Ballabhadas Mathurdas Lakhani And Ors. vs Municipal Committee, Malkapur on 1 April, 1970

Equivalent citations: AIR1970SC1002, (1970)2SCC267, AIR 1970 SUPREME COURT 1002, 1970 MAH LJ 561

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Bench: A.N. Grover, J.C. Shah, K.S. Hegde

JUDGMENT

J.C. Shah, J.

1. The Municipality of Mal-kapur recovered from the appellants Rs. 6,980/2/- as "Bale and Boja tax" for three years 1950-51, 1951-52 and 1952-58 in respect of cotton ginned in their factory. The appellants filed a suit in the Court of Civil Judge, Class I, Khamgaon, for an order permanently restraining the Municipality from recovering the "Bale and Boja" tax for the season 1953-54 and for subsequent seasons and for a decree refunding the amount paid and interest thereon.

2. The appellants contended that the levy of the "Bale and Boja" tax was ultra vires the Municipality. The Trial Court decreed the claim for injunction and also awarded the amount claimed less Rupees 750/-. In appeal, the District Court held that the levy of tax at the rate prevailing on March 31, 1939, was saved by the provisions of Section 142-A(2) of the Government of India Act, 1935, and the Municipality was competent to levy tax at that rate. The District Court on that view modified the decree and held that the Municipality was entitled to retain Rupees 1,867/4/-. In second appeal to the High Court of Bombay at Nagpur, the following question was referred to a Full Bench:

> Whether in respect of the recoveries, which are in contravention of the prohibitions contained in Sub-section (2) of Section 142-A of the Government of India Act, 1935, and Clause (2) of Article 276 of the Constitution, the provisions of Section 48(2) of the C.P. and Berar Municipalities Act, 1922 apply?
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> The High Court, following the judgment of tills Court in Bharat Kala Bhandar v. Municipal Committee of Dhamangaon 1965-3 SCR 499 : answered the question in the negative. The appeal was thereafter placed for hearing on questions not decided by the Full Bench. The Court at that stage entertained and upheld an objection that the suit against the Municipality for refund of tax paid by the appellants was not maintainable. The High Court observed:

We are bound to follow the decision in Bharat Kala Bhandar v. Dhamangaon Municipality but in view of the fact that the relevant provisions were not brought to the notice of the Court and in view of the fact that the decision in Firm Radha Kishan's case, holds that the remedy provided by similar provisions is adequate and a suit does not lie, we are constrained to hold that under the Act the suit is incompetent.

The High Court accordingly set aside the decree in favour of the appellants for refund of tax and confirmed the injunction restraining the Municipality from recovering the tax. With certificate granted by the High Court under Article 133(1)(c) of the Constitution this appeal has been preferred.

3. Two questions fall to be determined in this appeal (I) whether a suit for refund of tax paid to the Municipality is maintainable; and (2) if the suit is maintainable, whether the levy of tax by the Municipality was valid in law.

4. The first question is concluded by the judgment of this Court in Bharat Kala Bhandar's case, 1965-3 SCR 499 = . That case arose under the C.F. & Berar Municipalities Act, 1922. The right of a Municipality governed by that Act to levy under Section 66(1)(b) a tax on bales of cotton ginned at the prescribed rate was challenged by a taxpayer. This Court held that levy of tax on cotton ginned by the taxpayer in excess of the amount prescribed by Article 276 of the Constitution was invalid, and since the Municipality had no authority to levy the tax in excess of the rate permitted by the Constitution, the assessment proceedings levying tax in excess of the permissible limit were invalid, and a suit for refund of tax in excess of the amount permitted by Article 276 was maintainable. The decision was binding on the High Court and the High Court could not ignore it because they thought that "relevant provisions were not brought to the notice of the Court".

