

2024:BHC-OS:11009-DB

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**ORDINARY ORIGINAL CIVIL JURISDICTION**  
**WRIT PETITION NO. 2302 OF 2001**

1. **M/S. COLGATE PALMOLIVE (INDIA) LTD.,**  
a company duly registered under the Indian Companies Act 1913 and having its Registered Office at Colgate Research Centre, Main Street, Hiranandani Garden, Powai, Mumbai 400 076.

**... PETITIONER**

~ VERSUS ~

1. **MUMBAI MAHANAGAR PALIKA,**  
a statutory body constituted under the provisions of Bombay Municipal Corporation Act, 1888 at Mahanagar Palika Marg, Fort, Mumbai - 400 001.
2. **THE DEPUTY ASSESSOR AND COLLECTOR (OCTROI),**  
having his office at Shree Chatrapati Shivaji Maharaj Market Building, 3rd Floor, Matha Ramabai Ambedkar Marg, Mumbai 400 001.

**... RESPONDENTS**

**APPEARANCES**

**FOR THE PETITIONER**

**Mr. Jitendra Motwani, a/w Ms.**  
*Anusha Shah, Mr. Ansh Agal,*  
*i/b. Economic Laws Practices.*

**FOR RESPONDENT-BMC**    **Mr. Drupad Patil, a/w Ms. R. M.  
Hajare, i/b Mr. Sunil  
Sonawane.**

**PRESENT IN COURT**        **Mr. Mahesh Ghule, Octroi Inspector.**

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**CORAM : M. S. Sonak &  
Kamal Khata, JJ.**

**RESERVED ON : 23 July 2024  
PRONOUNCED ON : 26 July 2024**

**JUDGMENT (Per M S Sonak J):-**

1. Heard learned counsel for the parties.
2. The Petitioner, by instituting this Petition, seeks the following reliefs:-

*“a) that this Honourable Court be pleased to declare that the determination of the value for the purposes of levy of octroi by the Respondents In the Petitioners' case under Rule 2(7)(b) of the Octroi Rules 1965 is unconstitutional, illegal and ultravires the provisions of Rule 2(7) of the Octroi Rules, 1965 and/or the provisions of the Municipal Corporation Act, 1888.*

*b) that this Honourable Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction, calling for the papers pertaining to this case and after going into the question of legality and thereof to quash and set aside the assessment of octroi duty in respect of the said goods brought into the limits of Greater Bombay by the Petitioners on the basis of MRP less ad hoc deductions in terms of Rule 2 (7) (b) of the Octroi Rules, 1965.*

*c) that this Honourable Court be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other*

*appropriate writ order or direction ordering and directing the Respondents, their officers, subordinates, servants and agents (i) to forthwith forebear and/or desist from levying the octroi duty on the basis of the MRP in terms of Rule 2(7)(b) of the Octroi Rules, 1965; (ii) to forthwith levy and collect octroi duty on the basis of the invoice value under Rule 2(7)(4) of the Octroi Rules, 1965; (iii) to forthwith refund the amount of 1,12,87,269/- together with interest thereon at the rate of 24% per annum being the additional amount levied, and wrongly collected towards payment of octroi duty by the Respondents from the Petitioners as per the details contained in (Exhibit-H hereto).*

*d) that this Honourable Court be pleased to issue a writ of prohibition or a writ in the nature of prohibition or any other appropriate writ, order or direction, restraining the Respondents their servants and agents from levying and collecting octroi duty on the said goods brought in to the limits of Greater Bombay by the Petitioners on the basis of the MRP in terms of Rule 2(7)(b) of the Octroi Rules, 1965.*

*e) that pending the hearing and final disposal of this Petition, this Honourable Court be pleased to restrain the Respondents, their servants and agents from levying and collecting octroi duty on the said goods brought in to the limits of Greater Bombay by the Petitioners on the basis of the MRP in terms of Rule 2(7)(b) of the Octroi Rules, 1965 and to direct the Respondents their servants and agents to forthwith levy and collect octroi duty on the basis of the invoice value under Rule 2(7)(a) of the Octroi Rules, 1965.”*

3. This Petition was directed to be taken up along with First Appeal No.431 of 2002. However, Mr. Motwani, learned counsel for the Petitioner, submitted that First Appeal No.431 of 2002 has been dismissed for non-prosecution. Accordingly, we proceed to consider Writ Petition No.2302 of 2001.

