

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL NO.1227 OF 2018
WITH
CIVIL APPLICATION NO.2860 OF 2018
WITH
CIVIL APPLICATION NO.2859 OF 2018**

Municipal Corporation of Gr. Mumbai & Anr. ..Appellants

Versus

Bharat Petroleum Corporation Ltd. ..Respondent

Mr. G. S. Godbole, Senior Counsel a/w Santosh Parad i/by Sunil Sonawane, for the Appellants/MCGM.

Mr. S. R. Page, for the Respondent.

CORAM : KISHORE C. SANT, J.

**RESERVED ON : 6th MARCH, 2024
PRONOUNCED ON : 25th APRIL, 2024**

JUDGMENT

1. This Appeal is by Municipal Corporation of Greater Mumbai ("MCGM" for short) challenging judgment and order passed by the learned Ad-hoc District Judge and Additional Sessions Judge, Court Room No.18, Mumbai dated 10.01.2018 allowing the Appeal of Respondent/ Bharat Petroleum Corporation Limited ("BPCL" for short). By way of impugned judgment in Municipal Appeal No.290 of 2005, learned Judge has quashed and set aside the order passed by the Joint Municipal Commissioner dated 27.04.2005. The MCGM was directed to refund amount of

Rs.42,38,068.91 to the BPCL i.e. the amount paid by BPCL in excess of octroi duty payable.

2. Facts giving rise to the present Appeal are as under :-

That the MCGM is established under Bombay Municipal Corporation Act (now known as “Mumbai Municipal Corporation Act”) has power to collect octroi on the articles brought for use, consumption and sale within the municipal limits of Mumbai. (Now the Section 192 is deleted with effect from 01.07.2017 since GST is made applicable.) The articles liable to payment of octroi are included in “Schedule-H” of the said Act. The BPCL is also a Corporation established under the Act and is Government of India undertaking. The BPCL purchased a licence of a software from one SAP for use for itself and for the employees who were scattered at different places even beyond municipal limits of MCGM. The purchase was of 2500 licences. The cost of the licence was Rs.16,54,58,398/- for 2500 users. The licence fee per user was thus Rs.66,183/-. The MCGM therefore issued notice dated 4th October, 2001 through Vigilance Officer on special duty directing the BPCL to furnish purchase order placed on SAP for use of the software. He also demanded User Licence Agreement with SAP and the invoices raised by SAP under Rule 17 of the Octroi Rules.

3. The BPCL sent a reply on 06.12.2001 and complied with the notice and accepted the liability to pay the octroi if applicable.

On that the MCGP issued letter dated 09.01.2002 and called upon the Appellants to pay octroi at the rate of Rs.4.5% of the total licence fee of Rs.16,54,58,398/- for all the users numbering 2500. The BPCL by communication dated 14.01.2002 to the Vigilance Officer addressed that the octroi duty be not charged for 2500 licences as only 20% of the licences were for employees situated in Mumbai. The Vigilance Officer did not consider the said request and demanded an amount of Rs.74,45,628/- on the total consideration paid by the BPCL for the licence fees for all the users. The BPCL paid sum of Rs.14,89,125/- alongwith covering letter dated 27.03.2002. The Vigilance Officer acknowledged receipt of the above amount. The officer rejected the contention that the duty was leviable only on 20% of the amount of Rs.16,54,58,398/- and sent communication reiterating its stand on 15.07.2002 and directed the BPCL to appear before the Joint Municipal Commissioner (Improvements) ("JMC" for short) and informed the Appellants, date time and venue for hearing before the JMC vide communication dated 31.10.2002. Accordingly, a hearing before JMC took place on 31.10.2002. It was contended by BPCL that the SAP had just supplied the CD and the amount paid to SAP was only for user licences. Under bonafide mistake of law that the octroi duty was payable on the entire amount of licence fee, the BPCL had wrongly deposited the balance octroi amount.

