IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2752/2016

Thane Municipal Corporation … Petitioner

V/s.

Rohit Infra Projects Pvt. Ltd. & Anr. … Respondents

Mr. Mandar Limaye for the petitioner
Mr. Mandar P. Patil for the Respondent Nos.1 and 2.

CORAM: K.K. TATED, J.
DATED : JUNE 15, 2017

P.C. :

1. Heard the learned counsel for the parties.

2. By this petition under Article 227 of the Constitution of India the Petitioner challenges the judgment dated 29.09.2015 passed by the learned District Judge – 4, Thane in Civil Appeal No.126/2012 partly allowing the petitioner's appeal to the extent of directing the respondents M/s. Rohit Infra Projects Pvt. ltd. and M/s. Ankul Construction Co. to pay octroi on 221 pipes as per the then prevailing rate @ 6% p.a. from the date of notice i.e. 11.03.2011 till payment to the Thane Municipal Corporation. The appellate court has not granted decree in favour of the petitioner in respect of the penalty for non payment of octroi charges. Hence, the petitioner has filed the present petition partly challenging the judgment dated 29.09.2015, to the extent of penalty amount only.

3. In the present proceedings, the respondent had imported 221 pipes for water pipe line of MIDC, Wagle estate, Thane. As the respondent failed to pay octroi duty on the said 221 pipes, the petitioner issued demand notice dated 11.03.2011 calling upon the respondent to pay the octroi as well as 10 times penalty amount. In spite of the demand notice, the respondent failed and neglected to pay the octroi and penalty amount, the Assistant Commissioner, Octoi Department, issued a letter dated 14.03.2011 attaching the respondent's amount of Rs.71,31,300/- for recovery of octroi amount as well as the penalty.

4. The said demand notice dated 11.03.2011 and attachment letter dated 14.03.2011 was challenged by the respondent by preferring an appeal u/s.406 of the Maharashtra Provincial Municipal Corporation 1949 (said Act) before the Civil Judge, Senior Division Thane being Municipal Appeal No.3./2011. Considering the pleadings on record, the Civil Judge, Senior Division Thane framed following points for consideration :

	POINTS	**FINDINGS**
1	Whether present appeal u/s.406 of BPMC Act deserves to be entertained ?	In the affirmative
2	Whether the appellants prove that the demand notice dated 11.03.2011 bearing No.Jakat-1618 issued by the Assistant Commissioner, Octroi of the respondent corporation is illegal, unlawful and against the provisions of BPMC Act & Rules thereunder?	In the affirmative

3	Whether the appellants prove that the letter dated 14.03.2011 issued by the Assistant Commissioner, Octroi of the respondent corporation to the Executive Engineer, MIDC,Wagle Estate, Thane, in respect of attachment of bill amount of Rs.71,31,300/- is illegal and unlawful against the provisions of law ?	In the affirmative
4	Whether the appellants are entitled to the reliefs as prayed for ?	In the affirmative
5	What order ?	As per final order

5. The learned Civil Judge, Senior Division Thane relying on the judgment of this court in the matter of ***Bank of Baroda Vs. Pune Municipal Corporation 2010(1) Mh.L.J. 782*** and documentary evidence on record, set aside the demand notice dated 11.03.2011 issued by the petitioner Corporation through the Assistant Commissioner (Octroi) Thane and also a letter dated 14.03.2011 issued by the Assistant Commissioner (Octroi) for attaching the sum of Rs.71,31,300/-.

6. Being aggrieved by the said judgment, the petitioner preferred Civil Appeal No.126/2012 before the District Judge Thane. The learned District Judge, considering the pleadings on record framed following points for consideration.

	POINTS	FINDINGS
1	Whether the Appellant proves that the demand notice dated 11.03.2011 bearing No.JAKAT-1618 issued by the Asstt. Commissioner, Octroi of the Appellant corporation is illegal, lawful and as per the provisions of the BPMC Act and Rules thereunder ?	Yes
2	Whether the Appellant proves that the letter dated 14.03.2011 issued by the Asstt. Commissioner, Octroi of the Executive Engineer, MIDC Wagle Estate, Thane in respect of attachment of bill amount of Rs.71,31,300/- is legal and lawful and as per the provisions of law ?	No
3	What order	Appeal is partly allowed as per final order

7. The appellate court relied on section 398 of the said Act and Rule 35-d of the Thane Municipal Corporation Octroi Rules 1999 (Said Rules) holding that the respondents are liable to pay only octroi duty on 221 pipes imported by them and not the penalty as imposed by the petitioner under Rule 35-d of the said Rules.