4. The rule was issued in this Petition on 20 February 2002, and Interim Relief was granted in terms of prayer clause (e).

5. This Petition concerns the octroi duty paid by the Petitioner to the Respondent – Corporation between April 1995 and March

2001. There is neither any record nor any clear averment in the Petition that the octroi duty for the said period was paid by the Petitioner “under protest” or “without prejudice” to the Petitioner’s rights to question the levy or to question the alleged overcharging.

6. However, from March 2001, the Petitioner protested the alleged overcharging and required the Deputy Assessor and Collector (Octroi) – Respondent No.2 to decide on the merits of the Petitioner’s Application dated 16 March 2001. Therefore, by an Interim Order dated 27 November 2001 made in this Petition, we directed the 2nd Respondent to decide the Petitioner’s Application dated 16 March 2001 on merits within six weeks after giving an opportunity of personal hearing to the Petitioner.

7. The 2nd Respondent held against the Petitioner, and therefore, the Petitioner appealed to the Appellate Authority, i.e. the Small Causes Court. These Appeals were decided favouring the Petitioner by the Small Causes Court. Against such decisions of the Small Causes Court from 2001 onwards, the Bombay Municipal Corporation (“BMC”) has instituted its First Appeals in this Court. Mr. Motwani submitted that though the First Appeals were instituted in 2020, they are yet to be regularly numbered because the BMC has not bothered to clear the office objections.

8. The connected First Appeal No.431 of 2002 was instituted by the BMC against Hindustan Lever Limited to challenge the order of the Small Causes Court upholding the contention of Hindustan

Lever Limited in the context of overcharging octroi duties. Mr. Motwani pointed out that because the issue involved in First Appeal No.431 of 2002 and the present Writ Petition was the same, the First Appeal was tagged with this Petition. First Appeal No.431 of 2002 has since been dismissed for non-prosecution, i.e. failure to clear office objections.

9. Mr Motwani submitted that in terms of Section 192 of the Mumbai Municipal Corporation Act, 1988 (“MMC Act”), the octroi, at rates not exceeding those respectively specified in Schedule H, shall be levied in respect of the several articles mentioned in the said Schedule, on the entry of the said articles into Brihan Mumbai for consumption, use or sale therein. He submitted that Section 195-1B of the MMC Act empowers the Commissioner, with the approval of the Standing Committee, to frame rules with respect to the levy, assessment and collection of octroi under the MMC Act. No Rule framed by the Commissioner under this section shall have effect unless and until the State Government confirms it.

10. Mr. Motwani referred to Schedule H and entry No.19(a) in Group B and submitted that octroi at the rate of 5.5 per cent ad-valorem was the maximum that could be levied on the value of articles.

11. Mr Motwani also referred to Rule 2(7) of the Bombay Municipal Corporation (Levy) of Octroi Rules, 1965 (“Rules of 1965”) to submit that the value of the articles where octroi is charged ad-valorem shall mean the value of the articles as

ascertained from original invoice plus shipping dues, insurance, customs duties, excise duties, countervailing duty, sales tax, transport fee, vend freight charges, carrier charges and all other incidental charges, excepting octroi incurred or liable to be incurred by the importer till the articles are removed from the place or import.

12. Mr Motwani emphasised that the value of articles in terms of Rule 2(7)(a) of the Rules of 1965 was to be ascertained from the original invoice and had no co-relation whatsoever with the Maximum Retail Price (“MRP”) printed on the articles. He submitted that the BMC, by adverting to the MRP, had acted contrary to the rules for determining the value of articles.

13. Mr Motwani submitted that the BMC was wrongly invoking Rule 2(7)(b) of the Rules of 1965, which provides that where the value as at (a) is not ascertainable on account of non-availability or non-production of the original invoice at the time of import or when the genuineness of the invoice produced is in doubt, it shall mean the wholesale cash price less trade discount for which the articles of like kind or quality are sold or are capable of being sold at the time and place of import, without any abatement or deduction whatever except the amount of octroi payable on importation thereof.

14. Mr. Motwani submitted that this was a case where the value of the articles was easily ascertainable from the original invoices produced by the Petitioner from time to time. He submitted that the BMC raised no doubt on the genuineness of such invoices.

