
(1998) 05 SC CK 0007

In the Supreme Court Of India

Case No : Civil Appeal No's. 2623-2625 of 1998

Acqueous Victuals Pvt. Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 08-05-1998

Acts Referred:

Uttar Pradesh Municipalities Act, 1916 — Section 128, 128(1), 134, 135, 296

Citation : (1998) 3 SCALE 622 : (1998) 5 SCC 474

Hon'ble Judges : S. B. Majmudar, J;M. Jagannadha Rao, J

Bench : Division Bench

Advocate : Meera Agarwal and Ramesh Chandra Mishra, for the Appellant; A.K. Goel, Kavin Gulati, R.B. Misra, Pramod Swarup, Pareena Swarup, Alok Singh and V.B. Joshi, for the Respondent

Final Decision : Allowed

Judgement

S.B. Majmudar, J.

1. Leave granted.

2. All these three appeals arising from a common judgment rendered by the High Court of Judicature at Allahabad in three writ petitions project a short question whether the common appellant, original writ petitioner, was liable to pay Octopi duty during the relevant period from 1980 to 1987 to the respondent-Municipalities on the weight of the glass bottles which were brought within the municipal limits when they were containing soft drinks like Gold Spot, Limca, Thums Up, Soda, Rim-Zim etc. For the sake of convenience, we shall refer to the appellant as the writ petitioner and the respondents as the respondent-Municipalities in the latter part of the judgment. The contention of the writ petitioner was that the beverages in liquid form were imported by the wholesalers to whom the soft drinks were sold. The Municipalities, therefore, could validly impose Octopi on the weight of liquid contents of the bottles and not on the weight of bottles which were mere containers as these bottles after

taking out the liquid contained therein were being sent back in their empty state to the writ petitioner by the wholesalers for recycling and thus these bottles were not imported within the local limits of the Municipalities for consumption, use or sale therein. This contention of the writ petitioner was rejected by the Division Bench of the High Court relying on its earlier decision in the case of Prem Nath Monga Bottlers (P) Ltd. v. Municipal Board, Meerut. We shall refer to the said judgment at the appropriate place in the latter part of the judgment. In the impugned common judgment, the Division Bench of the High Court held that even though the cold drinks were being imported for being sold within the municipal limits, the bottles in which they were carried and filled in could be said to have been used within the municipal limits for the purpose of storing these liquids till they were ultimately utilised by the consumers concerned. Therefore, even the weight of bottles containing these liquids could legitimately be taken into consideration by the Municipalities for imposing the Octopi duty thereon.

3. It is the aforesaid decision of the High Court which is brought in challenge by the writ petitioner. We have heard learned counsel for the writ petitioner as well as learned counsel appearing for the respondent-Municipalities of Rampur and Moradabad and the State of Uttar Pradesh in support of the decision rendered by the High Court. The Municipalities of Pilibhit and Shahjahanpur, though served, have not thought it fit to appear and contest these proceedings.

Relevant facts

4. It will be necessary to keep in view a few relevant facts leading to these proceedings. The writ petitioner is a private limited company incorporated under the Indian Companies Act, 1956. Under an agreement with M/s. Parle (Exports) Pvt. Ltd., Bombay, the writ petitioner is engaged in the business of bottling soft drinks like Gold Spot, Limca, Thums Up, Soda, Rim-Zim etc. which are manufactured by Parle Exports. After bottling these beverages at its plants at Bareilly, the writ petitioner distributes the same to wholesalers in ten districts of Uttar Pradesh, which include amongst others, the respondent-Municipalities, namely, the Municipal Boards of Moradabad, Rampur, Shahjahanpur and Pilibhit. According to the writ petitioner- Company after the beverages are consumed by the consumers within the municipal limits the bottles in empty state are returned to it and the title and ownership in the bottles also remain with it. The Uttar Pradesh State Legislature enacted an Act in 1916 called the U.P. Municipalities Act, 1916 (hereinafter referred to as "the Act"). u/s 128 thereof, powers were conferred on the Municipal Board governed by the State Act to impose an Octopi on goods or animals brought within the municipality for consumption, use or sale therein. u/s 298 of the Act, the Municipal Boards are empowered to frame bye-laws for various purposes of the Act. The bye-laws of Municipal Boards of Moradabad, Rampur, Pilibhit and Shahjahanpur were enforced during the period from 12-5-1977 to 1-9-1982. According to the writ petitioner, these bye-laws provided for levying Octopi on soft drinks like Coca-Cola, Fanta, Vimgo, Soda Water, Lemon etc. but they did not permit levying Octopi on the weight of bottles

