BOMBAY HIGH COURT

Chopda Municipality

Vs.

Motilal

A.F.O.D. No. 62 of 1954, in Special Civil Suit No. 32 of 1952

(Shah and Gokhale, JJ.)

10.09.1957

JUDGMENT

Shah, J.

1. In this appeal, the question as to the competence of the Municipality of Chopda in the district of East Khandesh to levy under the Bombay District Municipal Act a tax designated the "cotton manufacturing tax" at the rate of one rupee per bale of cotton full-pressed within the municipal limits of Chopda, falls to be determined.

2. The Chopda Municipality is declared to be a District Municipality under the Bombay District Municipal Act (Act 3 of 1901) by the Government of Bombay. By S. 59 of the Act, the Municipality is entitled, subject to the general or special orders which the State Government may pass in that behalf, to impose for the purposes of the Act the taxes specified in that section. In 1919 the Municipality imposed a 'cotton manufacturing tax', with the sanction of the Provincial Government, at the rate of one anna for every bale of cotton pressed within the municipal limits, and the tax was made payable at the time when the bales were pressed by the owner (of the bale) to the tax collecting Karkun. Sanction to the levy of this tax was accorded by the Government of Bombay as from 7-4-1920. On 25-3-1924, the Commissioner, Central Division, sanctioned enhancement of the tax to eight annas on each pressed cotton bale, and the tax continued to remain payable by the owner. In 1946 the rules framed by the Municipality under S. 46 (1) of the Bombay District Municipal Act were modified, and the tax was made payable by the manager of the pressing factory within fifteen days from the presentation of the bill demanding payment of the tax. The tax, however, continued to be leviable at the rate of eight annas for every bale of cotton full-pressed or repressed within the municipal limits of Chopda. Under the bye-laws of the Municipality duty to furnish information about the pressing of bales was imposed upon the managers of the pressing factories. In 1949 the rules were again amended and the Municipality, with the sanction of the State, enhanced the tax to one rupee for every bale of cotton full-pressed within the municipal limits of Chopda. Certain other modifications were made in the rules, but the liability to pay the tax continued to remain imposed upon the managers of the pressing factories. The amendment of the rules came into operation as from 1st July, 1950.

3. For the period between 29-12-1950 and 29-5-1951 the Municipality of Chopda presented to the manager of "the Motilal Manekchand Press. Factory" bills for payment of Rs. 6,580 as cotton manufacturing tax at the rate of one rupee for bales of cotton pressed or re-pressed within that period. The manager of the factory paid the amount under protest. The owner of the factory Motilal Manekchand and its manager Dattatraya Prabhakar Tare then served a notice upon the Municipality on 20-5-1952 challenging the validity of the tax and calling upon the Municipality to refund the tax already paid under protest and to refrain from realising the tax demanded. The Municipality having failed to carry out the requisition, the owner of the factory Motilal Manekchand and the Manager Dattatraya Prabhakar Tare filed Civil Suit No. 32 of 1952 in the Court of Civil Judge, Senior Division at Jalgaon against the Municipality of Chopda for a decree for refund of Rs. 8,328 with interest of Rs. 676-3-0 as interest due thereon or, in the alternative, for refund of Rs. 7,828 and Rs. 631-3-0 as interest due thereon, and for an injunction restraining the municipality from levying and realising the cotton manufacturing tax. The plaintiffs pleaded that the levy of the tax was 'illegal and ultra vires', because (1) the plaintiffs had no ownership or interest in the cotton bales pressed in their factory, and (2) the levy of the cotton manufacturing tax contravened S. 142-A of the Government of India Act, 1935, and Art. 276 of the Constitution in that the amount demanded as tax from the plaintiffs was in excess of the maximum permissible.

4. The suit was resisted by the Municipality of Chopda. It was contended that the tax was not levied in contravention of S. 142-A of the Government of India Act, 1935, or of Art. 276 of the Constitution, that in the circumstances of the case notice under S. 167-A of the Bombay District Municipal Act was necessary, that the suit filed without serving the statutory notice was not maintainable, that the suit was barred as it was not filed within six months from the date on which the amount was paid and that the plaintiffs were accordingly not entitled to the decree for refund or injunction claimed by them. The Municipality also contended that the cotton manufacturing tax can be enforced against the plaintiffs in respect of the cotton bales pressed by them, even if the bales did not belong to them.

5. The learned trial Judge held that the levy of the tax by the Municipality contravened S. 142-A of the Government of India Act 1935, and Art. 276 of the Constitution, and that the suit filed without notice under S. 167-A of the Bombay District Municipal Act was maintainable. Holding that the suit filed after six months from the date on which the amount was paid by the plaintiffs under protest was still within limitation, the learned Judge passed a decree in favor of the plaintiffs for Rs. ,7,828 and issued an injunction restraining the Municipality from levying and realizing the cotton manufacturing tax in excess of Rs. 250 per annum from the plaintiffs.