Therefore, he submitted that the BMC was not justified in resorting to Rule 2(7)(b) of the Rules of 1965 and levying octroi on the MRP rates after an ad-hoc deduction or abatement of around 20%.

15. Mr. Motwani submitted that Rule 2(7)(b) was not applicable because the articles' value was easily ascertainable from the original invoices produced by the Petitioner. He submitted that this Rule also contemplates the value of the articles of like kind or quality. He submitted that in this case, the Petitioner's goods were directly covered by entry No.19(a) of Schedule H, and there was no question of looking at articles of like kind or quality.

16. Finally, he submitted that this Rule does not contemplate any trade discount, abatement, or deduction. Still, the BMC has granted an ad hoc deduction of about 20% from the MRP price to determine the value of articles.

17. For all the above reasons, Mr. Motwani submitted that the Rule in this Petition may be made absolute.

18. Mr. Drupad Patil, learned counsel for the BMC, submitted that the Petitioner paid the octroi duty without any protest or reserving any liberty to challenge the levy from 1995 to 2001. He submitted that only from 2001 did the Petitioner protest and require the 2nd Respondent to give a ruling. After such a ruling, the Petitioner appealed to the Small Causes Court by availing of the alternate and efficacious remedy provided under the MMC Act. He submitted that the Petitioner has directly instituted the present

Petition without making any payments under protest or without appealing the levy. He submitted that disputed questions of fact are involved. Therefore, this Petition should be dismissed for the Petitioner's failure to protest before making any payments and avail of the alternate remedy available under the MMC Act. Mr. Drupad Patil relied on **Tupperware India Private Limited v. State of Maharashtra 2018 SCC OnLine Bom 18029** to support his contention.

19. Mr. Drupad Patil submitted that, in this case, there was tremendous variation between the price reflected in the original invoice and the MRP. He submitted that the MRP was almost ten times the price reflected in the original invoice. Therefore, there was a doubt on the genuineness of the invoices produced. He submitted that in such circumstances, the BMC has a right to determine the value of articles by resorting to Rule 2(7)(b) of the Rules of 1965.

20. Mr. Drupad Patil submitted that, in any event, the grant of any relief to the Petitioner would result in the unjust enrichment of the Petitioner. He submitted that the Petitioner paid the octroi duties between 1995 and 2001 without protest or demur. After that, it is reasonable to infer that the burden of this levy was passed on to the consumers from whom the Petitioner recovered these amounts. He submitted that any relief in this Petition would unjustly enrich the Petitioner and impose severe financial strain on a public body like the BMC. He submitted that the octroi levied upon the Petitioner was not without the authority of law, and the BMC was



justified in determining the value of articles by resorting to the provisions of Rule 2(7)(b) of the Rules of 1965.

21. For all the above reasons, Mr. Drupad Patil submitted that the Rule in this Petition may be discharged with costs.

22. By way of rejoinder, Mr Motwani countered Mr Patil's contentions. Without prejudice, Mr. Motwani submitted that a declaration, as prayed for in prayer clause (a), could always be issued by this Court without going into the issue of refund and consequently the issue of unjust enrichment.

23. The rival contentions now fall for our determination.

24. In the exhaustive pleadings, the Petitioner has nowhere pleaded that they paid the octroi duties between 1995 and 2001 to the BMC "under protest" or "without prejudice" to their right to contest the same. Neither is there any pleading that the Petitioner applied to the 2nd Respondent, requiring him to assess the correct octroi duty payable on the articles entering within the jurisdictional limits of the BMC for the period between 1995 and 2001.

25. Had the Petitioner protested and required the 2nd Respondent to assess the precise rate at which octroi could have been levied on the articles in question, the 2nd Respondent would be obliged to decide on this issue. Under the scheme of the MMC Act and the Rules made thereunder, if the Petitioner were to be aggrieved by the decision of the 2nd Respondent, the Petitioner

could have appealed to the Appellate Authority, i.e. the Small Causes Court against such determination by the 2nd Respondent.

26. The record shows that from 2001 onwards, the Petitioner has not only protested the levy of octroi at the rates demanded by the BMC but, further, invited the 2nd Respondent to determine the correct rates. Since, according to the Petitioner, the 2nd Respondent did not determine the correct rates, the Petitioner appealed to the Small Causes Court. The Small Causes Court upheld the Petitioner's contention and even directed a refund to the Petitioner. The BMC, aggrieved by the orders of the Small Causes Court, has instituted several appeals in this Court corresponding to each of the levies or at least for each of the Assessment Years. However, regarding the impugned levy for 1995 to 2001, the Petitioner did not follow such a procedure.

