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such right was vested when the notification was issued; and no fresh clearings for cultivation or for any other purpose shall be made in such land except in accordance with such rules as may be made by the State Government in this behalf."

In the absence, therefore, of such a notification the accused could not have been held guilty of a contravention of s. 26(1)(a). Coming next to cls. (d) and (h), the question for consideration would be whether if these were not offences under the Tripura law, the accused could be prosecuted by reason of (a) the extension of the Forest Act to the Tripura State and (b) the notification under the Tripura law being "deemed to be a notification" under the corresponding provision of the Indian Act. We consider it unnecessary to examine this problem or to express any opinion on this matter in view of the conclusion that we have reached that the notification under s. 5 of the Tripura Act would constitute the area in question only as a protected forest under Ch. IV of the Indian Forest Act and not as a "reserved" forest under s. 20 contained in Ch. II of that Act.

The appeals fail and are dismissed. The appellant had undertaken to pay the costs of the respondents at the time of the admission of the appeals. In accordance with that undertaking the appellant will pay the costs to the respondents. One hearing fee.

Appeals dismissed.

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May 5

POONA CITY MUNICIPAL CORPORATION

v.

DATTATRAYA NAGESH DEODHER

(P. B. GAJENDRAGADKAR, C. J., M. HIDAYATULLAH, K. C. DAS GUPTA, J. C. SHAH AND RAGHUBAR DAYAL, JJ.)

Octroi—Tax on refund—Imposition if valid—Tax, if becomes fee—Who can claim refund—Suit for recovery—Limitation—Availability of

benefit—Bombay Provincial Municipal Corporation Act, 1949 (*Bom.* 59 *of* 1949), *ss.* 127, 487.

The respondent, who had been carrying on the business of securing refund of octroi duty on behalf of persons who had paid duty and were entitled to refund, claimed the refund of money paid as octroi duty by his principals in respect of the period commencing from February 15, 1950, the date from which the appellant became a Municipal Corporation under the Provincial Municipal Corporation, Act, 1949. After deducting ten percent of the amount in accordance with r. 18(3) of the Octroi Rules, framed by the Municipal Authorities, the appellant—Corporation paid the balance to the respondent. The representation of the respondent that from the date from which the Corporation had come into existence, the deduction had become invalid in law, was turned down by the appellant. Thereupon the respondent filed a suit for recovery of the balance with interest. The defence was that the deduction was valid; that in any case, the respondent who was not the person who paid the amount, was not entitled to bring the suit, and that the suit was barred by limitation. The trial court held the respondent was entitled to bring the suit and also that it was not barred by limitation but the deduction was valid and it dismissed the suit. On appeal, the District Court disagreeing with the trial court, held that the deduction was not valid in law, but the plaintiff was not entitled to bring such a suit and that the suit was barred by limitation and it dismissed the appeal. On a further appeal the High Court found in favour of the respondent on all the three points and allowed the appeal.

HELD:—(i) A tax on octroi refund is not one of the taxes which the Bombay Municipal Corporation could impose. Apart from the absence of power to impose such a tax, which is clear from the earlier parts of s. 127 of the Bombay Act of 1949 there is the categorical prohibition in sub-s. (4) against the imposition of any such tax by the Corporation.

(ii) Assuming, without deciding, that such a levy can be validly made by way of fees under s. 466, since no standing order was made under s. 466 prescribing any fee, it is not possible to justify the deductions as a levy of fee.

(iii) The tax did not become a fee merely because the new Act (Bom. Act 59 of 1949), prohibited the imposition of such a tax.

(iv) Cl. 5(a) of Appendix IV furnishes no justification for the levy of ten percent deduction after February 15, 1950 when the Act 59 of 1949 with its categorical prohibition in s. 127(4) against the imposition by the Corporation of a tax which the State Legislature had no power to impose under the Constitution became applicable.

(v) The respondent having made the claim in accordance with the rules was the person entitled to receive what amount was legally refundable, and so he was also entitled to bring the suit.

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(vi) The suit was not barred by limitation. The benefit of s. 487 of Act 59 of 1949 would be available to the Corporation only if it was held that this deduction was "an act done or purported to be done in pursuance or execution or intended execution of the Act."

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 582 of 1961.

Appeal from the judgment and decree dated August 25, 1959 of the Bombay High Court in Appeal No. 774 of 1956.

S. G. Patwardhan, S. B. Tarkunde, J. B. Dadachanji, O. C. Mathur and *Ravinder Narain,* for the appellant.

A. V. Vishwanatha Sastri, M. R. Kotwal and *Naunit Lal,* for the intervener.

May 5, 1964. The Judgment of the Court was delivered by

Das Gupta J.

