BOMBAY HIGH COURT

Jalgaon Borough Municipality

Vs.

Khandesh Spinning and Weaving Mills Co., Ltd

First Appeal No. 502 of 1949

(Bhagwati and Dixit, JJ.)

21.07.1952

JUDGMENT

Bhagwati , J.

1. The Khandesh Spinning and Weaving Mills Co., Ltd. (plaintiffs) were carrying on business as a Spinning and Weaving Mills at Jalgaon, and for the purpose of that business they used to import charcoal within the jurisdiction of the Jalgaon Borough Municipality (defendants). There were difficulties about obtaining charcoal with the result that the plaintiffs resorted to the user of fuel oil or furnace oil for the purpose of heating their boiler. The defendants claimed that the fuel oil or the furnace oil which was thus imported by the plaintiffs within their jurisdiction fell under item 73 of class in of sch. 'A' to these rules and by-laws framed by them and which provided for the levy of an octroi duty at the rate of annas -/4/- per maund on "all articles of sizing used in mill industries, oils used for machinery, boiler composition, spindle oil, china clay, grease, lubricating oils of all kinds". The defendants accordingly levied on the fuel oil or the furnace oil which was thus imported by the plaintiffs, from and after 21st May 1946, octroi duty at this rate of annas -/4/- per maund. Disputes thereupon arose between the plaintiffs and the defendants, and correspondence ensued between the parties. The plaintiff's claimed that the fuel oil or the furnace oil was imported by them in lieu of charcoal which they used before, and that the defendants were not entitled to charge anything more than six pies per maund by way of octroi duty, which was the duty payable on charcoal. The defendants, on the other hand, contended that the fuel oil or the furnace oil which was imported by the plaintiffs fell within the description of "oils used for machinery" and was, therefore, rightly charged by them with octroi duty at the rate of annas -/4/- per maund under item 73 above referred to. The plaintiff, therefore, ultimately gave a notice to the defendants and their Chief Officer on 2nd May 1947, under Section 206, Bombay Municipal Boroughs Act, 1925, setting out therein the cause of action which had accrued to them and their intention to file a suit in default of the defendants making duo amends. The defendants failed and neglected to comply with the requisitions contained in this notice with the result that on 3lst July

1947, the plaintiffs filed in the High Court of Judicature at Bombay, a suit for a declaration that the defendants' act of levying octroi duty on fuel oil was illegal, for a perpetual injunction restraining the defendants from levying and recovering the same from the plaintiffs, and for recovery from the defendants of Rs. 18,776-6-0 which was the amount which they had paid up to the date of the filing of that suit, the last of such payments having been made by them to the defendants under protest on 28th June 1947. The plaintiffs obtained leave under clause 12 Letters Patent, in so far as they claimed a refund of the monies to themselves at their registered office at Cambata Building, 42 Queen's Road, Bombay. The defendants took out appropriate proceedings for the revocation of leave under clause 12. Letters Patent, and on September 30, 1947, Coyajee J. revoked that leave and ordered that the plaint be taken off the file of the Court. The plaintiff filed an appeal and the appeal Court confirmed the order which was passed by Coyajee, J. On July 15, 1948, the plaintiffs filed the present suit in the Court of the Civil Judge (Senior Division) at Jalgaon. When, however, they filed the present suit, they applied for an amendment of the plaint, which- had been originally filed by them in the High Court, by putting forward a claim for Rs. 37,422-11-0 being the aggregate of the sums which they had paid to the defendants between May 21, 1946, and June 28, 1948. This sum of Rs. 37,422-11-0 was made up of the sum of Rs. 18,776-6-0 which had been claimed by the plaintiffs in the High Court suit plus the further payments which the plaintiffs had made to the defendants after July 31, 1947, up to June 28, 1948. The trial Judge granted the application. When this amended claim was made by the plaintiffs, they did not give any notice to the defendants under Section 206, Bombay Municipal Boroughs Act, 192-5, for the refund of this enhanced amount of Rs. 37,422-11-0 or for the refund of the excess over Rs. 18,776-6-0 which they had claimed from the defendants in the High Court. The defenses which were taken up by the defendants were that fuel oil or furnace oil fell within Item 73 of class in of sch. 'A' to the Rules and by-laws framed by the defendants; that in any event the plaintiffs had failed to give to the defendants the requisite notice under Section 206, Bombay Municipal Boroughs Act, 1925, in regard to their further claim after July 31, 1947; and that the plaintiffs' claim for the recovery of any amount beyond six months previous to the institution of the suit was, in any event, barred by limitation by virtue of the provisions of Section 206, Bombay Municipal Boroughs Act, 1925. The trial Judge negatived the contentions of the defendants in regard to Item 73 of class in of sch. 'A' to the Rules and By-laws, and held that the defendants were not entitled to levy any octroi duty on the fuel oil or the furnace oil which was imported by the plaintiffs within the jurisdiction of the defendants. He further held that notice under Section 206, Bombay Municipal Boroughs Act, 1925, was necessary to be given and that the same had not been given in regard to the further claim of the plaintiffs in regard to the amounts paid by them to the defendants after July 31, 1947. He, however, allowed to the plaintiffs, in the computation of the period of limitation, exclusion of the time which was occupied in prosecuting the suit and the appeal in the High Court, and, taking into account that period as well as the two months' period of notice under Section 206 of the Act, coupled with the six months which were allowed to the plaintiffs within the terms of that section, allowed to the plaintiffs a refund of an aggregate amount of Rs. 24,549-15.0 being the aggregate sum which had been recovered by the defendants from the plaintiffs between March 3, 1947, and June 28, 1948.