5. We may also observe that the judgment in Firm Seth Radha Kishan v. Administrator Municipal Committee, Ludhiana 1964-2 SCR 273 : on which reliance was placed by the High Court has no relevance. In that case under the Rules of the Municipality of Ludhiana tax on common salt imported within the Municipal limits could be levied at a certain rate, and on all other kinds of salts at a higher rate. On the Sambhur salt imported by the appellants duty was levied at the higher rate. The appellants then filed a suit for decree for refund of excess tax levied, contending that Sambhur salt was common salt. This Court held that the Civil Court had no jurisdiction to entertain the suit, for the liability to pay terminal tax was created by the Act and a remedy was also provided against improper enforcement of the Act. In a case where the Municipality has undoubted power to levy a tax under a provision of the Act, in respect of any article, and it levies tax under another provision of the Act not applicable to it, the Municipality merely commits an error in collecting the tax at the rate collected, and no question of jurisdiction arises, the party aggrieved must seek remedy in the manner prescribed by the Act. In the present case, however, there is a bar against levy in excess of the amount specified in the Constitution, and not a mere question of levy of tax under an inapplicable entry.

6.Again it was implicit in the judgment of the Full Bench that the suit was maintainable. If the suit was not maintainable the question whether to the claim made under Section 48 of the Act had application could not arise. Section 48 lays down the conditions subject to which the suit may be filed. Whether Section 48 of the C.P. & Berar Municipalities Act is not applicable, because the tax contravened Section 142-A of the Government of India Act, 1935, or Article 276 of the Constitution, could only fall to be determined if a suit for refund lay. The High Court was, in our judgment, in error in setting aside the decree passed by the District Court on the ground that a suit for refund of tax was not maintainable.

7. On the second question the argument of the Municipality has also not much substance. The Municipality was constituted in 1905 under Section 41(1)(a)(b) of the Berar Municipal Act, 1888, a tax called "the Bale and Boja tax" was levied by the Municipality with effect from October 1, 1912, on cotton ginned and pressed in Ginning and. Pressing Factories at the rate of 8 pies per bale of 10 maunds, and 10 pies per bale of 14 maunds. On October 2, 1989, the Municipality resolved to revise the rates and by notification dated January 2, 1940, under Section 87(5) of the C.P. & Berar Municipalities Act, 1922, tax was permitted to be levied at the rate of four annas per bale with effect from October, 1, 1939.

8. The Berar Municipal Act was promulgated by the Viceroy & Governor-General, Berar being then not a. part of British India. By a notification of the. 'Governor-General dated June 22, 1924, under the Indian (Foreign Jurisdiction) Order in Council the Berar Municipal Act was repealed, and the Central Provinces Municipalities Act 2 of 1922 was applied to the Berar Area. After the Government of India Act, 1935, the Berar Laws (Provincial) Act, 1941 was enacted, and Berar was under Section 47 of the Government of India Act to be administered together with the Central Provinces as one of the Provinces under that Act. Various Acts" including the Central Provinces Municipalities Act 2 of 1922 were extended to the Berar with certain modifications under the Central. Provinces and Berar Act 15 of 1941. By that Act the title of Act 2 of 1922 was altered: it read "Central Provinces and Berar Municipalities Act"., By Section 8 of the Act it was provided that the Central Provinces Municipalities Act, 1922, which had been applied to Berar by order under the Indian (Foreign Jurisdiction) Order in Council, 1902, shall cease to have effect "provided that all appointments, delegations, notifications, orders, byelaws, rules and regulations which have been made or issued, or deemed to have been made or issued and all other things done or deemed to have been done under, or in pursuance" of, any provision of any of the said Order m Council, and which are in force at the commencement of this Act, shall be deemed to have been made or issued or done under or in pursuance of the corresponding provision of that Act as now extended to, and in force in, Berar."

