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KAPILDEVA MALAVIYA v. JUDGES OF THE HIGH COURT AT ALLAHABAD

In our opinion, on the question whether the allegation amounted to a contempt of court or not the Division Bench had exclusive jurisdiction and its order is final. We must, therefore, decline to grant leave to appeal to His Majesty in Council. The application is dismissed with costs.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bennet

1935 *February*, 13

MUNICIPAL BOARD, BENARES (DEFENDANT) *v.* KRISHNA AND COMPANY (PLAINTIFF)*

Municipalities Act (Local Act II of 1916), *sections* 128, 160, 164 *—Octroi—Assessment to octroi charge—Civil suit challenging liability of the goods to pay octroi—Jurisdiction of civil court barred—Municipal Account Code, rule* 132, *class* (14)*—Machinery to be worked by electric power—Electric ceiling fans—Practice and pleading—Question of jurisdiction raised in Letters Patent appeal.*

A plea of want of jurisdiction to try the suit can be raised in Letters Patent appeal, although not pressed before the single Judge.

No suit for a refund of an octroi charge, which has been assessed and levied by a municipality, lies in a civil court on the ground that the goods were not in fact assessable to octroi duty or that the amount of assessment was excessive. The language of section 164 of the Municipalities Act, together with its marginal note, emphatically bars the jurisdiction of the civil court in such matters of assessment to taxes, which include octroi charges; the only remedy being that prescribed by section 160 of the Act.

Electric ceiling fans, being machinery to be worked by electric power, come under class (14) of rule 132 of the Municipal Account Code and are therefore exempt from octroi duty.

Mr. *A. M. Khwaja*, for the appellant.

Dr. *K. N. Katju* and Mr. *B. Malik*, for the respondent.

SULAIMAN, C.J., and BENNET, J.:—This is an appeal by the Municipal Board of Benares arising out of a suit brought by the plaintiff company for refund of certain octroi duty charged on certain ceiling fans imported into the municipal limits. The goods were detained at the

*Appeal No. 37 of 1934, under section 10 of the Letters Patent.

barrier and were charged at the rate of six pies per rupee on their value. The plaintiff paid the duty under protest and got the goods released. The plaintiff company has now instituted the suit in the civil court for refund of the octroi on the ground that the goods were not chargeable with octroi at all. The defendant *inter alia* pleaded that the civil court had no jurisdiction to entertain the suit. An issue on the question of jurisdiction was framed by the trial court, but it was not seriously pressed on behalf of the defendant. The point was again raised in the grounds of appeal before the lower appellate court, but the judgment of that court does not suggest that the point was argued. Before a learned Judge of this Court in second appeal the point does not appear to have been argued, and the only question considered was whether the electric ceiling fans could come under the category of "Hardware" so as to be chargeable under article 82 of the schedule.

A preliminary objection is taken on behalf of the plaintiff that a new point which was not argued before the learned Judge of this Court should not be allowed to be raised in the Letters Patent appeal. Reliance is placed on the observations in *Brij Bhukhan* v. *Durga Dat* (1) that in appeals under the Letters Patent an appellant is not entitled to be heard on points which he had not raised before the Judge from whose decree he was appealing. Probably all that the learned Judges meant to lay down was that he was not entitled as of right to raise such a question, and not that the Letters Patent Bench itself is precluded from allowing such a point to be raised. Even in the case of *Ram Kinkar Rai* v. *Tufani Ahir* (2) it was conceded that a question involving jurisdiction can be raised for the first time in appeal. It was pointed out in a later Full Bench case, *Mahabir Singh* v. *Dip Narain Tewari* (3), that the list could not be exhaustive and any suggestion that no other

(1) (1898) I.L.R., 20 All., 258(261). (2) (1930) I.L.R., 53 All., 65.
(3) (1931) I.L.R., 54 All., 25.

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category could be considered would be an *obiter dictum*. The matter has been set at rest by the pronouncement of their Lordships of the Privy Council in the case of *Official Liquidator* v. *Mrs. Burjorjee* (1), where their Lordships, quoting the remarks of LORD WATSON in *Connecticut Fire Insurance Company* v. *Kavanagh* (2), pointed out that "When a question of law is raised for the first time in a court of last resort, upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact." We are, therefore, of opinion that a plea of want of jurisdiction can be raised in this Letters Patent appeal, even though it does not appear to have been pressed before the learned Judge of this Court.

The first contention urged before us on behalf of the appellant is that no suit for a refund of octroi duty lies in the civil court.