8. The learned counsel for the petitioner submits that the court below has failed to consider the fact that as per Rule 35-d of the said Rules, the petitioner can impose 10 times penalty, if octroi duty is not paid. He submits that both the courts below failed to consider the fact that it is not necessary for them to prosecute the respondent as per section 398 of the said Act. He submits that as per Rule 35-d, the petitioner has power to impose 10 times penalty on octroi duty and

recover the same if the octroi duty is not paid by an assessee on his own. He submits that though these facts were brought on record by them before the courts below, they failed and neglected to consider the same. He submits that the courts below relied on the judgment of division bench of this court in the matter of Bank of Baroda (Supra). He submits that the division bench of this court, in the matter of Bank of Baroda has specifically held that unless and until an assessee applies for compounding the offence, the Corporation can impose penalty on octroi amount and recover the same. In support of this, he relies on paragraph 11 of the said judgment which reads thus:

> *"11. Under Section 398 any person with an intent to defraud the corporation causes or abates the introduction of any goods on which octroi is due but not paid or tendered on conviction can be punished with fine which may extend to ten times the amount of such octroi or toll. Thus the power is on conviction, in the authority deciding the case, to impose the fine. Ten times is the maximum fine which can be imposed. Rules have been framed for compounding. A reading of Rule 40 would show, in a case, where there be an offence, which is punishable, as and by way of compounding of the offence, the corporation can recover Octroi, plus an amount equal to the extent of ten times of the Octroi amount, as a fine, from any person who is charged with such offence if such person desires to compound the offence. In other words, it is only in the event that the person is liable to pay octroi and has committed an offence in respect of whom the respondent Corporation before or even after prosecution is launched, can call on such person if such person is willing to compound the offence and if it be so then, by way of compounding, to pay a fine equal to ten times the octroi due and payable. A conjoint reading therefore, of the Act and Rules would clearly indicate that there is no power in Respondent Corporation to demand fine from the person who is not willing to compound the purported offence. Any other construction will make the rule ultra vires Section 398 of the Act."*

9. The learned counsel for the petitioner further submits that there is specific provision under Rule 35-d of the said Rules, which clearly shows that the Corporation can recover 10 times penalty if the octroi duty is not paid by the Assessee without any reason. On the basis of this submission, the learned counsel for the petitioner submits that the impugned judgment dated 29.09.2015 passed by the District Judge 4, Thane in Civil Appeal NO.126/2012 is required to be partly set aside holding that the Corporation is entitled to recover 10 times penalty on the octroi amount.

10. On the other hand, the learned counsel for the respondent vehemently opposed the Writ Petition. He submits that there is special provision u/s.398 of the said Act that unless and until an assessee is convicted for the said offence, the Corporation has no power to impose penalty on the octroi duty. In support of this contention, the learned counsel for the respondent also relies on judgment of the division bench of this court in the matter of Bank of Baroda (supra). He submits that the Division Bench has specifically held that 10 times penalty amount can be recovered by the Corporation only if a person is convicted u/s.398 of the said Act. He relies on paragraph 13 of the said judgment which reads thus:

> *"13. In our opinion, considering section 398 and the rule as referred to earlier, it is only an enabling power in the Corporation to inform the party who is liable for prosecution or is being prosecuted, that the offence can be compounded by paying the fine as demanded. If such party refuses to compound the offence, the Corporation cannot demand from such party the compounding fine. Any such action would be clearly without jurisdiction. The power to impose fine is conferred by the Act and in such event it is only on*

conviction that there is power to impose fine which may extend to ten times the amount of octroi or Rs. 250/- whichever may be greater. We are therefore, clearly of the opinion that the demand is without jurisdiction."

11. The learned counsel for the respondent also placed reliance in the Division Bench judgment of this court in the matter of ***M/s. Dhoot Agencies Pvt. Ltd. Vs. Aurangabad Municipal Corporation & Ors. 2000(1) ALL MR 421***. He submits that in this Authority, the Division Bench held that the Municipality cannot impose the penalty without conviction on prosecution. In support of this contention, he relies on paragraph 5 and 7 of this authority, which read thus:

