

(1976) 03 AHC CK 0026

Allahabad High Court (Lucknow Bench)

Case No: Second Appeal No. 49 of 1966

Municipal Board, Faizabad

APPELLANT

Vs

Edward Medical Hall, Faizabad
and Others

RESPONDENT

Date of Decision: March 12, 1976

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 9
- Uttar Pradesh Municipalities Act, 1916 - Section 326

Citation: AIR 1976 All 349

Hon'ble Judges: T.S. Misra, J

Bench: Single Bench

Advocate: Jagdish Kumar, for the Appellant; H.D. Srivastava, for the Respondent

Final Decision: Allowed

Judgement

T.S. Misra, J.

The plaintiffs filed a suit for injunction to restrain the defendant from interfering with and checking the plaintiffs from carrying drugs and medicines etc., from railway station Faizabad to any other place within Faizabad Municipality and in the alternative to restrain the defendants from charging octroi tax at a rate higher than 1.25 nP. per maund on patent medicines manufactured in India.

2. The suit was resisted by the defendant on the ground inter alia, that it was bad for want of notice u/s 326 of the U. P. Municipalities Act that none of the medicines brought by the plaintiffs was covered by Serial No. 73 but were covered by Serial No. 71 of the Schedule for non-refundable octroi and the duty charged was correct. At the trial of the suit it was also urged by the defendant that the civil Court had no jurisdiction to try the suit.

2-A. The trial Court held that no notice was necessary to be given u/s 326 of the Municipalities Act and that the Civil Court had the jurisdiction to try the suit. It,

however, found that the goods were brought by the plaintiffs from outside within the municipal limits and the octroi duty was, therefore, payable thereon but it held that the drug containing alcohol was exempt from payment thereof. It did not agree with the contention that Item No. 73 for non-refundable octroi at a reduced rate included all patent medicines manufactured in India according to any system of medicine. In view of these findings relief B claimed in the suit was not granted. With regard to relief A it was observed that it could be granted only in a restricted sense in accordance with the findings on Issue No. 3. In the result, the trial Court partly decreed the suit by granting a permanent injunction restraining the defendant from interfering in carrying drugs containing Alcohol from Railway Station, Faizabad to any other place within Faizabad Municipality or from charging any octroi duty thereon from the plaintiffs and dismissed the suit with regard to other relief.

3. Against that decision both the parties filed separate appeals. The plaintiffs filed Reg. Civil Appeal No. 105 of 1962, and the defendant filed Reg. Civil Appeal No. 101 of 1962 in the Court of District Judge, Faizabad. The learned District Judge disposed of both the appeals by a common judgment dated 23-11-1965. Appeal No. 101 of 1962 was dismissed, whereas Appeal No. 105 of 1962 was allowed in part by holding that the plaintiffs were entitled on payment of octroi tax at 1.25 paise per maund to carry patent medicines manufactured in India from railway station, Faizabad to any other place within Faizabad Municipality and restraining the defendants by injunction from charging octroi tax in excess of 1.25 paise per maund. The decree for further relief granted to the plaintiffs by the trial Court was maintained.

4. Aggrieved the defendant has filed Second Appeal No. 49 of 1966 from the decree and judgment passed in Reg. Civil Appeal No. 101 of 1962, and has also filed Second Appeal No. 50 of 1966 from the judgment and decree passed in Civil Appeal No. 105 of 1962. I shall dispose of both these Appeals Nos. 49 of 1966 and 50 of 1966 by one judgment as they raise common points.

5. For the appellant, Municipal Board, Faizabad, it was urged at the outset that the Civil Court had no jurisdiction to try the suit and the suit was bad for want of notice u/s 326 of the U. P. Municipalities Act. I shall deal with these points in seriatim.

