Municipal Corporation Of The City Of ... vs Babubhai Himatlal on 16 August, 1989

Equivalent citations: 1989 AIR 2091, 1989 SCR (3) 862, AIR 1989 SUPREME COURT 2091, 1989 (4) SCC 103, (1989) 3 JT 437 (SC), (1990) 1 MAHLR 78, (1990) 1 GUJ LR 432, (1990) 185 ITR 255

Author: G.L. Oza

Bench: G.L. Oza, K.N. Saikia

PETITIONER:
MUNICIPAL CORPORATION OF THE CITY OF BARODA

Vs.

RESPONDENT:
BABUBHAI HIMATLAL

DATE OF JUDGMENT16/08/1989

BENCH:
OZA, G.L. (J)
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OZA, G.L. (J)
SAIKIA, K.N. (J)

CITATION:
1989 AIR 2091 1989 SCR (3) 862
1989 SCC (4) 103 JT 1989 (3) 437
1989 SCALE (2)305

ACT:
The Bombay provincial Corporations Act, 1949: Sections 147 and 466(1)(A)(f) and Standing Order No. 3--Payment of supervision fee by transporter--Whether reasonable--Optional to transporter-Avoidance of claiming refund on octroi duty--Standing Order held valid, legal and enforceable.

HEADNOTE:
The respondent who was carrying on the business of transporting goods challenged before the High Court the imposition of supervision fee levied under Standing Order No. 3 on the goods in transit through the limits of the Municipal Corporation of Baroda. Before the framing of Standing Order No. 3, a transporter was required to pay

octroi at the point of entry in the city and claim refund thereof at the point of exit after satisfying the authority that the goods which had entered were being taken out. Standing Order No. 3 framed under section 466(1)(A)(f) read with section 147 of the Bombay provincial Corporations Act 1949, provided that when a transporter entered into the corporation limits with goods which were only in transit, he could on payment of supervision fee carry the goods through the corporation limits under the supervision of the staff of the Corporation without payment of octroi at the point of entry.

The High Court held Standing Order No. 3 as illegal and without the authority of law. The High Court observed that under section 466(1)(A)(f) the Commissioner had the authority to frame standing orders only in respect of goods on which octroi was payable and as octroi was not payable on the goods which were in transit, no standing orders could be framed under the Section- The High Court further held that quid pro quo was not satisfied as no service was rendered to the transporter.

Before this Court it was contended on behalf of the appellant that the levy of supervision fee was optional; the procedure under Standing Order No. 3 was introduced to avoid hardship to the transporter; it was open to him to follow the normal procedure of paying the octroi and claiming refund; the requirement of quid pro quo was in substance
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satisfied, and the fee was charged only to facilitate the transporter in carrying the goods in transit.

Allowing the appeal, this Court,

HELD: (1) The procedure under Standing Order No. 3 is not compulsory and it is the option of the transporter to take advantage of this Standing Order if he so chooses otherwise follow normal procedure of payment of octroi and claiming refund. [868H-869A]

(2) Clause (f) of section 466(1)(A) contemplates that the Commissioner may by standing order prescribed 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 clear that this provision which confers the authority on the Commissioner to frame standing orders does not talk of goods on which octroi is payable. The Commissioner therefore had the authority under section 466, and the Standing Orders have been framed in accordance with the procedure prescribed under that section. [867D-E; 869D]

(3) It appears that while taking the view that the levy could not be justified under Entry 52 of the State List which authorises the State Legislature to impose a tax on entry of goods into a local area, the High Court was examining the fees prescribed as a tax, and it was on that basis that the High Court took the view that no such tax could be levied on goods on which no octroi was payable. But, as it is not a tax, the imposition could not be said to be bad on

the ground that the State Legislature had no authority to impose it. [869E-870A]

(4) In order to establish a quid pro quo concept it is not necessary to establish exactly that the amount collected is spent on the services rendered. [872A]

Sourthen Pharmaceuticals & Chemicals Trichur & Ors. etc. v. State of Kerala & Ors. etc., [1982] 1 SCR 519 and Sreenivasa General Traders & Ors. v. State of Andhra Pradesh & Ors., [1983] 3 SCR 843, referred to.