"*5. It is clear that though the Municipal Corporation has the power to impose penalty, the condition precedent for such penalty being imposed is conviction in a criminal prosecution and without there being a conviction there is no scope for levying the penalty for evading octroi. Admittedly, no criminal prosecution was initiated against the petitioner and the learned counsel for the corporation submitted that this was not done solely at the request of the petitioner's proprietor/partner. When a statue provides certain precondition for imposing penalty on account of evasion of octroi payment, it is mandatory that those conditions are followed before the penalty is levied and consequently if the corporation failed to initiate criminal prosecution it had no authority in law to levy the penalty for evasion of octroi payment. thre cannot be an agreement contrary to the provisions of law and it is high time that the Municipal Administration is awakened to follow the provisions of law meticulously."*

"7. We allow the petition and hold that the imposition of penalty, without conviction, is illegal and the Municipal Corporation was not justified in either levying or accepting the said penalty amount. However, we make it clear that if the corporation has any octroi recoveries from the petitioner the amount of penalty in question an be adjusted against such outstanding dues and the

petitioner shall not claim recovery of this amount unless the alleged recoveries are finally decided and settled.”

12. The learned counsel for the respondent submits that the respondent has no jurisdiction to impose 10 times penalty on octroi amount without conviction of the respondent by the court of law having jurisdiction. He submits that the petitioner has illegally and unlawfully demanded penalty amount from respondent. These facts were considered by the courts below and rightly held that the Corporation has no authority to impose 10 times penalty without taking any action u/s.398 of the said Act.

13. The learned counsel for the respondent submits that even the Trial Court, in paragraph 6 of its judgment, specifically recorded that as soon as the respondent learnt that they have to pay octroi, they shown their willingness to pay and requested to waive the penalty on that amount by their letter dated 24.03.2011 (Exhibit- 63). He submits that, this itself shows that the respondents were always ready and willing to pay octroi duty. Therefore, there is no question of imposing 10 times penalty as demanded by the petitioner. He further submits that in any case, in view of the division bench judgment of this court and bare reading of section 398 of the said Act, it is crystal clear that the petitioner has no right to collect 10 times penalty from the respondent. Hence, there is no substance in the Writ Petition. The Writ Petition is required to be dismissed.

14. Heard both sides at length. The short issue involved in the petition is whether the petitioner Corporation can recover penalty

without following procedure as prescribed u/s.398 of the said Act. Section 398 of the said Act read thus:

> ***"398 Penalty for evasion of octroi or toll.***
> *Where any vehicle, animal or goods imported into the limits of the City are liable to the payment of toll or octroi any person who, with the intention of defrauding the corporation, causes or abets the introduction of or himself introduces or attempts to introduce within the limits of the City any such vehicle, animal or goods upon which payment of the toll or octroi due on such introduction has neither been made not tendered, shall, on conviction, be punished with fine which may extend to ten times the amount of such toll or octroi."*

Rule 35-d of the Thane Municipal Corporation (Octroi) Rules 1999 reads thus:

> *"35-d (I) In case any person enters into the limits of the city with octroi chargeable goods without bringing the same to the notice of the officers a t the octroi post or without having paid the duty on the said goods. The Municipal Commissioner or the octroi officer authorised by the Municipal Commissioner shall recover from the said party the octroi duty and a sum ten times the octroi duty.*
>
> *In case, any person while paying the octroi duty a t the octroi post shows either the volume or value of the said goods less with a view to same duty, and thus evade the octroi duty, the Municipal Commissioner or the Officer authorizes by the Municipal Commissioner shall recover from him the amount of the octroi duty evaded by him and a n amount ten times of the said sum, till the time such octroi duty on the said goods and the penal amount got paid up the goods in quotation shall lie in the Municipal godown at the right of the importer. In addition, the importer shall also be liable for action under section 398 of the Mumbai Provincial Municipal Corporation Act. 1949. "*

15. Bare reading of section 398 of the said Act shows that without prosecution, the Corporation has no right to claim and/or demand 10

times penalty on octroi amount payable by the assessee. This issue is covered by the Division Bench judgment of this court in the matter of Bank of Baroda (supra) and Dhoot Agencies Pvt. Ltd. (supra). In both these authorities, the Division Bench has categorically held that if an assessee is convicted u/s.398 of the said Act, in that case only the Corporation can impose 10 times penalty on the octroi amount and recover the same.

16. In the present proceedings, admittedly, the petitioner Corporation has failed to take any action against the respondent as per section 398 of the said Act. These facts were considered by the court below and rightly held that the Corporation can recover only octroi on 221 pipes and not penalty on the said amount.

17. Hence, I do not find any substance in the Writ Petition. Same stands dismissed. No order as to costs.

(K.K. TATED, J.)