27. The Rule was issued in this Petition on 20 February 2002. Therefore, we are not inclined to dismiss this Petition based on the alternate and efficacious remedy available to the Petitioner. However, the fact that the Petitioner paid octroi at the rates demanded without any protest or demur for the period from 1995 to 2001 is a relevant circumstance which dissuades us from exercising our discretionary jurisdiction under Article 226 of the Constitution of India.

28. Besides, the rival contentions regarding determining the value of articles under sub-clauses (a) and (b) of Rule 2(7) of the Rules of 1965 raise arguable issues that would involve the examination of

certain factual aspects. This is why the MMC Act and the Rules made thereunder require the party to seek a determination from the 2nd Respondent on such issues. Further, if the party is aggrieved by the determination by the 2nd Respondent, the party can appeal against the same to the Small Causes Court. Since all this procedure was never followed by the Petitioner in so far as the levies from 1995 to 2001 are concerned, our discretionary jurisdiction under Article 226 of the Constitution of India cannot be conveniently exercised to adjudicate, inter alia, disputed questions of fact or to grant some general declaratory relief to the petitioner. The grant or refusal of relief would depend upon factual aspects like the genuineness of the original invoice, etc.

29. In *Tupperware India Pvt. Ltd.* (supra), a single learned judge of this court observed that a petition challenging consolidated levies spread over several transactions was “quite misadventurous”. The decision reasons that it was well established that each import for the purpose of levy of octroi was required to be considered on its own merits as per the 1965 Rules. The scheme contained in the Rules constituted a complete code. It was difficult to conceive a straitjacket formula suggested by the Petitioner to accept STVs regarding all its imports or to insist that the STVs should be held as conclusive regarding the value of the goods. The learned single judge held that each import within the corporation limit was required to be based on its independent documents along with the requisite forms to be submitted by the importer as mandated by the rules. Further, in case of any dispute, then subject to recourse to a determination by a commissioner, an appeal could always be filed by

the importer under section 217 of the MMC Act before the Small Causes Court disputing the levy.

30. Finally, we think granting the Petitioner any relief regarding the levies from 1995 to 2001 would result in the Petitioner's unjust enrichment. This is also one of the considerations for refusing to exercise discretionary jurisdiction under Article 226 or to grant any relief to the Petitioner in this Petition.

31. There is no record of the Petitioner paying the demanded octroi duties under protest to the BMC. The octroi duties were paid without any protest or demur. It is reasonable to infer that the Petitioner has already passed on the burden of such octroi duties to its millions of consumers. Therefore, if the BMC, a public authority, is directed to refund the alleged excess octroi duty collected by it to the Petitioner, then the Petitioner would certainly be unjustly enriched. It is impossible to direct or enforce the direction for the Petitioner to return this amount to millions of its consumers. This is another consideration for declining to exercise our writ jurisdiction.

32. In **Mafatlal Industries Ltd. and others versus Union of India and others**<sup>1</sup>, the Constitution Bench of the Hon'ble Supreme Court has held that a claim for refund, whether on the ground that excess tax has been collected by misinterpreting or misapplying the provisions of relevant law or on the ground that the relevant provision of the law under which it was levied is or has been

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<sup>1</sup> (1997) 5 SCC 536

declared to be unconstitutional, can succeed only if the Petitioner alleges and establishes that he has not passed on the burden of duty on another person/other persons. The refund claimed can be allowed/decreed only when the Petitioner establishes that he has not passed on the burden of the duty or to the extent he has not passed on, as the case may be.

33. The Constitution Bench held that whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement. Where the burden of the duty has passed, the Petitioner cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden, and only that person can legitimately claim its refund. But where such a person does not come forward, or it is not possible to refund the amount to him for one reason or another, it is just and appropriate that the amount is retained by the State, i.e., by the people. There is no immorality or impropriety involved in such a proposition.

34. The Constitution Bench further explained that the doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, the person cannot collect the duty from the purchaser at one end and the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust

enrichment is, however, inapplicable to the State. The State represents the people of the country. No one can speak of the people being unjustly enriched.

