

BOMBAY HIGH COURT

Khandelwal Traders

Vs.

Akola Municipal Council

Special Civil Appln. No. 3954 of 1976

(Ginwala and Patel, JJ.)

27.09.1984

JUDGEMENT

Ginwala, J.

1. The petitioner which is a partnership firm and deals in bailing hoops and other commodities, seeks a writ of mandamus against the respondent Municipal Council (hereinafter referred to as "the Council"), ordering it "to forbear from claiming octroi on goods which are in transit from one octroi limit to another and which are neither consumed nor used within the municipal area" of the respondent and "to refund the tax illegally collected" amounting to Rs. 809.59.

2. The case of the petitioner is that on 25-3-1975, 1-4-1975 and 2-5-1975 it imported within the octroi limits of the Council three consignments of iron bailing hoops consisting of 500, 300 and 550 bundles and were deposited in the bonded warehouse maintained by the Council. It exported 300 bundles out of the first consignment, 100 bundles out of the second and all the bundles of the third consignment on 25-3-1975, 1-4-1975 and 2-5-1975 respectively after carrying out all the formalities and depositing the amount of octroi as required by the relevant Rules of the Maharashtra Municipalities (Octroi) Rules, 1968 (called the Rules).

3. Similarly on 8-1-1973, 30-1-1973 and 6-2-1973, it had imported three consignments consisting of 300 bundles of iron hoops, 5 drums of lubricating oil and 100 bundles of iron hoops respectively. It temporarily detained these goods with itself for eventual export after making the requisite declaration and depositing the octroi thereon. It exported 280 bundles out of the first consignment and the whole of the second and third consignments on 9-5-1973 and 11-2-1973 respectively after obtaining the necessary permission.

4. The petitioner applied for refund of the amounts of octroi deposited in respect of the goods exported by it. However, the Council by its letters dated 24-8-1973 and 6-2-1976 has rejected the claim of the petitioners for refund.

5. The petitioner has given the particulars of the above said goods in paragraphs 6.01 to 7.03, 9.01 and 9.02 of the petition and the two statements annexed to the application for amendment of the petition. The Council has not refuted them in its return.

6. The petitioner contends that the refusal on the part of the Council to refund the octroi paid or deposited in respect of the goods which though were imported within the octroi limits but had been ultimately exported out of such limits, is illegal and unconstitutional inasmuch as no octroi can be levied and collected on goods unless they come to repose or are sold to ultimate consumer within such octroi limit or the goods are consumed or used within such limits. It contends that the Council cannot refuse to refund simply because the goods were sold within the octroi limits to persons who had ultimately exported them without consuming or using them within such limits. According to the petitioner, the change of ownership within the octroi limits can have no bearing on the liability of the goods for levy of octroi if they are not used or consumed within the limits but are exported out of it. The petitioner further contends that even if it is assumed that the goods had been sold by it to others within the octroi limits, the ownership had not passed to such buyers and for all practical purposes it remained to be the exporter. It submits that having taken all the steps required under the Rules for claiming refund on export of the goods, the Council ought to have refunded the amount.

7. The petition is resisted by the Council on the sole ground that it had rightly rejected the claim for refund as the goods had changed hands within the octroi limits and that the importer and exporter were not the same person. For this purpose, it relies on Rule 25(3)(d) of the Rules. It further contends that the terms and conditions on which the goods were sold to the persons to whom they were exported being questions of fact cannot be investigated in this writ petition.

8. In order to understand the rival contentions of the parties, it may be convenient at this stage to look into the relevant provisions of the Act and the Rules. Sub-section (28) of Section 2 of the Act defines octroi as "a tax on the entry of goods into a municipal area for consumption, use or sale therein." It is included in the list of taxes which it is compulsory for every Municipal Council to impose. Sections 136 to 143 deal with levy and collection of octroi. The State Government has made the Rules in exercise of the powers conferred on it under section 321(2) read with the proviso to section 105(1) of the Act. Clauses (f), (h) and (i) of Rule 2 which define the words "export", "import" and "importer" are as follows :

"2(f) "export" means taking out or movement of any goods from any place within the octroi limits of a Council to any place outside such limits;

2(g) x x x x x x x x x

2(h) "import" means bringing or entry of any goods into the octroi limits of a Council from any place outside such limits;