DAS GUPTA J.—This appeal is by the defendant, the Municipal Corporation for the City of Poona, in a suit for recovery of money. The Poona Municipality was formerly a Municipality under the Bombay District Municipal Act of 1901 (Act 3 of 1901). In 1925 it became a Municipal Borough under the Bombay Municipal Boroughs Act of 1925 (Act XVIII of 1925). Later, under the Bombay Provincial Municipal Corporation Act, 1949, Municipal Authority for the City of Poona became a Corporation known by the name of Municipal Corporation for the City of Poona.

It appears that from the time when the City was a Municipality under Act 3 of 1901, an octroi duty was being levied on goods imported within the Municipal limits of the City. When such goods were exported out of the city municipal limits within specified periods, refund used to be given in respect of the duty so recovered.

The respondent has for many years been carrying on business of securing refund of octroi duty on behalf of persons who had paid the duty and were entitled to refund. In respect of the period from the 15th February, 1950 to the 14th September, 1950, the respondent made a claim on behalf of his principals, for the refund of Rs. 73,650/- to

which, according to him, they were entitled. The Municipality however paid to him only 90 per cent of this amount. The remaining 10 per cent was deducted in accordance with Rule 18(3) of the Octroi Rules which had been framed by the Municipal Authorities.

The respondent then represented to the Corporation that with effect from the 15th February, 1950, the date from which the Corporation came into existence under the Provincial Municipal Corporation Act, 1949, this deduction of 10 per cent had become invalid in law and claimed that this amount should be paid to him. The Corporation however refused to concede this claim. The respondent then brought this suit for recovery of Rs. 7,364|15|- (being 10 per cent of Rs. 73,650/- the amount alleged to have been illegally withheld) with interest.

The main defence raised by the Corporation to the plaintiff's claim was that the deduction of 10 per cent was legally valid. It was further urged that, in any case, the plaintiff who was not the person who paid the amount, was not entitled to bring the suit. Lastly, it was contended that the suit was barred by limitation.

The trial Court held that the plaintiff was entitled to bring the suit and also that it was not barred by limitation. It held however that the deduction of 10 per cent from what was paid as tax was valid. Accordingly, it dismissed the suit.

On appeal by the plaintiff, the District Court, Poona, held, disagreeing with the trial Court, that the deduction of 10 per cent of what had been realised was not valid in law. It was however of opinion that the plaintiff was not entitled to bring such a suit. It was also of opinion that the suit was barred by limitation. In this view, it dismissed the appeal.

The plaintiff then appealed to the High Court of Judicature at Bombay. The High Court has found in favour of the plaintiff on all the three points raised. It held that the deduction of 10 per cent was invalid in law, that the plaintiff was entitled to sue, and that the suit was not barred

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by limitation. Accordingly, the High Court allowed the appeal, and made a decree in favour of the plaintiff for Rs. 7,364/15/- with interest thereon at 4 per cent from the date of the suit and interest at the same rate from the date of the judgment, with costs throughout.

The appellant Corporation challenges the correctness of the High Court's decision on all the three points.

The principal question for decision in this appeal is whether the deduction of 10 per cent as provided for in Rule 18(3) is invalid at least from the 15th February, 1950. The Rule runs thus:—

> "A deduction of ten per cent shall in all cases be made before refunding the amount of octroi duty on exportation of goods either in transit as per rule 13 or otherwise under rule 11(2)."

It is necessary to mention here that the legality of such a deduction prior to February 15, 1950 is not in controversy before us. We shall proceed on the basis that this provision in Rule 18(3) was valid in law prior to the 15th February, 1950. The question is whether even though valid then, it has ceased to be valid in law. To find the correct answer to this question it is necessary to be clear first as to the legal basis on which this levy by way of deduction was being made prior to 15th February, 1950.

It appears from Ex. D 72, the copy of the Government resolution dated the 6th March, 1922, that the Poona Municipality started this practice of levying this 10 per cent deduction from February 1921. The question of its legality appears to have been raised quite early. The Legal Remembrancer to the Government of Bombay expressed his view on this question in these words:—

> "The special powers conferred in the last sentence of clause (f) of section 48(1) of the Bombay District Municipal Act seems to negative the power of the Municipality (of Shirpur) to make any deduction from the refunds by means

of rules regulating the system, for making refunds referred to in the earlier part of the clause. The charge on refunds appears, however, to be a kind of tax which may be imposed under s. 59(b)(xi) of the Act."