Notifications issued under the Berar Municipal Act and the Central "Provinces Municipalities Act in force at the commencement of Act 15 of 1941 applied to the Municipalities in the former Berar area. In the meanwhile S. 142-A was incorporated in the Government of India Act, 1935, by India & Burma (Miscellaneous Amendment) Act, 194.0, 8 & 4, Geo. 6, Ch. 5, as from April 1,1939, imposing limit upon taxes, professions, trades and callings. But by the proviso to Sub-section (2) of Section 142-A levy by the Provinces or Municipal bodies of tax on profession, trade, calling or employment, at rates exceeding the rates prescribed by the Government of India Act were to remain in operation until provision to the contrary was made by the Parliament. To give effect to the limitation imposed

by Section 142-A the Parliament enacted the Professions Tax Limitation Act XX of 1941. The relevant provisions of Act 20 of 1941 are as follows:

> Section 2 - 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, district board, local board? or other local authority in any Province, 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 in which such taxes exceed fifty rupees per annum.
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> Section 3- The provisions of Section 2 shall not apply to any tax specified in the Schedule.
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> The Schedule is as follows:
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> THE SCHEDULE Taxes to which Section 2 does not apply.
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> 1.The tax on professions, trades and callings, imposed through fees for annual licences, under Chapter XII of the Calcutta Municipal Act, 1928.
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> 2. The tax on trades, professions and callings, imposed under Clause (f) of Sub-sections (1) of Section 123 of the Bengal Municipal Act, 1932.
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> 3. The tax on trades and callings carried on within the municipal limits and deriving special advantages from, or imposing special burdens on, municipal services, imposed under Clause (ii) of Sub-section (1) of Section 128 of the United Provinces Municipalities Act, 1916.
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> 4. The tax on persons exercising any profession or art, or carrying on any trade or calling, within the limits of the Municipality, imposed under Clause (b) of Section (1) of Section 66 of the Central Provinces Municipalities Act, 1922.

5, The tax on companies, imposed under Section 110 of the Madras City Municipal Act, 1919.

9. The Professions Tax Limitation Act, 1941, was repealed by the Adaptation of Laws Order, 1950, and limitations on the tax on professions, trades, callings and employment were continued by Article 278 of the Constitution after the repeal of the Government of India Act.

10. It may be recalled that the notification enhancing the rate of "Bale and Boja tax" was issued after Section 142-A of the Government of India Act, 1935, was incorporated. The only notification In force was the notification issued in 1912. The notification of 1940 was not saved by the proviso to Section 142-A of the Government of India Act, 1935. But the Municipality collected tax at rates set out in the notification of .1940. It is clear, however, that if the notification of 1940 was ineffective under the Government of India Act, it could not be revived under the Constitution Article 276(2) proviso. The

notification relied upon by the Municipality was brought into operation after the Constitutional prohibition under Section 142-A of the Government of India Act became effective on April 1, 1939. The modification of rates was plainly ineffective, for the rates prescribed thereby were not in operation in the financial year ending March 31, 1939.

11. No claim to recover the tax could therefore, be founded on that notification. But it was urged that the earlier notification of 1912 was in any case effective in the financial year ending March 31, 1939, and tax could be levied under that notification which was indisputably in operation in the financial year. This Court has however held in Municipal Committee, Akot v. Manilal Manekji Pvt Ltd. 1967-2 SCR 100 : ; on interpretation of Sections 2 and 3 and Item 4 of the Schedule to the Professions Tax Limitation Act 20 of 1941 that the rate fixed by the earlier notification was also not saved from the operation of Section 2. This Court was of the view that by virtue of Item 4 of the Schedule only the tax on persons, exercising professions imposed under Clause (b) of Sub-section (1) of Section 66 of the Central Provinces Municipalities Act, 1922, was saved from the operation of Section. 2 of Act 20 of 1941 and not the tax under Section 66 of the Central Provinces & Berar Municipalities Act, 1922, and the tax levied by the respondent Municipality was levied under the latter Act. That decision is binding upon us. It must therefore be held that the rate of tax prescribed by the notification of 1912 alone could be enforced, subject to the limit prescribed by Article 276(2) of the Constitution. The Municipality was therefore incompetent to levy a tax at a rate exceeding Rs, 250/- for the whole year.

12. The appeal is allowed and the decree passed by the Trial Court is restored. The Municipality will pay the costs in this Court and in the High Court.