2(i) "importer" means the person who imports any goods, and includes any person who

owns the goods, at the time of the import"

Clauses (c) and (d) of Rule 14(1) prescribe the forms in which an importer has to make declaration in respect of goods intended for temporary detention in the Bonded Warehouse maintained by a Council or with the importer himself and eventual export. Rules 19 and 20 prescribe the procedure to be followed for temporary detention of imported goods in Bonded Warehouse and eventual export and for export of goods so deposited. Rule 23 provides for refund of deposits made under

Rule 20. Rules 24 and 25 lay down the procedure for temporary detention of dutiable goods for eventual export, with the importer himself and for export of such goods, Rule 28 provides for the refund of deposit made under Rule 24 at the time of import. Since it is not disputed that the petitioner had followed the procedure prescribed in Rules 19, 20, 24 and 25 while importing and exporting the goods, we need not reproduce these rules here, except Rule 25(3) which is relevant. We may, however, reproduce Rules 23 and 28 which relate to refund. These Rules are as follows :

"23. Claims for refund of deposits.- Every importer claiming refund of the deposit made under rule 20 shall apply for refund to the Superintendent of Octroi in Form 10, with the written permission-cum-export pass duly endorsed by the Octroi Officer at the Exit Naka and the deposit receipt. The application may be made, on any working day during the hours fixed for money transaction in each Council, within a period of one month from the date of actual export of such goods. The Superintendent of Octroi, on being satisfied that the claim is in order, shall refund the amount immediately from the permanent advance held by him.

24. x x x x x x x x

25. Procedure for export of dutiable goods temporarily detained with importer.-

(1) and (2) x x x x x x x x x x

(3) No such intimation-cum-application shall be accepted unless, -

(a) it is complete in all respects and signed by the importer himself or by a person authorised by him in writing in this behalf;

(b) it is supported by the receipt for the deposit paid at the time of import and is accompanied by the original invoice, if any, filed at the time of import;

(c) the goods produced for inspection and intended to be exported are, subject to the provisions of sub-rule (2) of the last preceding rule, identical with what they were at the time of import;

(d) the exporter and the importer of these goods are one and the same person and such articles have not undergone change of ownership.

(4) to (9) x x x x x x x

26 and (27) x x x x x x x

28. Provision for refund of deposit.- (1) When any goods for which a deposit has been paid under rule 24 at the time of their import are exported, the amount of deposit

recovered shall, subject to the provision of sub-rule (2), be refunded.

(2) The refund shall be admissible, if all the conditions below are satisfied : -

(a) The refund is applied for within one month from the date of export.

(b) The goods are exported out of the octroi limits within a period of six months of their import.

Provided that the said period of six months shall not apply to goods imported by the Food Corporation of India, established under section 3 of the Food Corporation Act, 1964.

(c) The application for refund is supported by a duly certified written permission-cum-refund export pass.

(d) All the conditions in sub-rule (3) of rule 25 are fulfilled.

(e) The amount claimed as refund is withdrawn within three months from the date of intimation to the importer to receive the amount.

(f) The goods exported were declared to be intended for temporary detention with the importer and eventual export at the time of import.

(3) The provisions of this rule shall apply mutatis mutandis to refund of any deposit claimed under sub-rule (3) of rule 18 where the goods arrive at the Exit Naka after 48 hours of the time of payment of the deposit as entered in the written permission-cum-transit pass.

(4) This rule shall apply to the goods which are imported within the octroi limits on or after the date on which this rule becomes effective in the municipal area concerned."

9. Let us first take up the case of the goods which had been deposited in the Bonded Warehouse maintained by the Council and which were eventually exported by the petitioner. The necessary particulars with regard to the observance of the procedure for depositing these goods in the Bonded Warehouse on their import and for exporting them from there and for applying for refund of the amount deposited have been stated in paragraphs 6.02 to 7.03 of the petition and are tabulated in one of the statements annexed to the application for amendment of the petition. In its return, the Council has not only not denied the contents of paragraphs 6.01, 6.02, 6.04, 7.01, 7.02 and 7.03 but has stated that they "May be correct". As regards the remaining paragraph namely paragraph 6.03 it has merely stated that it was not clear to which record the petitioner was referring and that it had no knowledge of annexure C or about the real transaction contained therein. Besides this, it has not denied the factual statements made in that paragraph. It is, therefore, admitted position that the petitioner had followed the procedure prescribed in Rules 19 and 20 in respect of these goods and had applied for refund well within one month as required by Rule 23. It is not the case of the Council that the refund was refused because the petitioner failed to follow the prescribed procedure while exporting the goods. An indication of the case of the Council in this behalf is found only in paragraph 10 of the return. It is as follows :