On this, the Councillors of the Municipality passed a resolution that a 10 per cent tax should be levied on all octroi refund, under section 59 (b)(xi). This proposal was submitted to the Government of Bombay for sanction and was duly approved. It may be mentioned here that s. 59 (b)(xi) of Act 3 of 1901 which deals with the question of a Municipality's powers to impose taxes sets out in the cls. (i) to (x) various taxes which the Municipalities can impose and then mentions in cl. (xi) the words "any other tax". The Government appears to have accepted the view of the Legal Remembrancer that the levy by way of deduction of 10 per cent from the amount to be refunded should be authorised as a tax on octroi refund, this being "any other tax" within the meaning of s. 59(b)(xi). It is no longer open to dispute that after Government's sanction was received, the Municipality could under the old Act legally levy such tax. It is also not disputed that the deductions that continued to be made under Rule 18(3) were all along made under this authority, as a tax levied under s. 59(b)(xi) of the Bombay District Municipal Act, 1901. The levy of the tax continued even after Act 3 of 1901 ceased to be applicable to Poona and it became a Municipal Borough under the Bombay Municipal Boroughs Act, 1925. The validity of such continuation does not also appear to have been challenged. The Bombay Provincial Municipal Corporation Act 1949 was applied to Poona on the 15th February, 1950. From that date therefore the powers of taxation of the municipality became governed by s. 127 of the Act. This section first authorises a Corporation under the Act to impose, (a) property taxes; (b) a tax on vehicles, boats and animals. It then mentions in the second sub-section certain other taxes which the Corporation may impose. In cls. (a) to (f)—(a) is octroi, (b) a profession tax, (c) a tax on dogs, (d) a theatre tax, (e) a toll on animals and vehicles and (f) mentions "any other

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tax which the State Legislature has power under the Constitution to impose in the State". Sub-section (4) provides:—

> "Nothing in this section shall authorise the imposition of any tax which the State Legislature has no power to impose in the State under the Constitution."

A tax on octroi refund is not thus one of the taxes which the Bombay Municipal Corporation could impose. It is not one of the specified taxes. Nor is it a tax which the State Legislature has power under the Constitution to impose in the State. Apart from this absence of power to impose such a tax, which is clear from the earlier parts of s. 127, we have the categorical prohibition in sub-section 4 against the imposition of any such tax by the Corporation.

Mr. Patwardhan next tried to persuade us that even if this levy could not be made under the new Act as a tax, it could be made as a fee. In support of his argument he drew our attention to s. 147 and s. 466 of the new Act. The first sub-section of section 466 provides that the Commissioner of the Corporation may make standing orders consistent with the provisions of the Act and the rules and bye-laws in respect of the matters specified. One of the matters specified is "determining the supervision under which, the routes by which and the time within which the goods intended for immediate exportation shall be conveyed out of the City and the fees payable by persons so conveying the goods." [s. 466(1)A(f)]. Section 147 dealing with a controversy, that may arise, whether the importation of some goods into the City has been for the purpose of consumption, use or sale therein, says: "Until the contrary is proved any goods imported into the City shall be presumed to have been imported for the purpose of consumption, use or sale therein, unless such goods are conveyed from the place of import to the place of export by such routes, within such time, under such supervision and on payment of such fees therefor as shall be determined by the standing orders."

It is obvious that reference to fees in this section is to such fees as may be prescribed by standing orders under

the provisions of s. 466(1)A(f). It is unnecessary for us to decide for the purpose of the present appeal, whether the provision of s. 466 for determination of fess payable by persons conveying goods imported into the City is valid in law or not. Assuming, without deciding, that such a levy can be validly made by way of fees under s. 466, what we find is that in fact there has been no standing order prescribing any fees. It may be mentioned in this connection that sub-section 2 of s. 466 lays down that no order made by the Commissioner under cl. A of sub-section (1) shall be valid unless it is approved by the Standing Committee and confirmed by the State Government. It is not the case of the appellant Corporation that any Standing Order was made at all under s. 466 prescribing any fees. It is not possible therefore to justify the deductions that were made in the present case as a levy of fee.

The appellant relied next on cl. 5(a) of Appendix IV to the Act read with s. 493. Section 493 provides that provisions of Appendix IV shall apply to constitution of the Corporation and other matters specified therein. Appendix IV is headed "Transitory Provisions" and is plainly intended to deal with the position that arose as a result of the repeal of the old Act. (s. 490). The relevant portion of cl. 5(a) is in these words:—

> "Save as expressly provided by the provisions of this Appendix or by a notification issued under paragraph 22 or order made under paragraph 23,
>
> (a) any appointment, notification, notice, tax, order, scheme, licence, permission, rule, bye-law, or form made, issued, imposed or granted under the Bombay District Municipal Act, 1901 or the Bombay Municipal Boroughs Act, 1925 or any other law in force in any local area constituted to be a City immediately before the appointed day shall, in so far as it is not inconsistent with the provisions of this Act, continue in force until it is superseded by