(1) Jurisdiction

6. The jurisdiction of a Court to entertain and decide a suit depends upon the allegations in the plaint and not upon those which may ultimately be found true. Such allegations may after the trial be held to be unfounded which will in consequence result in dismissal of the suit not because the Court had no jurisdiction but because the allegations on which it was based were found to be incorrect. The question of maintainability of a suit also thus depends on the allegations made in the plaint. The plaintiff cannot, however, by merely so drafting his prayer as to exclude relief which may or may not be granted by the Court confer jurisdiction to try the suit. Hence in all cases it is necessary to consider what the cause of action in

the plaint is and what is the substantive relief sought for by the plaintiff. An exclusion of jurisdiction of Civil Court is not readily to be inferred. Where a statute gives a finality to the orders of the special tribunals the Civil Court's jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Court would normally, do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency decisive to sustain the jurisdiction of the Civil Court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not. Similarly the questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry. See [Dhulabhai and Others Vs. The State of Madhya Pradesh and Another](#), .

7. In the case on hand the plaintiffs alleged that they were dealing in Chemicals and Drugs within the municipal limits and for their business they procured Chemicals and Drugs from out station. The defendant through its employees interfered with and checked the plaintiffs' goods at the octroi post near the Railway Station, Faizabad and charged the plaintiffs with the Octroi tax, on the goods received, at the rate of Rupees 7.50 nP., per maund, which, according to the plaintiffs, was illegal and without jurisdiction, on the ground, inter alia, that according to the U. P. Municipalities Act, 1916 and the Bye-laws framed thereunder by the Municipal Board, Faizabad, the Octroi tax is chargeable from the person who imports the goods from outside the limits of Faizabad Municipality in the limits of Faizabad Municipality. As the plaintiffs did not import any goods from outside the limits of Faizabad but carried their goods from one place i.e., Railway Station Faizabad to another, i.e., Mohalla Rekabganj, City Faizabad both situate within the Municipal Limits, they were not liable to any octroi tax. They also pleaded that the defendant had been charging from the plaintiffs the Octroi tax in respect of patent medicines manufactured in India at the rate of Rs. 1.25 nP. per maund specified at Serial No. 73 of the Schedule mentioned in Clause (c) for the non-refundable octroi on Maundage Basis. The defendant had, however, illegally started charging from the plaintiffs from 1-7-1960 the octroi tax at a higher rate of Rs. 7.50 np. per maund on the

above-mentioned goods which were being charged at the rate of Rs. 1.25 np. per maund. It is on these allegations that the plaintiffs sought for a decree for a perpetual injunction against the defendant restraining it from interfering with and checking the plaintiffs from carrying the Chemicals and Drugs from Railway Station, Faizabad to any other place within Faizabad Municipality and in the alternative a decree for perpetual injunction against the defendant restraining it from charging the octroi tax at a rate higher than Rs. 1.25 np. per maund on patent medicines manufactured in India.

8. Learned counsel for the appellant relied on a decision of the Chief Court of Oudh reported in *Dyer Meakin Breweries Ltd. v. Municipal Board, Lucknow* 1948 O.W. N. 231 : AIR 1949 Oudh 14 as an authority for the proposition that Section 164 of the U. P. Municipalities Act barred the jurisdiction of the Civil Court in matters of taxation under the Act. This case relates to realisation of terminal tax on exported goods of foreign spirits and wines and the plaintiffs had prayed for a permanent injunction prohibiting the Municipal Board, Lucknow from realising terminal tax on the said goods which the plaintiffs might send outside the Municipality of Lucknow by road or rail. Examining the provisions of Sections 160 and 164 of the Act as also the Rules framed under the Act regarding the imposition of terminal tax it was observed by a Division Bench of the Chief Court that the provisions of the Act will make it clear that the statute when it provides for the imposition of a tax also lays down the mode in which a remedy in respect of the imposition is to be sought by the citizen, and that it bars the jurisdiction of the civil and criminal Courts in such matters. The bar contained in Section 164 of the U. P. Municipalities Act was held to be explicit and absolute. It was not disputed in that case that the Municipal Board had the jurisdiction to levy the tax on the goods imported into or exported from Lucknow Municipality: the matter involved in the case was whether the plaintiffs were liable to pay the terminal tax on the consignment discharged by them. It was observed that it was a dispute as to the liability to or the principle of assessment of a tax. It was held that it was within the power of the Board represented by its officers to determine whether the plaintiffs were or were not liable to pay the tax on the consignment in question. Even if they came to a wrong decision on this point the remedy of the person aggrieved could not be in the Civil Court. At the same time it was also observed that if the question were whether the consignments were exported from within the limits of Lucknow Municipality and the officers of the Board charged terminal tax taking the view that the consignments were despatched from the Lucknow Municipality, the party aggrieved would be entitled to have the decision of the Civil Court on that question. The provisions of Section 164 would in that event not bar such a suit, though loosely speaking it might even in such a case be said that the question related to the liability to pay terminal tax.

