consumed within the octroi limit of Bangalore and the goods which are exported out of the limits of Bangalore and not used or consumed therein appropriately in order to facilitate movements of goods and avoid difficulties to the octroi incharge."

8. The Corporation turned down the demand. The Division Bench noted that the petition was resisted by the respondent on two grounds :

> "1. The transferring of Horlicks imported in bulk into the city of Bangalore into bottles amounts to use of the Horlicks within the city of Bangalore notwithstanding the fact that a part of the total number of the bottles were despatched outside the city of Bangalore.

2. The octroi collected on the Horlicks imported into the city of Bangalore was in accordance with the law and unless the procedure prescribed under Rules 24 and 25 of the bye-law 45 was followed, no obligation or duty was cast on the part of the Corporation to refund any part of the octroi collected."

9. The Division Bench of the High Court in the decision under appeal observed that as far as the first ground raised was concerned, the learned Single Judge had rejected the claim and held that when the Horlicks powder was transferred into bottles of different sizes it did not use Horlicks within the city of Bangalore. In this connections, the Division Bench referred to the decision of Burmah Shell Oil Storage & Distributing Co. of India Ltd., v. Belgaum Borough Municipality (1963 Supp 2 SCR 216 : AIR 1963 SC 906). This Court in that case held that mere transferring of a bulk product into small containers like packets or bottles for the purpose of sale does not amount to use of the goods in the sense the word is used in relation to levy of octroi. On this aspect, the Division Bench agreed with the learned Single Judge. So far as the second contention raised by the Corporation was concerned, the Division Bench noted that the relevant provision of the rules was not considered. We have set out hereinbefore the said rules. In the Schedule there is a form for refund. The contention of the petitioners was that Rule 24 did not apply. Rule 24, as we have noticed hereinbefore, provided that in respect of articles on which octroi has been paid and which are 'subsequently exported beyond the octroi limits without breaking bulk', refunds shall be subject to the rules indicated therein. So, according to the petitioners, after opening for breaking open the drums and putting the powder in the bottles, as in this case amount to breaking bulk, and as such there was no scope of applying for refund under Rule 24. But the Corporation contended that it was not so. The Division Bench, however, accepted the contention of the Corporation. It is indubitably true that the petitioners had not claimed the refund in accordance with the law because according to the petitioners the said rules would have no application as the bulk was broken. The Division Bench, however, observed that the petitioners in their letter addressed to the Commissioner have specifically stated that the goods were subsequently exported outside the city of Bangalore as envisaged by bye-law 24 of Notification No. N.A.I. (53) of 1952-53 dated April 5, 1954. Regarding the expression "without breaking bulk", the Division Bench of the High Court was unable to accept the contention that the bulk of the goods on which the octroi has been paid was transferred to containers of small sizes and despatched outside the city, the bulk was broken. But the question was whether in such a situation, it can be said that it was done without breaking the bulk. The Division Bench was of the view that having regard to the rule and having regard to the fact that it was imported into the city of Bangalore, and was to be despatched outside the city of Bangalore in the same form i.e., without the same having been used or sold or consumed in the production or manufacture of other goods, the person concerned can only claim refund in accordance with the rules. Therefore, according to the Division Bench, no importance can be attached to the expression "without breaking bulk" on despatched of the goods. Refund could be claimed only on despatches of the goods outside the city, for octroi is leviable only if the goods imported into the city are consumed, used or sold within the city. Therefore, 'bulk', in the view of the Division Bench, was, in fact, broken and the petitioner not having applied in accordance with Rules 24 and 25, no amount could be refunded to the appellant. In that view of the matter, the appeal was allowed by the Division Bench and the judgment of the leaned Single Judge was reversed.

10. It may be mentioned that there is no dispute that the Horlicks powder was brought in bulk in drums. At the relevant time, there was levy of octroi at the entry of such goods. After being imported, it has been found that the entirety of the Horlicks powder had not been sold. A part of the powder has been put in the bottles and exported outside the city of Bangalore. It has been found by the Division Bench that putting powder from the drums to the bottles inside the city, is not user or

consumption as contemplated by the rule. And on that no octroi duty was leviable. In this case also, it has been found pursuant to the order of the learned Single Judge how much octroi will be refundable on account which has been paid by the petitioners. The only ground on which the Division Bench had resisted the refund was that the petitioners did not apply in accordance with the procedure envisaged by Rules 24 and 25 of the aforesaid bye-laws. Mr. Krishnamurthy Iyer, learned counsel for the respondent, contended that the High Court was right in the view it took on the construction of Rules 24, 25 and 26. We are unable to agree with this submission. As we have indicated before, "without breaking bulk" is not an expression of art, nor is it an expression defined in the Act or the rules. It has, therefore, to construed in its literal and ordinary sense to the extent possible, and construed as it is, in our opinion, transferring the product from the drums by breaking seal of the drums to bottles, cannot be said to be "without breaking bulk". "Breaking bulk" is an expression not unknown to legal terminology especially in England. In the Cyclopedic Law Dictionary, 3rd edn., "breaking bulk" has been stated to mean that for a bailee to open a box or packaging entrusted to his custody and fraudulently appropriate its contents. In Stroud's Judicial Dictionary, 4th edn., Vol. 1, it has been stated that to 'break bulk' is not now necessary to constitute larceny or theft by a bailee. It is stated that the cases were very numerous and turned on nice distinctions as to what amounted to "breaking bulk". In the Dictionary of English Law by Earl Jowitt "breaking bulk" has been defined as that at common law there could be no larceny of goods which had originally been lawfully obtained by a person who subsequently wrongfully converted them to his own use, unless such conversion was preceded by some new act of taking. If that is so, we are unable to agree with the construction suggested by the Division Bench. It was contended that the octroi was leviable on the entry of the goods in the municipal limits of the city but the Horlicks powder had not entered into the local limits of Bangalore for the purpose of use or consumption, as understood in the decision of the Burmah Shell case (1963 Supp 2 SCR 216 : AIR 1963 SC 906) and as found both by the learned Single Judge and the Division Bench that putting the powder from the drums to the bottles for the purpose of exporting or for taking this out of the city, is neither use nor consumption of the Horlicks powder, attracting the levy of octroi. Certainly, the bulk was broken in the procedure followed. The High Court was wrong in putting the construction on the expression as it did. Mr. Iyer sought to raise before us the plea that in a case where refund is due in respect of the duties like this whether petitioners would be entitled to refund on the basis that refund cannot be given because there was possibility of undue enrichment of the claimant, is pending before the seven Judge Constitution Bench in this Court. Therefore, it was submitted that we should await the said decision or refer the matter to the Constitution Bench. Octroi in this case is a duty on the entry of the raw materials for coming in. It is the duty on the coming in of the raw materials which is payable by the producer or the manufacturer. It is not the duty on going out of the finished products in respect of which the duty might have been charged or added to the costs passed on the consumers. In such a situation, no question of 'undue enrichment' can possibly arise in this case. If that is the position then the pendency of the question before the Constitution Bench should not deter us from proceeding with this adjudication.