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any appointment, notification, notice, tax, order, scheme, licence, permission, rule, bye-law, or form made, issued, imposed or granted under this Act or any other law as aforesaid as the case may be;"

Mr. Patwardhan readily conceded that the 10 per cent deduction, as a tax on octroi refund could not get the protection of cl. 5(a) for the simple reason that such taxation is on the face of it inconsistent with s. 127(4) of the Act. He asked us, however, to regard this levy as a fee, and on that basis, argued that this should continue in force under cl. (a) of s. 5 of Appendix IV since the levy of such a fee is consistent with the provisions of s. 466 of the Act. If in fact a fee was being realised under the old Act, it may be that levy of such fees could continue in force until superseded by any order under the new Act as coming under an order issued "under the District Municipal Act, 1901, or the Bombay Municipal Boroughs Act, 1925". In fact, however, this was not levied as a fee, but was levied as a tax. The tax did not become a fee merely because the new Act (Act LIX of 1949) prohibited the imposition of such a tax. We are clearly of opinion therefor that cl. 5(a) of Appendix IV furnishes no justification for the levy of the ten per cent deduction, after the 15th February, 1950 when the Act LIX of 1949 with its categorical prohibition in s. 127(4) against the imposition by the Corporation of a tax which the State legislature had no power to impose under the Constitution became applicable. The defence that the deduction of 10 per cent of the amount collected as octroi was legally valid has thus been rightly rejected by the High Court.

We also agree with the High Court's conclusion that the plaintiff was entitled to bring the present suit. The Poona City Municipality's Octroi Rules and Bye-laws under which the claim for refund can be made define "a claimant" as a person "who produces the duly receipted import bill and the corresponding export certificates." [Rule 2, cl. (g)]. It is not disputed that for the several cases in respect of which this deduction of ten per cent had been made by the Corporation the plaintiff was the person

who produced "the duly receipted import bill and the corresponding export certificate." Indeed, it is on that basis that 90 per cent of the amount paid by different exporters was refunded by the Corporation to the claimant. It is difficult to understand how if the plaintiff was entitled to claim and obtain refund in respect of 90 per cent of the amount paid, he was not entitled to make the claim with respect to the remaining 10 per cent.

It may be pointed out that as the receipted import bill and the corresponding export certificates in respect of the goods in question have already been made over by the plaintiff to the defendant Corporation, it will not be possible for the merchants who actually imported the goods and then exported them, to make any fresh claim. For, no claim would be accepted without the receipted import bill and the corresponding export certificates. Mr. Patwardhan faintly argued that the definition of a claimant in the Rules is only in respect of 90 per cent of the octroi refund. There is obviously no substance in this argument. Rule 11 deals with the procedure of claims to refund and requires that claimant should produce a duly receipted import bill and an export certificate relating to such goods. [Rule 11(2)(iv)]. These provisions are entirely independent of Rule 18(3) which lays down that a deduction of ten per cent shall in all cases be made before refunding the amount of octroi duty in certain circumstances. It is, in our opinion, clear that the plaintiff having made the claim in accordance with the rules was the person entitled to receive what amount was legally refundable. As we have found that the deduction of ten per cent could not legally be made, in other words, the entire amount paid was refundable, it follows that the plaintiff was the person entitled to obtain the refund and so he was also entitled to bring the suit.

There remains for consideration the appellant's plea of limitation. For this plea, the appellant relies on s. 487 of Act LIX of 1949. The material part of the section runs thus:—

(1) No suit shall be instituted against the Corporation or against the Commissioner, or the

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Transport Manager, or against any municipal officer or servant in respect of any act done or purported to be done in pursuance or execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act:—

(a) until the expiration of one month next after notice in writing has been, in the case of the Corporation, left at the chief municipal office and, in the case of the Commissioner or of the Transport Manager or of a municipal officer or servant delivered to him or left at his office or place of abode, stating with reasonable particularity the cause of action and the name and place of abode of the intending plaintiff and of his attorney, advocate, pleader or agent, if any, for the purpose of such suit, or

(b) unless it is commenced within six months next after the accrual of the cause of action."

The benefit of this section would be available to the Corporation only if it was held that this deduction of ten per cent was "an act done or purported to be done in pursuance or execution or intended execution of this Act." We have already held that this levy was not in pursuance or execution of the Act. It is equally clear that in view of the provisions of s. 127(4) (to which we have already referred) the levy could not be said to be "purported to be done in pursuance or execution or intended execution of the Act." For, what is plainly prohibited by the Act cannot be claimed to be purported to be done in pursuance or intended execution of the Act. Our conclusion is that the High Court has rightly held that the suit was not barred by limitation.

All the points raised in the appeal fail. The appeal is accordingly dismissed.

Appeal dismissed.