"10.- As to para No. 8.03 : It is submitted that the claim of refund was rightly rejected, as the article had undergone change of ownership. The moment sale takes place within the municipal area, the petitioner is not entitled to refund. All contents, which are not

specifically admitted, are denied." It may be stated here that in paragraph 8.03 of the petition, the petitioner has stated its case for entitlement of the refund. It would, therefore, appear that according to the Council the petitioner was not entitled to refund of the deposit made under Rule 20 simply because the goods had been sold by the petitioner within its municipal limits prior to their being exported resulting in change of ownership. The question is how far this stand is correct and is in keeping with the relevant rules and law.

10. There is nothing in Rules 20 and 23 which as said above, prescribe the procedure for export of the goods deposited in Bonded Warehouse maintained by a Council and for refund of deposit made while so exporting the goods, to suggest that the importer would not be entitled to refund of such deposit if he sells the goods so exported by him, within the municipal area where the Bonded Warehouse is situated. In other words, there is nothing in these rules to prohibit the importer from selling such goods within the municipal area if he intends to export them consequent to such sale. The documents on record show that it was the petitioner who had applied for the export and had taken all the steps in that direction. The goods had been exported by the petitioner who was the importer and not by the consignees to whom the goods were sent on export. In our opinion, the Council was not justified in rejecting the claim for refund on the ground it did and the petitioner was entitled to refund of the amount deposited in this behalf which amounts to Rs. 570/-.

11. This brings us to the case of goods temporarily detained by the petitioner with itself for eventual export. Particulars are given in paragraphs 9.01 and 9.02 of the petition and also in the statement annexed to the application for amendment of the petition. In paragraph 11 of the return, the Council merely says that the contents of these paras may be correct. Since the Council has not rejected the claim of the petitioner for refund on the ground of non-compliance with the procedure prescribed in Rule 25 (except Rule 25(3)(d)), it may be assumed that the petitioner had complied with these provisions. The petitioner has made out its case in this behalf in paragraph 10 of the petition. The Council's case for refusal of the refund is stated in paragraph 13 of its return which is as under :

"13.- As to para No. 10.00 : The claim for refund has been rightly rejected taking into consideration rule 25(3)(d) of the Octroi Rules. It is denied that the respondent has misconstrued or misapplied the rule. It is denied that importer or exporter is the same. Even if it is so, and if the change of ownership has taken place, as stated above, the petitioner is not entitled to the refund. The property in the goods passed to the buyer at the time of the agreement of sale itself, even though the payment of price of the goods might have been postponed. It is not necessary that the article must be consumed within the octroi limits. What in fact were the conditions of the sale is a question of fact to be determined in each case of contract or agreement. This needs examination of oral as well as documentary evidence and, therefore, it is respectfully submitted that the present writ

petition is not maintainable, as its decision depends on question of facts. Even as per the conditions of the bills filed along with the petition, it is clear that change of ownership has taken place out of the territory of Akola municipal limits. The allegations about conditions of sale are deliberately kept vague. All contents which are not specifically admitted, are denied."

It would appear that the refund has been refused by virtue of Rule 28(2)(d) read with Rule 25(3)(d). In short, according to the Council, the petitioner was not entitled to refund of the octroi paid in this behalf since before the export it had sold the goods to others and the buyers were the exporters and not the petitioner. It seems, according to the Council, the goods had changed hands within its octroi limits thus violating Rule 25(3)(d).