11. Shri Ganesh drew our attention to a decision of this Court in Kirpal Singh Duggal v. Municipal Board, Ghaziabad ((1968) 3 SCR 551 : AIR 1968 SC 1416). There, the appellant had transported, between August 1953 and March 1955, certain materials in execution of a contract to supply goods for use by the government of India. The respondent Municipality collected toll while the appellant's trucks were passing through the toll barrier. The appellant, in that case, obtained in June 1955, a certificate from the authority concerned that the goods transported were "meant for government work and had become the property of the government". The appellant then applied to the municipality for refund of the amount paid pursuant to the exemption granted by the Government of

India under the U.P. Municipalities Act, 1916. The respondent declined to refund the amount. In an action against the respondent, the trial court decreed the claim. The High Court affirmed the order of the Civil Judge. Both the Civil Judge and the High Court took the view that by the rules framed under the Act an application for refund within six months from the date of actual payment is a condition precedent for refund of the toll. The party appealed to this Court. This Court was unable to accept this contention. Shah, J., as the learned Chief Justice then was, speaking for this Court noted that the respondent therein had contended that the rules framed by the government regarding the procedure constituted a condition precedent to the exercise of the right to claim refund and recourse to the civil court being conditionally strict, compliance to that procedure was necessary for obtaining any decree in civil court. Allowing the appeal, this Court held that this contention was untenable. Shah, J. observed at p. 555 of the report as under :

> "The rules framed by the government merely set up the procedure to be followed in preferring an application to the Municipality for obtaining refund of the tax paid. The Municipality is under a statutory obligation, once the procedure followed is fulfilled, to grant refund of the toll. The application for refund of the toll must be made within fifteen days from the date of the issue of the certificate and within six months from the date of payment of the toll. It has to be accompanied by the original receipts. If these procedural requirements are not fulfilled, the Municipality may decline to refund the toll and relegate the claimant to a suit. It would then be open to the party claiming a refund to seek the assistance of the court, and to prove by evidence which is in law admissible that the goods transported by him fell within the order issued under Section 157(3) of the Act. The rules framed by the government relating to the procedure to be followed in giving effect to the exemptions on April 15, 1939, do not purport to bar the jurisdiction of the civil court if the procedure is not followed. In our judgment, the Civil Judge and the High Court exalted what were merely matters of the procedure, which the Municipality was entitled to require compliance with in granting refund, into conditions precedent to the exercise of jurisdiction of the civil court. It is impossible on a bare perusal of the order issued by the government and the rules framed by it to give to the order and the rules that effect."

12. These observations, in our opinion, in view of the contentions raised on behalf of the Municipality here are apposite in this case. The aforesaid rule 24 does not apply. In that view, Rules 25 and 26 have no scope of application. Indubitably, amounts have been realised as octroi on the entry of the goods on which octroi was not leviable because these were not for use of consumption within the municipal limits. Mere physical entry into the city limits would not attract the levy of octroi unless goods were brought in for use or consumption or sale. In this case, putting the powder from the drums to the bottles for the purpose of exporting or taking these out of the city is neither use nor consumption of the Horlicks powder attracting the levy of octroi. Such amounts, therefore, cannot be retained by the respondent-Corporation. There is no dispute as to the quantum in view of the fact that the amount has now been found to be certified to be credited pursuant to the direction of the learned Single Judge of the high Court. We see no grounds as to why amount should not be refunded. Realisation of tax or money without the authority of law is bad under Article 265 of the Constitution. Octroi cannot be levied or collected in respect of goods which are not used or consumed or sold within the municipal limits. So these amounts become collection without the authority of law. The respondent is a statutory authority in the present case. It has no right to retain the amount, so far and so much. These are refundable within the period of limitation. There is no question of limitation. There is no dispute as to the amount. There is no scope of any possible dispute on the plea of undue enrichment of the petitioners. We are, therefore, of the opinion that the

Division Bench was in error in the view it took. Where there is no question of undue enrichment, in respect of money collected or retained, refund, to which a citizen is entitled, must be made in a situation like this.

13. We, therefore, hold that amounts should be refunded subject to the verification directed by the learned Single Judge of the High Court of the amount of refund. The appeal is, thus, allowed. The judgment and order of the Division Bench of the High Court are, therefore, set aside. In the facts and the circumstances, there will be no orders as to costs.

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