4. The Vigilance Officer again issued notice dated 14.01.2003 and demanded amount of Rs.59,56,503/- towards

balance of octroi duty payable. In the said communication, he also mentioned that in case of failure to deposit the amount, he would initiate an action against the BPCL as per the rules. The BPCL under bonafide belief sought time to make payment and requested not to take action for recovery of the amount by letter dated 17.01.2003. The BPCL further paid amount of Rs.22,33,688/- along with covering letter dated 11.03.2003. This was done as there was apprehension of an action by the Vigilance Officer of initiating proceeding. The BPCL thus paid total amount of Rs.37,22,813/- to the MCGM towards octroi duty. It is further the case that the Vigilance Officer again vide letter dated 17.03.2003 asked BPCL to pay the balance amount of Rs.37,22,814.40. Again by letter dated 22.03.2004, it directed BPCL to immediately pay octroi duty and threatened of recovery action. By letter dated 22.03.2004 again the BPCL informed that they are liable to pay octroi only for 1200 licenced users which were within the area of MCGM.

5. The BPCL approached this Court by filing Writ Petition No.1228 of 2004 and challenged the levy of octroi duty. This Court by order dated 23.12.2004 directed to give the BPCL a fresh hearing and to pass a reasoned order. The matter was again heard by JMC. The JMC by order dated 27.04.2005 upheld the demand of octroi made by the MCGM.

6. The BPCL being aggrieved by the said order filed an Appeal under Section 217 of the MMC Act with the contention that

no octroi is leviable as licence fee is not included in Schedule 'H' and no duty is therefore payable at all. BPCL prayed for refund of amount of Rs.74,42,649.76 being excess octroi duty paid. It is the case of BPCL that octroi duty can be charged at the most only as single user licence.

7. The MCGM opposed the Appeal. It is the case of MCGM that the software licence was obtained for installation and use of the software in Mumbai and was meant for employees in Mumbai. The software was unloaded on the mother server situated in Mumbai. It is the server at Mumbai that is in fact utilized mainly by the employees in Mumbai.

8. In support of the Appeal, the BPCL examined its officer as witness. The MCGM did not examine any officer and didn't lead any evidence before the Appellate Court. The Appellate Court has taken it as admitted position that the BPCL has purchased only a right to use the software i.e. licence to use the software. The said right to use software is not included in Schedule 'H' and therefore octroi duty is not leviable except on 1077 licenses based within the municipal limits of Mumbai and directed MCGM to refund the amount of Rs.42,38,068.91 to the BPCL being excess octroi duty paid by BPCL holding that octroi duty can be charged only on 1077 users within the municipal limits. The MCGM is thus before this Court challenging the judgment and order directing refund.

9. From the orders, it appears that for sometime, the parties were in the process of settling the dispute amicably. However, the settlement talks didn't fructify. The matter was therefore admitted on 23rd September, 2019.

10. Learned senior counsel, Mr. G. S. Godbole relied on Section 192 (deleted w.e.f. 01.01.2017) and Schedule H of the said Act. He relied on Entry No.27(c) of Schedule H of the said Act, which reads as under :-

“(c) Instruments, apparatus and appliances and parts thereof clocks, watches, typewriters and their spares, transistors, radios, radiograms, television sets, video cassette recorders, video cassette players, audio and video cassettes, recording systems, tape-recorders, video-games, walkman, stereo systems, loud-speakers, gramophones, amplifiers, wireless goods, telephone instruments, telephone cables, cable jointing kits and their components and spares, photographic machinery, photo goods and materials including photo-graphic chemicals, cameras, lenses, fax machines, photocopier systems, photo processing machinery, flash-light apparatus, films and mounts and their components and spares, cine projection machinery, their components, spares and materials used therein, surveying apparatus, scientific appliances, optical goods, their spares and accessories including optical lenses, all kinds of instruments, appliances and apparatus used in medical, surgical, dental or veterinary sciences including scientigraphic apparatus, scanners, X-Ray machines, screening machines, ECG Machines, electro-medical apparatus, sight-testing instruments and all other hospital requirements and their spares and accessories, mill and gin stores including crucibles and cotton ropes, simulators, **data processing machinery, computer systems and peripherals and their accessories and spares, rides and games, all kinds of apparatus, appliances and spares.**”