9. I shall examine the plaintiff allegations in the light of the principles laid down in *Dyer Meakin's* case AIR 1949 Oudh 14 (supra) and *Dhulabhai's* case as already indicated above the plaintiffs in the case in hand had alleged that they did not

import any goods from outside the Municipal limits of Faizabad but they carried their goods from the place i.e.. Railway Station Faizabad to another i.e., Mohalla Rekabganj, City Faizabad both situate within the Municipal limits and, therefore, they were not liable to any octroi tax and the charging of octroi tax by the defendant was illegal and without jurisdiction. The defendant disputed this assertion of the plaintiffs. The issue raised on this assertion could be decided only by the Civil Court as pointed out in Dyer Meakin's case (supra). The other contentions raised by the plaintiffs, however, related to the liability to or the principle of assessment of tax and as held in Dyer Meakin's case the Civil Court had no jurisdiction to decide the same. True it is; the contention of the plaintiffs that they were not liable to pay any octroi tax on any goods which they carried from the Railway Station to their place of business within the Municipal limits was not found to be correct by the appellate Court below but as pointed out earlier the jurisdiction of the Court to entertain and decide the suit depends on the allegations in the plaint and not upon those which may ultimately be found to be true. The allegations may finally be found to be incorrect and unsustainable but that would not oust the jurisdiction of the civil Court. The relief (A) sought for by the plaintiffs was not an ancillary relief. In fact, the plaintiffs had claimed it as main relief and had sought relief (B) only in the alternative in case relief (A) was not possible to be granted. In these circumstances I find no substance in the contention of the appellant that the Civil Court had no jurisdiction to try the suit.

2. Notice.

10. The defendant had pleaded that the plaintiffs having not complied with the provisions of Section 326 of the U. P. Municipalities Act were not entitled to maintain the suit. Admittedly, no notice was given by the plaintiffs to the Municipal Board u/s 326 of the U. P. Municipalities Act before instituting a suit. Section 326 of the U. P. Municipalities Act reads as follows:--

"(1) No suit shall be instituted against a board, or against a member, officer or servant of a board in respect of an act done or purporting to have been done in its or his official capacity, until the expiration of two months next after notice in writing has been, in the case of a board, left at its office, and, in the case of a member, officer or servant, delivered to him or left at his office or place of abode, explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of abode of the intending plaintiff, and the plaint shall contain a statement that such notice has been so delivered or left.

(2) If the Board, member, officer or servant shall, before action is commenced, have tendered sufficient amends to the plaintiff, the plaintiff shall not recover any sum in excess of the amount so tendered, and shall also pay all costs incurred by the defendant after such tender.

(3) No action such as is described in Sub-section (1) shall, unless it is an action for the recovery of immovable property or for a declaration of title thereof, be commenced otherwise than within six months next after the accrual of the cause of action.

(4) Provided that nothing in Sub-section (i) shall be construed to apply to a suit wherein the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the commencement of the suit or proceeding."

It was urged on behalf of the plaintiffs-respondents that no notice u/s 326 of the Act was necessary to be given in this case as the plaintiffs had sought for an injunction to restrain the defendant from committing a future act where as Section 326 deals with the act already done or purported to have been done, the submission was that Section 326 prohibited the institution of a suit against the Board or against the member, officer, or servant of a Board, in respect of an act done or purporting to have been done in its or his official capacity, until the expiration of two months next after notice in writing had been served on the Board or the member or the officer concerned, but it does not prohibit the institution of a suit relating to a future act threatened to be done- by the Board or its officers. Learned counsel for the appellant, however, submitted that the terms "act done or purporting to have been done" relate not only to the past acts but also future acts which have a direct bearing with the past act. He submitted that Section 326 governed all suits including suits for injunction. In support of his contention the learned counsel for the Municipal Board referred me to [Bombay Housing Board \(now the Maharashtra Housing Board\) Vs. Karbhase Naik and Co., Sholapur](#), and [The Trustees of Port of Bombay Vs. The Premier Automobiles Ltd. and Another](#), . Learned counsel for the plaintiffs-respondents, however, placed reliance on [The Municipal Board Vs. Dr. Radha Ballabh Pathak](#), .