6. Against that decree the Municipality has appealed to this Court. The plaintiffs have filed cross-objections to the decree appealed from contending that interest from the date of the suit till the date of realization should have been awarded.

7. Before we deal with the question as to the competence of the Municipality to levy the tax at the rate prescribed by the rules framed by the Municipality, we may set out a short legislative history of the relevant provisions. By S. 59 of the Bombay District Municipal Act of 1901 the Municipality is entitled to levy the taxes specified in Cls. (i) to (x) of sub-s. (1) (b) thereof, and is also entitled, with leave of the State, to levy any other tax which the State Government is competent to impose. In the year 1919 the Government of Bombay sanctioned the levy of 'the

cotton manufacturing tax' under the category presumably 'any other tax' which the Provincial Government was competent to levy or impose. In 1939 the Government of India Act, 1935, was amended by adding S. 142-A, which provided by the first sub-section that "no Provincial law relating to taxes for the benefit of a Province or of a municipality, district board, local board, or other local authority therein in respect of professions, trades, callings or employments shall be invalid on the ground that it relates to a tax on income". But by the second sub-section it was provided that the total amount payable in respect of any one person to the Province or to any one Municipality by way of taxes on professions, trades, callings and employments shall not, after the 31st day of March, 1939, exceed fifty rupees per annum. There was, however, a proviso to that sub-section which enacted that if in the financial year ending with 31-3-1939 there was in force in the case of any Province or any such Municipality a tax on professions, trades, callings or employments the rate, or the maximum rate, of which exceeded Rs. 50 per annum, the provisions of sub-section (2) shall, unless for the time being provision to the contrary was made by a law of the Federal Legislature, have effect in relation to that Province or Municipality, as if for the reference to Rs. 50 per annum there was substituted a reference to that rate or maximum rate or such lower rate, if any, as may for the time being be fixed by a law of the Federal Legislature. The Government of India then enacted the Professions Tax Limitation Act XX of 1941, which by section 2 provided :

> "Notwithstanding the provisions of any law for the time being in force, any taxes payable in respect of any one person to a Province, or to any one municipality..... by way of tax on professions, trades, callings or employments, shall from and after the commencement of this Act cease to be levied to the extent to which such taxes exceed fifty rupees per annum."

By Article 276 of the Constitution it was provided that a law of the Legislature of a State relating to taxes for the benefit of the State or of a Municipality in respect of professions, trades, callings or employments shall not be invalid on the ground that it related to a tax on income. By clause (2) of Art. 276 it was provided that the limit of such a tax shall not exceed Rs. 250 per annum in respect of any one person to the State or to the Municipality. That clause was followed by a proviso which enabled the levy of taxes at a higher rate if there was, in the financial year immediately preceding the commencement of the Constitution, in force in any State or Municipality, a tax on professions, trades, callings or employments, and such a tax could be continued to be levied until provision to the contrary was made by Parliament by law. It may be mentioned that Act 20 of 1941 has been repealed by the Adaptation of Laws Order, 1950.

8. The cotton manufacturing tax levied by the Chopda Municipality is related to the quantity of cotton which is pressed in a ginning factory, and it is levied not from the owner of the cotton pressed but from the manager of the factory. The plaintiffs press every year a large number of cotton bales, and if the levy of the tax is valid the Liability of the plaintiffs considerably exceeds the maximum limit provided under Art 276 of the Constitution. Our attention has not been invited to any Act of the Parliament which is enacted pursuant to the proviso to clause (2) of Article 276 of the Constitution. We are unable to hold that the cotton manufacturing tax is invalid merely because it is levied from the manager of the pressing factory. A manager of a pressing factory is normally not the owner of the cotton pressed in the factory. But the Municipality has devised this mode of collection of the cotton manufacturing tax from the manager for facility of

collection. There is nothing either in the Bombay District Municipal Act or in the Constitution which prevents the State from levying a tax from a person other than the owner of the commodity which is subjected to a manufacturing process : and if the State is competent to levy a tax from a person other than the owner, with the sanction of the State the Municipality is also competent, by virtue of section 59 (1) (b) (xi) of the Bombay District Municipal Act, to levy such a tax. A manager of a factory is normally a paid employee of the owner of the factory and he has no interest either in the factory or in the cotton which is subjected to the manufacturing process in the factory, but the imposition of liability to pay the cotton manufacturing tax is not on that account invalid.