which contained these soft drinks. As the respondent-Municipalities were seeking to levy Octopi on the basis of gross weight not only of the beverages contained but also of the bottles containing the beverages which were brought within the municipal limits of the aforesaid Municipalities, the writ petitioner-Company filed three writ petitions in the High Court of Judicature at Allahabad in the year 1983. The grievance made in the writ petition was that from 1980 onwards the respondent-Municipalities were illegally recovering Octopi also on the weight of bottle-containers which they were not entitled to do and hence the respondent-Municipalities were required to be ordered to refund the requisite amount of Octopi levied on the basis of the gross weight of bottles from 1980 onwards. During the pendency of the writ petitions in the High Court from 1983 till 1987, by interim orders, the respondent-Municipalities were restrained from recovering Octopi on the gross weight of bottles meaning thereby the Octopi duty was required to be confined only on the net weight of the beverages contained in these bottles that were imported by the writ petitioner within the municipal limits of the aforesaid four Municipalities. During the pendency of these writ petitions, the State of Uttar Pradesh issued a government order on 6-4-1987 directing all the Municipalities functioning under the Act in the State not to charge Octopi on the basis of gross weight but only on the weight of beverages contained in the bottles. Thus, from 6-4-1987 onwards, the weight of bottles and crates containing the bottles got exempted from the Octopi duty. Consequently, it must be held that dispute got confined only from 1980 till 6-4-1987. We may also note a further development, namely, that after 1991 the provision of Section 128(1) (viii) got deleted, therefore, from that date in the State of Uttar Pradesh no Octopi duty is levied by any of the Municipalities on any goods or animals imported within the municipal limits of the Municipalities.

5. In the light of this factual backdrop, the main grievance put forth by learned counsel for the writ petitioner has to be examined.

Rival contentions

6. Learned counsel for the writ petitioner submitted that u/s 135 of the Act, the State Government or the prescribed authority has to notify in the Official Gazette the imposition of the tax from the appointed date as laid down by Section 135(2) of the Act. The Governor of Uttar Pradesh had issued a notification dated 26-5-1979 in exercise of powers conferred u/s 135(2) of the Act read with Section 21 of the U.P. General Clauses Act, 1904 notifying that the Municipality concerned had in exercise of the powers under clause (viii) of sub-section (1) of Section 128 of the Act imposed the following tax in the Municipality of Moradabad with effect from the date of the said notification. The description of the taxes was to the following effect:

"Octopi on goods and animals brought within the limits of the Municipality of Moradabad for consumption, use or sale therein be levied according to the rates given in Schedule I below subject to the exemptions in Schedule II thereunder:

SCHEDULE I

Class 1.--Articles of food and drink for human and animal consumption

SCHEDULE I Class 1.--Articles of food and drink for human and animal consumption

Sl. No. Description of goods Rate of Octopi Rs . p.

1 to 16. * --

17. Aerated water like Coca-Cola, Fanta, Vimgo, Soda Water, Lemon etc. 2.25 per quintal"

7. It is of course true that the notification regarding the Municipality of Moradabad was brought on record of this case at p. 47 of the main paper-book but we may mention that similar notifications were issued by the Governor of Uttar Pradesh concerning the other three Municipalities also. Learned counsel for the writ petitioner submitted that the aforesaid entry at SI. No, 17 includes aerated water like Coca-Cola, Fanta, Vimgo, Soda Water, Lemon etc. for which the rate of Octopi prescribed is 2.25 per quintal. That this would show that no separate rate of Octopi was sought to be levied on the bottles containing these beverages. Therefore, there could be no Octopi imposed under the Act so far as the bottles or containers of these beverages were concerned. It was also submitted that the High Court in the impugned judgment had erroneously held that these bottles containing the beverages were being used within the municipal limits and were imported for that purpose. That they were brought within the municipal limits only as containers, as only beverages were sold and not the bottles within the municipal limits. In fact, two Municipalities out of four contesting Municipalities, namely, Moradabad and Shahjahanpur had not disputed that the title of bottles remained with the writ petitioner and only the liquid contents thereof were being sold to the consumers through the wholesalers within the municipal limits of the Municipalities and the empty bottles were being sent back to the writ petitioner for the purpose of recycling at its plant at Bareilly for further circulation. It was further submitted that the bottles containing the beverages, though physically entered the municipal limits of the respondent-Municipalities, they, i.e., the bottles were neither consumed nor used nor sold within the municipal limits. Therefore, no Octopi could be levied on the weight of bottles brought within the municipal limits. As at the entry point, weight of these bottles was also subjected to the charge of Octopi duty, the action of the respondent-Municipalities must be held to be ultra vires the Act, rules and the notification issued under the Act. Consequently, the respondent-Municipalities were required to refund the illegally collected Octopi duty on the gross weight of bottles. The writ petitions were, therefore, required to be allowed. They were erroneously rejected by the High Court. In support of this contention, strong reliance was placed on some of the decisions to which we shall make a reference hereafter.