11. He submits that there is no much dispute about the facts. He submits that since software and licences are purchased by BPCL in Mumbai for use by its employees, the octroi is leviable on all the licences total in 2500. It is immaterial as to from which place the licences are used. The data ultimately is stored in the main frame situated in Mumbai and copies are also stored at Noida, Uttar Pradesh. What is purchased is a software and it falls in Entry 27 of Schedule H. He submits that the octroi is leviable on the articles consumed/used or sold in Brihan Mumbai. The present purchase thus falls in Entry 27(c) of Schedule 'H' of the MMC Act, which clearly provides as "data processing machinery, computer systems and all kinds of apparatus etc.". He submits that the rate of octroi applicable to the items in Entry 27(c) is 4.5% ad valorem. He submits that the findings in the impugned order that the use, sale or consumption must be within municipal limits is not correct. His submission is that though some of the users of the software are beyond the local limits of the Corporation, the main programme is loaded on the software in Brihan Mumbai. Thus, the purchase of the main software and the licences is a package deal. The users of the licences cannot use the licence without main software loaded in the server at Mumbai. Thus, the users though are from outside municipal limits, still they are using the main software in Mumbai and thus, every user is using the software in Mumbai.

12. As against this, learned advocate Mr. S. R. Page supports

the impugned judgment and order. He submits that there is no serious dispute that octroi is leviable on the purchase of software and licences. Each of the licence is independently purchased by BPCL, at Mumbai only the data is stored. The price of the total software is based on per unit basis. Only 1077 licences are used in Mumbai and therefore the liability is to pay octroi only on the licences which are actually used in Mumbai. As such, he opposes the Appeal by supporting the impugned judgment.

13. From the rival contention, what appears is that the dispute is not about as to whether octroi duty is leviable on the licences, so far, those are used in Mumbai. The dispute is mainly about as to how many licences are leviable with octroi. Following questions thus arise for consideration :-

“Whether the octroi leviable on 2500 licences as those are purchased by BPCL in Mumbai or it is leviable only on 1077 licences which are used and are purchased for use in municipal limits of MCGM and consequently as to whether the impugned order is correct in holding that the BPCL is liable to pay octroi only on 1077 licences ?

14. Learned senior counsel, Mr. G. S. Godbole relies on the following judgments :-

- i) **Burmah Shell Oil Storage and Distributing Co. of India Ltd., Belgaum Vs. Belgaum Borough Municipality,**

Belgaum¹

ii) **Bharti Airtel Ltd. Vs. Mira Bhayandar Municipal Corporation & Ors.²**

iii) **Tata Consultancy Services Vs. State of A.P.³**

iv) **State Bank of India Vs. Municipal Corporation of Greater Bombay & Anr.⁴**

15. In case of **Burma Shell (cited supra)**, the five judges bench was considering the provisions of Bombay Municipal Boroughs Act. After considering all the provisions of Section 73 of Bombay Municipal Boroughs Act, relevant extract reads as below :-

“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 rate were not altered.

1 AIR 1963 SC 906.

2 2018 (3) Mh.L.J. 430.

3 (2005) 1 SCC 308.

4 1997 (2) Mh.L.J. 18.

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.

24. For the reasons above stated this appeal must fail. It will be dismissed with costs.

Appeal dismissed.”

(emphasis supplied)

16. It was held that the octroi is leviable on the goods brought within the limits for use, consumption or sale therein. In that case, the Burma Shell company had filed writ petition seeking exemption for charging the octroi from the company on the products brought inside of octroi limits for sale. The petition was filed in view of amendment to the Act inserting word “sale” in clause (v). It was the case that the company manufactured the products in its refineries situated outside octroi limits of Belgaum Municipality. The goods brought within the octroi limits, can be divided into following categories :-

- i) Goods consumed by the Company,
- ii) Goods sold by the Company through its dealers or by itself and consumed within the octroi limits persons other than the Company,

- iii) Goods sold by the Company through its dealers or by itself inside the octroi limits.