11. In [The Municipal Board Vs. Dr. Radha Ballabh Pathak](#), a learned Single Judge of this Court was of the view that a notice u/s 326 of the U. P. Municipalities Act is needed only with regard to suits instituted in respect of an act done or purporting to have been done and that Sub-section (1) of Section 326 does not contemplate a case in which a suit is instituted in respect of an act which is threatened to be done in future.

12. In [The Trustees of Port of Bombay Vs. The Premier Automobiles Ltd. and Another](#), construing the term "purported to be done under the Act" it was observed that what is done under purported exercise of statutory functions, even if in excess of or contrary to its provisions, is done pursuant to or under the Act so long as there is a legitimate link between the offending act and the official role. In that case the question which fell for determination was whether short delivery by a statutory bailey was something done or purporting to have been done under the provisions of that Act. It was held that a suit for damages for breach of contract would not attract Section 87 of Bombay Port Trust Act which requires notice to be given be- fore

instituting the suit. This view was affirmed in [Bombay Housing Board \(now the Maharashtra Housing Board\) Vs. Karbhase Naik and Co., Sholapur,](#) . A Full Bench of this Court in the case of [Zila Parishad \(District Board\) Vs. Smt. Shanti Devi and Another,](#) construed the term "an act done or purporting to have been done in its or his official capacity" as under:--

"If an act comes within the scope of the duties, powers or functions of the authority created by the statute

it may also be an act done under the Act or statute. The words "done under an Act" require more direct connection between the act and the statute than "done under the official capacity of authority", it must be an act directly required or permitted, expressly or by necessary implication, to be done by the statute. If a statute authorises the doing of an act it is an act done under the statute, it is also done under the authority of the statute; or in the official capacity of the doer. An act done, though not under an express or implied provision of a statute but in performance of a statutory duty or in exercise of a statutory power or function is done under the authority of the statute. If the statute confers an official status or capacity upon the doer it is done under the official authority or in the official capacity."

13. Distinguishing between an act done with semblance of authority or show of right and prima facie an illegal act Bhagwati, J., (as he then was) in [Jalgaon Borough Municipality Vs. Khandesh Spinning and Weaving Mills Co. Ltd.,](#) held that an act which is prima facie illegal is not within the category of acts done or purported to have been done in pursuance of that Act, and that it is only an act done under a vestige or semblance of authority or with some show of a right that would fall within the category. The acts which would fall within the category of those done or purported 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 and that the distinction 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 -- is that they are intended 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 those acts.

14. In the case in hand the Municipal Board has imposed the octroi tax. The goods in question in which the plaintiffs deal were covered by Serial No. 71 according to the defendant and by Serial No. 73 according to the plaintiffs. The octroi rate prescribed at Serial No. 71 or Serial No. 73 if the contention of the defendant or the plaintiffs was correct. From this it follows that if the plaintiffs brought their goods from outside within the Municipal limits corresponding to the description given in Serial No. 71 or 73 they would be charged octroi tax. The plaintiffs may or may not bring their goods of that description. If they do not bring such goods there would be no occasion to charge octroi tax from them but if they choose to bring any such goods they would be called upon to pay octroi tax thereon. In pursuance of the decision of