8. Learned counsel for the State of Uttar Pradesh as well as learned counsel appearing for the two Municipalities, as aforesaid, on the other hand, contended that beverages of different types of cold drinks cannot enter the municipal limits in loose or liquid form unless they are contained in bottles and other receptacles or containers and these containers are, therefore, in the nature of primary packing. Consequently, the gross weight of bottles containing beverages as well as weight of beverages contained therein has to be taken into consideration for imposing the Octopi duty, that the bottles can be said to have been brought within the municipal limits for the purpose of use or consumption till the bottles get emptied at the end of the consumers within the municipal limits and that the bottles remained in use for storing the cold drinks. A lot of time is taken for consumption of cold drinks. Bottles may also get destroyed in the meanwhile or may not be returned by the consumers to the retailers or wholesalers for being re-sent to the writ petitioner for recycling. Therefore, for an indefinite period the bottles can also be said to have entered the municipal limits for the purpose of use. Learned counsel for the respondent-Municipalities accordingly submitted that the view taken by the Division Bench of the High Court in the impugned judgment and also the view taken by the earlier Division Bench of the High Court in Civil Miscellaneous Writ Petition No. 6883 of 19731 cannot be said to be erroneous in any manner. They also invited our attention to some of the judgments of this Court and also one judgment of the Orissa High Court to which we shall make a reference hereafter.

9. Learned counsel for the respondent-Municipalities further submitted that the writ petitioner never filed relevant statement of objections as required by the Act and that no details were furnished to the effect that the empty bottles were being re-exported after the contents thereof were taken out by the consumers. It was also contended that in substance, the bottles could also be said to have been sold within the municipal limits as the full value of the bottles was recovered in advance by the writ petitioner-Company by way of security deposits and under these circumstances if the bottles were not returned they remained sold through the wholesalers. Some bottles may also get destroyed and may never get out of the municipal limits for recycling and that all these disputed questions of fact could not have been decided by the High Court under Article 226 of the Constitution nor can they be decided by us in the present proceedings. It was, therefore, contended that the writ petitioner was not entitled to any refund in these proceedings and in any case no refund can be ordered to the writ petitioner without satisfying the authorities concerned that they had not passed on the burden of disputed Octopi duty to their consumers. It was accordingly submitted that the writ petitions were rightly dismissed by the High Court.

10. In the light of these rival contentions, the following points arise for our consideration:

Point I

Whether the weight of bottles containing beverages imported within the

municipal limits of the respondent-Municipalities during the period from 1980 to 1987 could be legally subjected to Octopi duty by the respondent-Municipalities under the Act?

Point 2

In the light of the decision on Point 1 what further directions, if any, can be issued in the present proceedings?

We shall proceed to deal with the aforesaid two points which arise for our consideration.

Point 1

11. It is not in dispute between the parties that the writ petitioner which is bottling beverages in its plant at Bareilly in the State of Uttar Pradesh is selling beverages through wholesalers functioning within the municipal limits of the aforesaid four Municipalities for making them available to the consumers within the municipal limits. The writ petitioner has, therefore, to sell these beverages to the wholesalers within the municipal limits. Consequently, the cold drinks and beverages contained in bottles can be said to have been brought within the Municipalities for the purpose of sale. Accordingly, on the weight of beverages contained in the bottles, Octopi duty could be legally levied by the respondent-Municipalities. There is no dispute on this point.