17. The petition was filed stating that the octroi would not be leviable on the goods which were sent out of the octroi limits and claimed the refund. The municipality was prepared to give refund of the octroi for the goods which were sent outside the limits of the municipality. The argument was that the consumption or use are in contrast with word 'sale'. It was argued that the consumption or use of the goods by the person who deals with the goods or animals in the octroi goods and it would not be leviable for the sale or use or consumption outside the municipal limits. It was ultimately held that the octroi would be liable for the goods brought into local area, firstly for consumption by itself or sold by the company to the consumer directly or secondly to dealers who in turn sold the goods to the consumers within the municipal area whether such consumers bought them for use in the area or outside limits.

18. In the case of **Bharti Airtel Ltd. (cited supra)**, the question was whether the Sim Cards, recharge coupons and e-recharge can be considered to be goods for the purpose of local body taxes as then was known as Local Body Tax (LBT). It was held that the SIM cards and recharge vouchers are tangible goods and capable of being brought into limits of city and sell the same. It was further held that the Sim Cards, e-recharge vouchers etc. capable of being transmitted, transferred, delivered, stored and possess and

thus are covered by definition of goods and therefore were chargeable with duty.

19. In the present case, there is no dispute as such as to whether the licences are goods or not. The Respondent/BPCL has accepted that octroi is chargeable on the licences of the software as the same is used or consumed. The objection of BPCL is with regard to the use of licence within the limits of Corporation and outside the limits of Corporation.

20. In the case of **Tata Consultancy Services (cited supra)**, the question was about the software specially designed for the user as uncanned and also canned i.e. the software packages off the shelf. The canned softwares are softwares owned by the company who developed those softwares, whereas the uncanned softwares are the custom made softwares those are loaded in the customers computers. The Court considered the expression “goods”. It was held that the commodity is an expression of wide connotation and includes everything of use or value which can be an object of trade and commerce. The Court was considering the provisions of the AP General Sales Act. The Court concluded that the word “goods” used in Article 366(12) of the Constitution and defined under the said Act is very wide and includes all types of movable properties, whether those properties be tangible or intangible. In the case of ***Associated Cement Companies Ltd.***, it is held that a software program may consist of various commands which enables the

computer to perform a designated task. When copies are made of such software and are marketed, the same becomes goods, which are susceptible to sales tax. It is held that even intellectual property, once it is put on to a media in whatever form of book or canvas or computer disc or cassettes and marketed would become “goods”. In the present case also, there is no dispute that the products would fall in the definition of goods.

21. In the case of **State Bank of India (cited supra)**, it was held that the computer disc being a device for making use of computer in a particular manner is an “appliance” for the purpose of Article 52(i) of Schedule to Octroi Rules.

22. On considering all the above judgments and the submissions, this Court has to see as to whether the Appellate Court has rightly passed the order. From all the discussions above, what necessarily appears is that the goods which are brought within the octroi limits at the relevant time brought within the limits for use, consumption or sale of total 2500 licences were purchased. It has come on record that out of the said licences, only 1077 licences were for use in the limits of Municipal Corporation. The remaining softwares were to be used and consumed beyond municipal limits and those were not used or consumed in municipal limits. The licences were certainly not brought for sale and the same is concluded by the learned Court in Municipal Appeal No.290 of 2005. So far as judgments are concerned, the judgment in the case

of Burma Shell (cited supra), the Hon'ble Apex Court has considered that it is only the goods which are brought for use and consumption and sale in the limits of the municipal area, those are leviable with the octroi, however, the goods which are not for use consumption or sale within such limits are not leviable with octroi. This Court thus holds that the Appellate Court has rightly considered all the aspects involved in the matter. No ground is made out calling for interference at the hands of this Court. Hence, the following order.

23. The Appeal stands dismissed with no order as to costs.
24. Pending Civil Applications also stand disposed of.
25. Necessary consequences to follow.

[KISHORE C. SANT, J.]

After pronouncement of Judgment

26. At this stage, learned senior counsel prays for stay to the effect of the order.
27. The same is opposed by learned advocate for the Respondent.
28. However, considering the fact that the interim order was running, same shall be continued for eight weeks from today.

[KISHORE C. SANT, J.]