12. It has been argued on behalf of the petitioner that firstly no sale had taken place and the ownership had not changed before the goods were exported. According to it, the ownership was to pass to the consignees only on delivery of the goods to them at their destination and after they paid the price thereof. It is submitted that the goods had been forwarded by the petitioner and the petitioner was the exporter. It is next contended that at any rate sale within the octroi limits by itself would not make the goods exigible to octroi unless it is for purpose of consumption or use of the goods sold within such limits. It is urged that if the goods are sold within the octroi limits and the buyers take them out of such limits without using or consuming within such limits, no octroi can be levied on such goods and the Municipal Council is liable to refund the octroi paid thereon if the goods had been imported with permission to temporarily detain them with the importer for eventual export within the prescribed time. For this proposition, reliance is sought to be placed on rulings of the Supreme Court in *Burmah Shell Oil Co. v. Belgaum Borough Municipality*¹ and *Hiralal v. Broach Municipality*²

13. In *Burmah Shell Company's* case, the Supreme Court considered the concept and legislative history of octroi as a tax as imposed under the provisions of the Bombay Municipal Boroughs Act, 1925. Under section 73(1) (iv) of that Act before its amendment in 1954, a Municipality was empowered to impose "an octroi on animals or goods or both, brought within the octroi limits for consumption or use therein," subject to the provisions of sections 75 and 76 which laid down the procedure for the Municipality to follow before imposing the tax. In 1954, by legislative amendment the words "or use" were substituted by the words "use or sale", thus including the word "sale" in the description of octroi. However, consequent to this amendment, the rules and bye-laws were not reframed and the procedure prescribed under section 76 was not followed to impose octroi on sale also. The petitioner Company contended that it was not liable to pay octroi on goods sold by it within the octroi limits in the absence of the abovesaid procedure being followed or the rules and bye-laws being amended. The Supreme Court examined the scheme of taxation under the said Act and the rules and bye-laws made by the Municipality for the levy of octroi. It also took note of the abovesaid amendment in 1954 and also of the legislative lists in the Government of India Act, 1935 and the Constitution. After examining the history of octroi

and terminal taxes, the Court recorded its conclusions in paragraphs 21 to 23 of the report which we may reproduce here with advantage :

"(21) Looking to the trade of the company, it is quite obvious that it brings in the goods (a) for consumption by itself-which of course is within the term 'octroi' as described; (b) for re-export either by itself or through dealers outside the area which as is admitted by the municipality, entitles the company to a refund of tax and (c) for sale by it directly to consumers or to dealers who distribute the goods within the area to ultimate consumers. So long as the goods are brought inside the area for sale within the area to an ultimate consumer, it makes no difference that the consumer does not consume them in the area but takes them out for consumption elsewhere. A motorist who buys petrol within the municipal area and goes outside it for a drive buys the petrol in the area for purposes of consumption and the person who-keeps and stores the petrol for sale in such circumstances keeps it for consumption therein. The word "therein" does not mean that all the act of consumption must take place in the area of the municipality. It is sufficient if the goods are brought inside the area to be delivered to the ultimate consumer in that area because the taxable event is the entry of goods which are meant to reach an ultimate user or consumer in the area. Indeed, the consumer may never consume them as, for example, a motorist buys a tin of oil and finds that it does not suit his vehicle and leaves it lying on his shelf. The goods must be regarded as having been brought in for purposes of consumption when a person brings them either for his own use or consumption, or to put them in the way of others in the area, who are to use and consume. In this process, the act of sale is merely the

¹ AIR 1963 SC 906

² AIR 1976 SC 1446

means for putting the goods in the way of use or consumption. It is an earlier stage, the ultimate destination of the goods being 'use or consumption'. The earlier stage, namely, the sale by him, does not save the person who brought the goods into the local area from liability to the tax if the goods were brought inside for consumption or use. In other words, a sale of the goods brought inside, even though not expressly mentioned in the description of octroi as it stood formerly, was implicit, provided the goods were not re-exported out of the area but were brought inside for use or consumption by buyers inside the area. In this sense the amplification of the description both in the Government of India Act 1935 and the Constitution did not make any addition to the true concept of 'octroi' as explained above. That concept included the bringing in of goods in a local area so that the goods come to a repose there. When the Government of India Act 1935 was enacted, the word 'octroi' was deliberately avoided and a description added to forestall any dispute of the nature which has been raised in this case. In other words, even without the description the tax was on goods brought for 'consumption, use or sale.' The word 'octroi' was also avoided because terminal taxes are also a kind of octroi and the two were to be allocated to different legislatures.

(22) In our opinion, even without the word 'sale' in the Boroughs Act the position was the

same provided the goods were sold in the local area to a consumer who bought them for, the purpose of use or consumption or even for resale to others for the purpose of use or consumption by them in the area. It was only when the goods were re-exported out of the area that the tax could not legitimately be levied and in this case the municipality has agreed to refund the amount of tax on goods re-exported without being used or consumed in the municipal area. In this view of the matter it was not necessary for the Municipality to follow the procedure for imposing taxes when the section was amended. The tax still remained the same. Its nature, incidence or rates were not altered.