(5) So far as the charging of supervision fee is concerned, it reasonably appears to be a charge for the services rendered. The High Court was, therefore, not right in coming to the conclusion that this fee was not justified because, according to the High Court, it was not established that the fee was in consideration of the services or privilege conferred on the transporter. [872F]

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JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1086 of 1971.

From the Judgment and Order dated 28.4.71 of the Gujarat High Court in S.C.A. No. 671 of 1970.

R.F. Nariman, A.K. Verma and D.N. Misra for the Appellant. V.J. Francis, (N.P.), Krishan Kumar, Vimal Dave & Co., M.N. Shroff, (N.P.) and Girish Chandra for the Respondent. The Judgment of,the Court was delivered by OZA, J. This appeal on certificate by the High Court of Gujarat is filed against the judgment of the Gujarat High Court dated 28th April, 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 Municipal Corporation, 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 this Standing Order which is the subject matter of challenge before the High Court and before us, was framed, a trans- porter who brought the goods within the limits of the Munic- ipal 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 have been imported for sale, consumption or use 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 are taken out on the other end, and if the octroi post authority was satisfied that the goods which had entered are 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 the ends and for those transporters who were carrying goods which only were in transit in the city of Baroda still had to suffer the inconvenience of paying the octroi duty when they en- tered the city limits and then satisfy the authorities at the post from where they went out of town and also had to pay first the tax and then claim a refund, in order to avoid inconvenience and the burden on the transporter this Stand- ing 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 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 stand- ing orders but he can only frame standing orders 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 the octroi was not payable thereon and therefore no standing orders could be framed under Section 466(1)(A)(f) and therefore standing order providing for fees as discussed above was beyond the authority of the Commis- sioner under this Act.

The High Court also accepted the second contention of the respondent that although the Corporation claim 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 it is established that the charge and the collection made on the basis of this charge had any ration- ale ratio 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 this Standing Order it was not compulsory and it was open to the trans- porter 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 therefore contend- ed 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 them- selves 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 sum by the transporter so that it may be possible for him to pay the octroi on the entry checkpost itself. It was therefore contended firstly that it being an option given 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 language of Section 466(1)(A)(f) it is clearly with the authority of the Commis- sioner 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 how 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 quid pro quo is satisfied and in fact the fee is charged only to facili- tate the transporter in carrying the goods in transit with- out payment of octroi and without undue detention in the process of payment of octroi at the entry and claiming refund at the exit. It is alleged that a notice was issued suggesting this procedure as prescribed in 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 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 this 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 but it could not be said that there was any agreement entered into by the association nor it could 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 quid pro quo is not satisfied as no service is rendered to the transporter. Learned counsel for the parties referred to the decision of this Court on the question of fee and the principle of quidpro quo.

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

> "466(1) The Commissioner may make standing orders consistent with the provisions of this Act and the rules and by-laws in respect of the following matters namely:
>
> (A) (a) xxx xxx xxx
> xxx xxx xxx
>
> (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 with the Commissioner to make Standing orders consistent with this Act, rules or by- 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) con- templates that Commissioner may by 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 this provision which confers the authority on the Commissioner to frame Standing Orders do not talk of goods on which octroi is payable. But Section 466 pertains t9 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 Commit-

tee 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 ap-

proved 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 reads as under:

> BARODA MUNICIPAL CORPORATION "The Standing Orders made by the Municipal Commissioner, Baroda Municipal Corporation, Baroda under Section 466(1)(A)(f) of the Bombay Provincial Municipal Corporation Act, 1949 vide his order No. 2441 dated 16.8.69 and approved by the Standing Committee under its Resolution No. 882 dated 28th Novem-

ber, 1969 and confirmed by Government under their Resolution P.H.D. No. BMC 4470-160 P. Dated the I2th March, 1970.