Section 128(1) of the Municipalities Act, 1916, empowers a Board to impose several kinds of "taxes", and the list includes an octroi on goods or animals brought within the municipality for consumption or use therein. The opening portion of the sub-section indicates that an octroi is regarded as one of the taxes which can be imposed by the Board. In section 133(1) it is specifically mentioned that if the proposed "tax" falls under any of the clauses (i) to (xii) of sub-section (1) of section 128, the Commissioner may refuse to sanction it. Clause (viii) of sub-section (1) is the clause referring to octroi on goods. Similarly section 166 speaks of any sum on account of "tax" other than an octroi or toll, or any similar tax payable upon immediate demand. It therefore seems to be obvious that the word "tax" is

(1) [1932] A.L.J., 706. (2) [1892] A.C., 473(480)

intended to be comprehensive enough to include an octroi or a toll also. Section 153 also is general in its scope and provides for the making of rules regulating the assessment, collection or composition of taxes, and, in the case of octroi or toll, the determination of octroi or toll limits. That is to say, the assessment and collection of octroi as well as the determination of the limits of octroi can be provided for in the rules made by the Board. Section 160 allows an appeal in the case of all taxes other than those assessed upon the annual value of buildings or lands, and section 162 provides for a reference to the High Court in case there is a reasonable doubt. It is difficult to hold that these sections are inapplicable to the assessment, imposition or demand of octroi.

We then come to section 164, on which main reliance is placed on behalf of the appellant. It provides: "(1) No objection shall be taken to a valuation or assessment, nor shall the liability of a person to be assessed or taxed be questioned in any other manner or by any other authority than is provided in this Act. (2) The order of the appellate authority confirming, setting aside or modifying an order in respect of valuation or assessment or liability to assessment or taxation shall be final"; etc. The marginal note added to the section is "Bar to jurisdiction of civil and criminal courts in matters of taxation." Both the marginal note as well as the language of the two sub-sections indicate that it is the intention of the legislature that matters of this kind are to be decided finally in accordance with the provisions laid down in the Municipalities Act and not otherwise, and that they should not be reopened in any civil or criminal court in any manner other than that which is provided in this Act. It is obviously intended that all objections to the valuation or assessment as well as to the liability or assessment of taxes shall be made either to the Board or to the appellate authority and that the ultimate decision

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of the appellate authority shall be absolutely conclusive and incapable of being reopened in any other court except in accordance with the provisions of the Act itself.

It has been held by a Bench of this Court that when proceedings are started under section 155 of the Municipalities Act the question whether an offence has in fact been committed can be considered afresh by the criminal court because there is provision for conviction for such an offence in the Act itself. In the case of *Kashi Prasad Verma* v. *Municipal Board, Benares* (1) there was a remark in the nature of an *obiter dictum* that "So far as civil courts are concerned the contention (that the jurisdiction is barred) is well founded." The learned counsel for the respondent has relied on the case of *Chairman of Giridih Municipality* v. *Srish Chandra Mozumdar* (2). That case turned on the interpretation of section 116 of the Bengal Municipalities Act, 1884. In the previous Act the words "nor shall the liability of any person to be assessed or rated be questioned" had also occurred in the same section, but in 1884 those words were deliberately deleted by the legislature and omitted from the section. Furthermore, there was no marginal note indicating that the section was intended to be a bar to the jurisdiction of civil or revenue courts. It is also quite clear that there the taxation had been made in respect of income earned outside the jurisdiction of the municipal limits. In those circumstances the Calcutta High Court held that a suit in a civil court was maintainable. The position in these provinces is quite different because the language of section 164 together with its marginal note is quite emphatic. It may also be noted that in chapter X of the Municipal Account Code, rule 134 onwards, the imposition of octroi duty is called an assessment. We are, therefore, of opinion that no suit for a refund of octroi which has

(1) (1934) I.L.R., 57 All., 648. (2) (1908) I.L.R., 35 Cal., 859.

been assessed by the Municipal Board on goods imported lies in a civil court on the ground that the goods were not in fact assessable or that the amount of assessment was excessive.

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The next question is whether the goods were really chargeable with octroi duty. It is not absolutely necessary to decide this finally in this case. The learned single Judge was of the opinion that ceiling electric fans did not come within the category of hardware mentioned at serial No. 82 of the schedule. There is much to be said for the view that "Hardware" would not include machinery of the kind of electric ceiling fans. The learned counsel for the Municipal Board suggested that they may come under the heading "other metals and articles made therefrom"; while the learned counsel for the respondent pointed out that iron, brass, copper, etc. had been previously mentioned and the expression "other metals" would not include iron. It is not necessary to decide this point. But we may point out that class (14) of rule 132 of the Municipal Account Code expressly exempts from duty machinery, meaning machines or sets of machines, to be worked by electric power. Electric ceiling fans are obviously within the scope of this category. Although no suit lies for refund of the octroi duty we must express our opinion that the goods were actually exempt from duty, when considering the question of costs.

We accordingly allow the appeal and dismiss the plaintiff's suit, but we direct that the parties should bear their own costs throughout.