(23) In our opinion, the company was liable to pay octroi" tax on goods brought into local area (a) to be consumed by itself or sold by it to consumers direct and (b) for sale to dealers who in their turn sold the goods to consumers within the municipal area irrespective of whether such consumers bought them for use in the area or outside it. The company was, however, not liable to octroi in respect of goods which it brought into the local area and which were re-exported. But to enable the company to save itself from tax in that case it had to follow the procedure laid down by rules for refund of taxes."

14. In Hiralal's case (AIR 1976 Supreme Court 1446), a plea was made to reconsider the decision in Burmah Shell Company's case (AIR 1963 Supreme Court 906). The Supreme Court rejected it and affirmed the view taken in that case observing that the law on the subject had been laid down quite clearly in that case.

15. What has been said by the Supreme Court in Burmah Shell Company's case in the context of the provision contained in the Bombay Municipal Boroughs Act, 1925 regarding octroi would apply with equal force to identical provisions contained in the Maharashtra Municipalities Act, which have been adopted from the former with slight modifications which are not material to the issue.

16. The position, therefore, which emerges from the decision of the Supreme Court is that an importer would be liable to pay octroi if he brings the goods within the octroi limits for his own use or consumption or for being sold by him direct to users or consumers or for being sold to dealers who in their turn sell the goods to users or consumers within the octroi limits irrespective whether such consumers buy them for use or consumption in the area or outside it. The importer would not however be liable to pay octroi in respect of goods which he brings into the octroi limits but re exports them. In other words, only such goods which are brought within the octroi limits for consumption or use therein would be liable to octroi. But if they are not imported with this end in view but only to export them, they would not be exigible to octroi.

17. In the present case, the three consignments had been brought in by the petitioner for eventual export and for that purpose it had temporarily detained them in its own custody, after making declaration in Form 4. Not only this but at the time of export it had followed the procedure prescribed in Rule 25. They had applied in Form 11 for written permission for export of these

consignments and they had been granted such permission in Form 12. These facts are not denied and are not in dispute. It is, therefore, abundantly clear that the petitioner had not imported these goods for the purpose of use or consumption within the octroi limits but for the sole purpose of export.

18. It is true as has been said by the Supreme Court in *Burmah Shell Co's case* (AIR 1963 Supreme Court 906) that in order to save itself from tax on goods exported, the petitioner had to follow the procedure laid down by rules for refund of taxes. There is no dispute that the petitioner has followed this procedure, namely making declaration at the time of import, giving intimation and applying for permission to export and obtaining written-permission-cum-refund export pass. As said above, the only ground on which the refund is refused is that there was breach of clause (d) of sub-rule (3) of Rule 25 in that the importer and exporter were not the same and the goods had undergone change of ownership. Now this condition for permission to export for claiming refund of octroi will have to be read in the background of the law laid down by the Supreme Court in *Burmah Shell Co.'s case*. If the goods are not imported within the octroi limits for ultimate use or consumption therein but specifically for export sale of such goods even within the octroi limits not for use or consumption therein but for export would not make the importer or the exporter liable to pay the octroi and they would be entitled to refund the amount already deposited after such export. Here it is not correct to say that the importer and exporter are not the same since the petitioner had applied for necessary permission and obtained it. In these set of facts, it is not possible to say that there was change of ownership at the time the goods had been exported. Simply because the goods had been consigned to another person does not mean that there was change of ownership.

We, therefore, find that the Council has wrongly refused to refund the amount of octroi in this behalf which comes to Rs. 239,59.

19. The Council, therefore, is liable to pay to the petitioner the sum of Rs. 809.59. Civil Application No. 3067 of 1983 for amendment of the petition is allowed since it is only of a formal nature. It is not possible to grant relief in terms of prayer clauses (i) and (ii) as they are too general and vague. Relief can be granted in terms of prayer clause (ii)(b) as introduced by the amendment. Petitioner shall carry out the amendment within a week.

20. In the result, the petition is allowed and the respondent is directed to refund to the petitioner the sum of Rs. 809.59 within three months from today. In the circumstances of the case, there shall be no order as to costs.

Petition allowed.