9. We must then address ourselves to the question whether pressing cotton in a factory amounts to carrying on a trade" within the meaning; of Article 276 of the Constitution and whether the limit prescribed by Art. 276 applies to the levy by the municipality of the impugned tax. It is urged on behalf of the Municipality that 'trade' necessarily postulates transactions in the nature of sale and purchase and a pressing factory does not either sell or purchase any commodity. But the expression 'trade' has not the restricted connotation which it is contended it has. Undoubtedly in its primary sense the word 'trade' means exchange of goods for goods or goods for money : but in a secondary sense it includes any business carried on with a view to profit, whether manual or mercantile as distinguished from the liberal arts or learned professions or agriculture. The word, however, is of very general application and must always be considered with the context with which it is used (see Halsbury's Laws of England, 2nd Edition, Vol. 32, p. 303). In Stroud's Judicial Dictionary, 3rd Edition, Vol. 4, p. 3057, it is observed that "trade" "may have a larger meaning so as to include manufactures" : see *Commissioners of Taxation v. Kirk*[1], In several cases decided in England under the Revenue Acts the expression "trade" has been held to include any skilled employment pursued for the purpose of gain. In *The Chartered Mercantile Bank of India, London and China v. Wilson*[2], it was held that business of a telegraph company was trade within the meaning of 57 Geo. 3, C. 25, S. 1. At p. 113 Kelly, C. B. observed : It was not the intention of the Legislature to limit the meaning of the word "trade to buying and selling." In *Citizens Insurance Co. of Canada v. Parsons*[3], Sir Montague Smith in his speech observed at p. 112 : "Whether the business of fire insurance properly falls within the description of a "trade" must ..... depend upon the sense in which that word is used in the particular statute to be construed." In *Mulshankar Maganlal v. Government of Bombay*[4], this Court held that the expression "trade," as used in S. 168 of the Indian Penal Code and R. 21 of the Bombay Civil Service Conduct, Discipline and Appeal Rules, must be construed in a wider sense, so as to cover every kind of trade, business, profession or occupation. It is. evident that the connotation of "trade" is not limited to an occupation which primarily concerns itself with sale and purchase of goods. Pursuit of a skilled employment with a view to earn profit, such employment not being in the nature of a learned profession or agriculture, must be regarded as engaging in "trade" within the meaning of Art. 276 of the Constitution. A skilled occupation which involves the application of manufacturing

[1]1900 A. C. 588
[2](1877) 3 Ex. D. 108
[3](1881) 7 AC 96
[4]52 Bom L. R. 648 : (AIR 1951 Bom 233)

processes to a commodity submitted to the person carrying on the occupation must, therefore, be regarded as trade. Evidently for remuneration the plaintiffs undertake by mechanical process to press cotton into bales, and the tax levied from them is in respect of the pursuit of that activity.

10. In *District Council, Bhandara v. Kishorilal*[5], a Division Bench of the Nagpur High Court

held that a tax imposed by a municipality on persons carrying on the occupation of husking, milling or grinding of grains was a tax imposed on trade within the meaning of section 142-A of the Government of India Act, 1935, and was subject to the provisions of the Professions Tax Limitation Act, 1941. In *Municipal Committee, Karanja v. New East India Press Co. Ltd., Bombay*[6], the Nagpur High Court held that a tax levied by the Municipality on ginned cotton was a tax on a profession, trade, calling or employment within the meaning of section 142-A of the Government of India Act.

11. It was urged on behalf of the Municipality that the cotton manufacturing tax which is levied per bale is in truth a tax on commodity and not a tax on trade and is, therefore, not subject to the maximum limit prescribed by Article 276 of the Constitution. Our attention was invited to R. 1 framed by the Municipality, which provides that "a tax of rupee one on every bale of cotton being full pressed within the municipal limits of Chopda shall be levied" and it was urged that the primary incidence of taxation was related to cotton bales and such a tax could not be regarded as a tax on trade. We are unable to agree with that contention. The liability to pay the tax is by R. 3 imposed upon the manager of the pressing factory, and the quantum of tax is computed by reference to the number of bales pressed within the municipal limits by the manager. The charging rule, in our judgment, is R. 3, and it is on the trading activity of the manager that the liability to pay the tax is imposed. In considering a question as to the nature of a tax the Court must have regard to the true nature as is often said the 'pith and substance' of the tax, and not merely to the form in which it may have been imposed. Lord Atkin in *Gallagher v. Lynn*[8], observed :

> "It is well established that you are to look at the 'true nature and character of the legislation" *Russell v. The Queen*[7], 'the pith and substance of the legislation.' If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally if affects matters which are outside the authorized field."