He also gave to the plaintiffs the declaration they had asked for, as also the perpetual injunction against the defendants as prayed. The defendants appealed to the High Court. The plaintiffs filed cross-objections, contending that not only should the whole of their claim have been allowed by the trial Judge against the defendants, but that also a sum of Rs. 601 which had been paid by the plaintiffs to the defendants after the filing of the suit and before the interim injunction, ought to have been ordered to be refunded by the defendants to them. The appeal and the cross-objections were heard together.

Bhagwati, J

2. (His Lordship, after setting out the facts and deciding points not material to the report, proceeded :)

> (1) Mr. Banaji, however, contended that Section 206, Bombay Municipal Boroughs Act, 1925 did not apply to the facts of the present case. He contended that the levy of octroi duty on fuel oil or furnace oil by the defendants was illegal, and that, therefore, the act of the defendants in levying that octroi duty could not be said to be anything done or purporting to have been done in pursuance of the Act, and if it could not be said to be anything done or purporting to have been done in pursuance of the Act, the operation of Section 206 of the Act was not attracted and it was not incumbent on the plaintiffs to give notice of the type to the defendants, that the plaintiffs' claim was governed by Article 62, Limitation Act, which applied in all eases where monies had been received by the defendants to the use of the plaintiffs, and that, therefore, the plaintiffs were entitled to recover all the monies which they claimed from, the defendants, their claim in that behalf being well within three years of the date of the accrual of the cause of action.

Mr. Banaji placed particular reliance on a decision of Mr. Justice Kania, as he then was, reported in *City Municipality, Bhusawal v. Nusserwanji Hormusji*[1], In that case, the plaintiffs had filed the suit against the defendants-Municipality to recover inter alia a sum of Rs. 666-12.0 which represented the amount of certain taxes which had been adjudicated by the Court as an illegal levy. On such an adjudication being made by the Court in another suit at the instance of one of the tax-payers, the plaintiffs had filed the suit, out of which the second appeal arose, to recover the amount on the ground that the tax had been illegally levied. The learned Judge had, before him, this judgment of the Court which had declared the tax as having been illegally levied. An argument had been advanced before him contending that, under Section 206, Bombay Municipal Boroughs Act, 1925, the Act of the Municipality in imposing the tax was one purporting to have been done in pursuance of the Act, and that, therefore, the claim in respect of that act should have been made within six months from the date of the act complained of. A decision of our High Court in *Parvateppa v. Hubli Municipality*[2], was cited in support of this proposition. But the learned Judge observed that, in his opinion, it was not necessary to decide that point. What the learned Judge apparently meant was that, in so far as the tax had been illegally levied, there was no question of considering whether the act which was complained of was done or purported to

have been done in pursuance of the Act. An illegal act could certainly not have been "done or purporting to have been done in pursuance of the Act". It would be only a lawful act, or an act which was apparently lawful, which could have been "done or purporting to have been done in pursuance of the Act". An illegal act would certainly not fall within that category. The learned Judge, therefore, went on to consider whether the plaintiffs' suit before him was governed by Article 62, Limitation Act, or Article 96 thereof, and came to the conclusion that it wag governed by Article 62, Limitation Act. Mr. Banaji also drew our attention to two decisions of the Allahabad and the Madras High Courts, one reported in *The Rajputana Malwa Railway Co-operative Stores, Limited v. The Ajmere Municipal Board*[3], and the other reported in *Municipal Council, Dindigul v. Bombay Co. Ltd*[4].,