35. The Constitution Bench, dealing with the argument based on Article 265 of the Constitution, observed that Article 265 has to be construed in the light of the goal and the ideals set out in the Preamble to the Constitution and Articles 38 and 39 thereof. The concept of economic justice demands that in the case of indirect taxes like Central Excises duties and Customs duties, the tax collected without the authority of law shall not be refunded to the Petitioner-Plaintiff unless he alleges and establishes that he has not passed on the burden of duty to a third party and that he has himself borne the burden of the said duty. The Court held that even Section 72 of the Contract Act, which deals with restitution, is based upon and incorporates a rule of equity. Equitable considerations cannot be ruled out while applying the said provision in such a situation. This answers Mr Motwani's contention based on Article 265 of the Constitution.

36. The Constitution Bench also held that while examining the refund claims, the financial chaos which would result in the administration of the State by allowing such claims is not an irrelevant consideration. Where the Petitioner-Plaintiff has suffered no real loss or prejudice, having passed on the burden of tax or duty to another person, allowing or decreeing his claim would be unjust since it is bound to affect the public exchequer prejudicially. In the

case of large claims, it may well result in financial chaos in the administration of the affairs of the State.

37. Similarly, in **Sahakari Khand Udyog Mandal Ltd. versus Commissioner of Central Excise & Customs<sup>2</sup>**, the Hon'ble Supreme Court explained that "unjust enrichment" means retention of a benefit by a person that is unjust or inequitable. "Unjust enrichment" occurs when a person retains money or benefits that belong to someone else in justice, equity, and good conscience. The doctrine of "unjust enrichment", therefore, is that no person can be allowed to enrich himself inequitably at the expense of another. A right of recovery under the doctrine of "unjust enrichment" arises where retention of a benefit is considered contrary to justice or against equity. The juristic basis of the obligation is not founded upon any contract or tort but upon a third category of law, namely quasi-contract or the doctrine of restitution. The "unjust enrichment" doctrine is based on equity and has been accepted and applied in several cases.

38. The Hon'ble Supreme Court held that, therefore, *irrespective of the applicability of Section 11-B of the Central Excise Act, the doctrine can be invoked to deny the benefit to which a person is not otherwise entitled.* The Hon'ble Supreme Court held that Section 11-B of the Central Excise Act, or a similar provision in other statutes, merely gives legislative recognition to this doctrine. *That, however, does not mean that in the absence of statutory provision, a person can claim or retain undue benefit. Before claiming relief of refund, it is necessary for*

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2 (2005) 3 SCC 738

*the Petitioner-Appellant to show that he has paid the amount for which the relief is sought, he has not passed on the burden on the consumers, and if such relief is not granted, he will suffer loss.*

39. In the present case, the Petitioner has neither pleaded nor established that the Petitioner has not passed on the burden of the alleged excess octroi collected by the BMC to its consumers. It is reasonable to assume that the Petitioner has already passed on such a burden to millions of its consumers. Accordingly, allowing any refund to the Petitioner would only unjustly enrich the Petitioner even though it is not established that the Petitioner has suffered any real loss or prejudice. This is a valid consideration for not ordering any refund even if this Court were to conclude that any excess octroi was collected from the Petitioner based upon any alleged misapplication or misinterpretation of the legal provision. In any event, even this alleged misapplication or misinterpretation issue is left open to be determined in appropriate proceedings.

40. Therefore, for the above reasons, we propose to dismiss this Petition. However, we wish to clarify that for the above reasons, we have not gone into the issue of whether the value of articles in the present case ought to have been determined under clauses (a) or (b) of Rule 2(7) of the Rules of 1965. This question is, therefore, kept open for the decision of the 2nd Respondent on a case-to-case basis. If the determination of the 2nd Respondent aggrieves the Petitioner, the Petitioner has the statutory right to appeal such decisions. The record shows that in the past, i.e. from 2001 onwards, the Petitioner



has not only appealed but succeeded in the appeals before the Small Causes Court against the determination by the 2nd Respondent.

41. Therefore, we dismiss this petition by keeping the issues of law and facts it raises open. The interim relief we granted is also vacated because the learned counsel for the parties submitted that the GST regime now subsumes the Octroi regime.

42. This Petition is accordingly disposed of, and the Rule therein is discharged without any orders for costs.

**(Kamal Khata, J)**

**(M. S. Sonak, J)**