In *Sir Byramjee Jeejeebhoy v. The Province of Bombay*[9], this Court held that a tax known as the urban immoveable property tax was not a tax on income but was a tax on immoveable property and, therefore, intra vires the Bombay Provincial Legislature. In that case the tax was levied on the annual letting value and not on the actual income which the tax-payer received from his property : and as prima facie the tax was on the annual value of the land and not a tax on income, the tax could not be regarded as income-tax and excluded from the competence of the State Legislature. This view was upheld by the Federal Court in *Ralla Ram v. Province of East Punjab*[10], (J).The cotton manufacturing tax being a

[5] ILR (1949) Nag 87 : (AIR 1949 Nag 190)
[6] ILR (1948) Nag 971 : (AIR 1949 Nag 215)
[7](1937; A. C. 863 (G)
[8](1882) 7 App. Cas. 829 (H)
[9]42 Bom LR 10 : (AIR 1940 Bom 65) (FB)
[10]51 Bom LR 333 : (AIR 1949 FC 81)

tax imposed upon the manager of the pressing factory and being in respect or a skilled occupation which is not of the nature of a learned profession must be regarded as a tax on trade. The nature of the tax is not altered because the computation of the tax depended upon the quantity of cotton pressed in the factory. We are, therefore, of the view that the trial Court was right in holding that the cotton manufacturing; tax was a tax on trade and subject to the ceiling provided by Article 276 of the Constitution.

12. We are unable, however, to agree with the view of the trial Court that the plaintiffs were entitled to an order for refund of the tax already paid by them under protest. Under Sec. 167-A of the Bombay District Municipal Act, 1901, a suit will not lie against a Municipality in respect of any act done in pursuance or execution or intended execution of the Act, unless it is commenced within six months next after the accrual of the cause of action and until the expiration of one month after notice in writing has been delivered or left at the office of the Municipality. Evidently the plaintiffs in this case sued for refund of the tax paid by them nearly three years after the accrual of the cause of action, and prima facie the suit was barred.The Municipality had been levying the cotton manufacturing tax with the sanction of the local Government since the year 1920. Even after Act 20 of 1941 was passed the tax was continued to be levied, and the local Government permitted alteration of the incidence of taxation. The Municipality, on the assumption that it was entitled to levy the tax continued to levy it, demand and collect the same. In the circumstances it must be held that the tax was levied and collected in "execution or intended execution of the Act.

13. In *Jalgaon Borough Municipality v. Khandesh Spinning and Weaving] Mills Co. Ltd*[11]*.,* it was held by a Division Bench of this Court, in considering an analogous provision of the Bombay Municipal Boroughs Act, 1925, that a levy of octroi duty on fuel oil or furnace oil under the rules and bye-laws framed with the sanction of the local Government by the Jalgaon Municipality could not be ordered to be refunded in a suit filed more than six months after the date, on which the cause of action accrued, even if the Court held that under the rules the Municipality was not competent to levy octroi duty on fuel oil or furnace oil. Mr. Justice; Bhagwati, who delivered the judgment of the Court, in considering the words" done or purporting to have been done in pursuance of this Act" observed :

> "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 extraordinary 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. The distinction is 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

[11]55 Bom LR 65 : (AIR 1953 Bom 204) (K)

> those acts." It is true that the words used in S. 206 of the Bombay Municipal Boroughs Act, 1925, as it stood when the Jalgaon Borough Municipality's case was decided, were "acts done or purporting to have been done in pursuance of that Act, whereas the words used in Sec. 167-A of the Bombay District Municipal Act, 1901, are "acts done in pursuance or execution or intended execution of that Act. But, in our judgment, the

> difference in the phraseology does not justify us in holding that the principle of that case is in applicable. The Municipality levied the cotton manufacturing tax in execution or intended execution. of the Act, and even if the Municipality acted beyond its authority the act must be regarded as wrongful or irregular but it cannot be regarded as ultra vires.

14. The learned trial Judge has not awarded interest to the plaintiffs and the plaintiffs have by their cross-objections claimed future interest' on the decretal amount from the date of the suit. On the view we take, it is unnecessaly to consider the cross-objections, as the plaintiffs are not entitled to an order for refund of the amount of tax paid by them.

15. On the view we take, the decree passed by the trial Court will be modified and paragraphs 2 and 3 of the decretal order will be deleted. For the first paragraph of the decretal order, the following will be substituted :

> "It is hereby declared that the Municipality of Chopda is not entitled to levy from the plaintiffs the Cotton Manufacturing Tax under the Rules framed by the Municipality and brought into operation on 1-07-1950 at a rate exceeding Rs. 250 per annum."

The parties will bear their own costs throughout including costs of the cross-objections.

Order accordingly.