Section 147 of this Act reads:

> "Until the contrary is proved any goods im- ported into 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 purposes or sale or consumption and 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 language of Section 147 that the normal procedure before this Standing Order was introduced, was that the goods when entered into the corporation limits, 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 author- ities that the goods on which he has paid octroi and import- ed are being exported out of the city and it is only after satisfying the authorities about the goods on which octroi is paid 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 pre- sumption. 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 con- troversy is 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 fees it is not compulsory as it is the option of the trans- por-

ter to take advantage of this Standing Order if he so chooses otherwise 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 import- ers. As I have pointed out hereinabove this is not obligatory but purely voluntary and op- tional. Those who do not want to avail of this facility need not avail it and allow 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 Stand- ing Orders have been framed in accordance with 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 this 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 there- fore took the view that Standing Orders which the Commis- sioner could frame under Section 466 could be in respect of goods on which octroi is payable and not pertaining to the goods on which the octroi is not payable. It appears that while taking this view the High Court was examining this fees 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 fees could be said to be a tax is concerned, there is no difficulty as even the 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 imposi- tion could not be said to be bad because the State Legislature had no authority to impose it. It was contended by the learned counsel that in view of Section 147 quoted above any import within the local limits would draw a presumption that it is for consumption 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 in the payment of octroi duty at the entry and after satisfying the authorities at the exit end claim the refund of the octroi paid, thereby the Corporation intended to help the trans- porter in saving time and also in payment of the octroi at one end and later on claiming a refund. This in fact was the service rendered by the corporation to the benefit of the transporter and this fees which was charged was just to meet the approximate expenses that the Corporation 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 sugges- tion of the petitioner association when the association suggested to the appellant corporation to reduce this fees from Rs.5 to Rs.2 which is

clear from the letter written by the Association to the Corporation dated 31st March, 1970. As regards this aspect of the matter, the learned Judges of the High Court came to the conclusion that there was no quid pro quo established which could justify the levy of this fees as fees for the services rendered in the interest of the transporter. In Southern Pharmaceuticals & Chemicals Trichur & Ors. etc. v. State of Kerala & Ors. etc., [1982] 1 SCR 519 this Court after considering the various decision distinguished fees from tax in these words.

> "'Fees' are 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 out 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:

> "That is because the Constitution did not contemplate it 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 senso 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 super- vision 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 advantage of this provision makes it further clear that it is not a levy or an imposition of tax but merely a fees charged for the privi- lege or services rendered to the payer. In Sreenivasa Gener- al Traders & Ors. etc. v. State of Andhra Pradesh & Ors. etc., [1983] 3 SCR 843 this Court considered series of decisions on the question and observed:

> "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 inspite 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 compul- sion or coerciveness present 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 collections for the service rendered or grant of a privi- lege or licence are taken to the consolidated fund of the State and not separately appropri- ated towards the expenditure for rendering the service is not by itself decisive. Presumably the attention of the Court in the Shirur Mutt case was not drawn to Art. 266 of the Consti- tution. 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 increas- ingly 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 neces- sarily absent in every tax: Constitutional Law of India by H.M. Seervail Vol. 2, 2nd Edn. p. 1252, para 22.39."

It is therefore clear that in order to establish a quid pro quo concept it is not necessary to establish exactly that the amount collected is spent on the services rendered as it was further observed in this decision:

> "The traditional view that there must be actual quid pro quo for a fee has under gone 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 in public interest. If the element of revenue for 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 bene- fitted 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 rendered. However, co-relationship between the levy and the services rendered expected is lone of the general character and not of mathematical exactitude. All that is necessary is that there should be a "reasona- ble relationship" between the levy of the fee and the services rendered."

It is therefore clear that so far as the charging of super- vision 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 fees was not justified as it is not established that it reasonably satisfies that it is in consideration of the services or 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 al- lowed. The judgment of the High Court is set aside and it is held that the Standing Order No. 3 passed by the appellant Municipal Corporation is valid and enforceable. The appel- lant shall also be entitled to costs of this appeal. Costs quantified at Rs.5,000.

R.S.S. Appeal allowed.