[1] AIR 1940 Bom 252 [3]32 All 491

[2] AIR 1937 Bom 491 [4] AIR 1929 Mad 409

In both these cases, a prima facie illegal act was certainly considered not within the category of acts "done or purporting to have been done in pursuance of the Act". The acts which would fall within the category of those "done or purporting to have been done in pursuance of the Act" could only be those which were done under a vestige or semblance of authority, or with some show of a right. If an act was outrageous and extra-ordinary or could not be supported at all, not having been done with a vestige or semblance of authority, or some sort of a right invested in the party doing that act, it would certainly not be an act which is "done or purports to have been done in pursuance of the Act". The distinction between ultra vires and illegal acts, on the one hand, and those purporting to be done in pursuance of the Act, on the other, is quite well known. (Vide *Secretary of State v. Major Hughes*[5], *Corbett v. South Eastern and Chatham Railways Committee*[6], *Parvateppa v. Hubli Municipality*[7], *Koti Reddi v. Subbiah*[8], and *Municipal Borough, Dhulia v. Mahomed Isak*[9], *at p.45 (H)).* The distinction and really between ultra vires and illegal acts, on the one hand, and wrongful acts, on the other - wrongful in the sense that they purport to have been done in pursuance of the Act; they are intended to seem to have been done in pursuance of the Act and are done with a vestige or semblance of authority, or sort of a right invested in the party doing those acts. If the defendants, therefore, not having the power to levy octroi duty at all, either wholly or in regard to some classes of goods, had purported to levy the same, it would certainly have been an act which was outrageous and extraordinary with not a vestige or semblance of authority, or not even a shadow of a right. But we have in Section 73(iv), Bombay Municipal Boroughs Act, 1925, the power given to the defendants to impose octroi duty on articles and goods imported within their jurisdiction. We have also the various items of class in of sch.'A' to the Octroi Rules and By-laws which have been framed by the defendants with the sanction of the Government, and we have item 73 in that class III of sch.'A' which comprises various articles including oils used for machinery. If the defendants, in interpretation which they gave to the words "oils used for machinery", did something which ultimately, on an adjudication in that behalf, the Court found to be wrongful, the act of the defendants in the matter of the levy of octroi duty on fuel oil or furnace oil, as they purported to do, could not be said to be illegal or outrageous and extraordinary, or done without having any vestige or semblance of authority, or without ever shadow of a right. It is no doubt true that their interpretation of the expression "oils used for machinery" was wrong. But they had, in so far as they had got the power and the

authority to impose octroi duty on articles and goods imported within their jurisdiction, and had levied octroi duty on oils used for machinery comprised within item 73 class III of Sch.'A' to the Octroi Rules and By-laws which had been framed by them with the sanction of Government, a vestige or semblance of authority or a shadow of a right for doing though they had no real authority to do so, nor had the substance of the right for doing so. What they did, therefore, was not an act done in pursuance of the Act, but it was an act which they purported to do in pursuance of the Act. They intended to seem as if they were doing the act complained of in pursuance of the Act. Their action was, therefore, well within the terms of Section 206, Bombay Municipal Boroughs Act, 1925.

We are, therefore, of the opinion that it was incumbent on the plaintiffs to give notice of their claim for refund to the defendants. In so far as they gave the requisite notice under Section 206 of the Act to the defendants on May 2, 1947, they were well within their rights to prosecute their claims and institute the suit against the defendants for the refund

[5] AIR 1914 Bom 33 at p.35 [7] AIR 1937 Bom 491 [9] AIR 1936 Bom 43

[6](1906) 2 ch 12 [8] AIR 1918 Mad 62

of the amounts which the defendants had recovered from them up to July 31, 1947. This, however, could not be predicated of the plaintiffs' claim from the defendants for refund of the excess over the sum of Rs. 18,776-6-0. To the extent, therefore, that the plaintiffs claimed in their amended plaint which they put on file on July 15, 1948, to recover the excess over this sum of Rs. 18,776-6-0, the plaintiffs' claim could not sustained.

(The rest of the judgment is not material to the report,)

2. The appeal filed by the defendants will, therefore, be allowed in part. The decree passed by the Court below will be confirmed with this variation, that there will be a decree in favor of the plaintiffs for the sum of Rs. 11,605-1-0 instead of the sum of Rs. 24,549-15-0 with interest on that sum at the rate of 6 per cent, per annum from July 2, 1947, till today, costs and interest on judgment at the rate of 4 per cent, per annum till payment. The plaintiffs and the defendants will be entitled to their proportionate costs here as well as in the Court below, in proportion to their success or failure. The plaintiffs' cross-objections will, of course, be dismissed with costs.

Appeal allowed in part; cross-objections dismissed.