the Municipal Board there would be imposition of octroi tax on goods of such description. Such a decision of Municipal Board to impose octroi tax had already been made. The plaintiffs knew of that decision inasmuch as they had paid such octroi tax in the past as would appear from the plaint allegations. This decision of the Municipal Board is an act done or purported to have been done in the official capacity. If the suit is filed in respect of any act which is threatened to be done in the future but the act is unconnected with any past act or order communicated to the plaintiffs or brought to their knowledge, no notice would be necessary. But if in order to get relief against the threatened future action the past act or the order has to be challenged in the suit, without challenging which the injunction as against the future action cannot be granted, notice will have to be given u/s 326 of the Act. The tax is imposed by the Municipal Board under the provisions of the Act. The Municipal Board may impose octroi tax on goods imported into or exported from any municipality on which an octroi was in force on the sixth day of July, 1917, or, with the previous sanction of the Central Government, any other Municipality, under Sub-clause (xiii) of Section 128 of the Act and on goods or animals brought within the municipality the consumption, use or sale therein under Sub-clause (viii) of Section 128 of the Act. Section 296 of the U. P. Municipalities Act empowers the State Government to make rules consistent with the Act in respect of the matters described in Sections 95, 127, 153 and 235. Under the powers conferred by Section 296 of the U. P. Municipalities Act the State Government has framed rules incorporated in the Municipal Account Code. Rule 131 of the Municipal Account Code provides that octroi shall not be levied on excisable liquor manufactured in India and drugs liable to excise duty. The Municipal Board passed a resolution in 1958, by which the schedule for non-refundable octroi was prepared. This schedule inter alia, contained items Nos. 71 and 73 which read as under:--

"71. Scent, Itra, Perfumery of all kinds, foreign or Indian, patent and dispensing medicines, Homoeopathic and Allopathic medicines, Injections of all kinds, foreign liquors, musk, Saffron, amber and Menthols for gas camphor, peppermint and Sat Ajwain 7.50.

73. Indian Patent medicines such as of Dr. S. K. Burman, Vaidya Nath Ayurved Bhawan, Gurkul Kangri, etc., Re. 1.25."

The plaintiffs contended that octroi tax could be charged from them only under Item No. 73 and not under Item No. 71. The contention of the defendant was just the other way. The Officers of the Municipal Board were, according to the plaintiffs, insisting upon charging octroi tax under the aforesaid Item No. 71. It is in the performance of their duties that the officers of the Municipal Board realise octroi tax on taxable items of goods at the check-post. It is one whole process of imposition and recovery of octroi tax. There is a reasonable connection between the act of imposition of octroi tax and discharge of official duty of realising that tax. One of the tests for determining whether an act has been done in the purported discharge of

official duties is whether the public servant can defend his act by reference to the nature of duties of his office if he is challenged while doing the act. The Board and its officers while asking for payment of octroi duty can defend their action by reference to the decision of the Board to charge octroi duty on the goods which are brought within the Municipality for consumption, use or sale therein and the goods imported into or exported from any municipality on which an octroi was in force on the sixth day of July, 1917, or with the previous sanction of the Central Government or any other municipality. The complaint thus relates to something which the Act requires to be done. The plaintiffs want that this act should not be done in future though in the past, it was, according to them, illegally done. They contend that the Municipal Board was not empowered to charge any octroi tax on the medicine containing alcohol on which the excise duty has been paid. Their allegation is that they mostly deal with the medicines containing alcohol on which the excise duty has already been paid and hence the defendant had no jurisdiction to charge octroi tax. The validity of the assessment of the octroi tax and the liability to pay them had direct connection with the decision of the Board already taken for the imposition of the octroi tax. If what is done under the purported exercise of official duties, even if in excess of or contrary to the provisions, is done pursuant to or under the Act, so long as there is a legitimate link between the offending act and the official role notice u/s 326 of the U. P. Municipalities Act would be necessary. Section 326 of the Act applies as much to suits for injunction as to other kinds of suits. It is not in dispute that the plaintiffs had not given any notice u/s 326 of the Act before instituting the suit. The suit is, therefore, bad for want of notice u/s 326 of the Act.

15. In view of my finding that the suit is bad for want of notice u/s 326 of the U. P. Municipalities Act, I do not consider it necessary to examine the propriety or legality of the decision of the court below as to the plaintiffs claim for a decree for injunction.

16. In the result, both the appeals are allowed with costs, the decree passed by the appellate court below is set aside and the suit is dismissed with costs.