12. The dispute centers round the weight of bottles containing beverages. In order to resolve this controversy between the parties, it is necessary to have a look at the relevant provisions of the Act which held the field during the period from 1980 to 1987. Section 128 of the Act provides for taxes which may be imposed. Sub-section (1) clause (viii) thereof lays down that subject to any general rules or special orders of the State Government in this behalf, the taxes which a Board may impose in the whole or part of a municipality can consist of Octopi on goods or animals brought within the municipality for consumption, use or sale therein. It is, therefore, obvious that before any Octopi is levied on any commodity by the municipality, it must be shown that the said commodity was brought within the municipal limits for consumption, use or sale therein. Section 134 of the Act deals with resolution of the Board directing imposition of tax. Subsection (1) thereof lays down that when the proposals have been sanctioned by the State Government, the State Government after taking into consideration the draft rules submitted by the Board, shall proceed forthwith to make u/s 296 such rules in respect of the tax as for the time being it considers necessary. Sub-section (2) of Section 134 provides that when the rules have been made, the order of sanction and a copy of the rules shall be sent to the Board, and thereupon the Board shall by special resolution direct the imposition of the tax with effect from a date to be specified in the resolution. Then follows Section 135 regarding imposition of tax to which we have made a reference earlier. A conjoint reading of Section 128(1)(viii) and Sections 134 and 135 leaves no room for doubt that tax by way of Octopi on goods brought within the municipal limits for

consumption, use or sale could legitimately be imposed by the authorities concerned functioning under the Act. It is true, as pointed out by learned counsel for the writ petitioner, that u/s 135(2), notifications were issued by the Governor of Uttar Pradesh permitting imposition of Octopi duty on goods and animals brought within the limits of the Municipalities according to the rates given in Schedule I to the notification and subject to the exemptions in Schedule II thereof. It is also true that in Schedule I at Entry 17 for aerated water like Coca-Cola, Fanta, Vimgo, Soda Water, Lemon etc. the rate of Octopi was specified. However, learned counsel for the writ petitioner could not effectively contend that merely because the rate of Octopi as laid down in the notification, Schedule I refers to the aerated water etc. and because the rate does not contain any reference to the aerated water bottles, no Octopi duty can be imposed on such bottles. The imposition of Octopi duty is in general terms on goods or animals brought within the municipal limits for consumption, use or sale therein. If it is so, the bottles containing beverages -- aerated water like Coca-Cola etc. when brought within the municipal limits for the purpose of consumption, use or sale would also become liable to bear the burden of Octopi tax. Our attention was invited to specimen rules framed under the Nagarpalika Moradabad Octopi Rules, 1978 which are at p. 35 of the main paper-book. Rule 2(w) thereof defines "Octopi" to mean a tax on goods or animals brought within the municipality for consumption, use or sale therein. According to Rule 2(vii), "schedule" means the schedule of rates at which Octopi shall be levied. Rule 4 thereof lays down that if the Octopi is levied according to weight it shall be calculated on the gross weight of the consignments including bardana and packing etc. Therefore, as per this Rule, it can be said that if the packing or bardana by utilisation of which the consignments of goods liable to Octopi entered the municipal limits, the former would also as packing materials become liable to bear the burden of Octopi duty and the gross weight thereof would remain chargeable for Octopi. However, despite the said Rule 4, it has to be considered whether the said Rule falls within the four comers of the charging provision of Section 128(1)(viii). In the light of this main charging provision, it must be held that weight of bardana or packing which contains the consignments of Octopi able beverages would remain liable to be included in the taxable gross weight of the consignment provided such bardana or packing which, even may be primary packing or secondary packing, is shown to be brought within the municipal limits for the purpose of its sale, consumption or use within the municipal limits. If such primary or secondary packing is not brought within the municipal limit for the purpose of consumption or sale or use thereof and is found to have been taken out of the municipal limits after its contents were discharged within the municipal limits, then the weight of such outgoing bardana or packing, on the express language of the charging provision, cannot be brought to Octopi tax or if such a tax is levied at the entry point, it would become liable to be refunded. But this question in its turn will raise further questions of fact whether such consignments including packings contemplated by Rule 4 were actually sold with their contents to the local consumers or wholesalers, as the case may be, or whether they were consumed

or used up within the local limits or whether they were used for an indefinite period and had ultimately rested within the municipal limits and had not been taken out. These are all disputed questions of fact which are required to be examined and adjudicated upon when claims for refund on the allegation that Octopi was wrongly realised on the gross weight of such bardana or packing of bottles which were allegedly taken out of the municipal limits are placed for consideration of the appropriate authorities.

13. We have, therefore, to see whether on the facts of the present case the writ petitioner was justified in invoking the writ jurisdiction of the High Court straightaway without going to the competent authorities for lodging its claim for refund of Octopi levied on the weight of bottles in which beverages were packed and brought within the municipal limits of the respondent-Municipalities. Learned counsel for the writ petitioner submitted that the High Court had patently erred in taking the view that these bottles containing beverages were brought within the municipal limits for use and that the Division Bench had also equally erred in taking the further view that liability to pay the Octopi duty on the weight of bottles also got fastened on the relevant consignments. In this connection, our attention was invited to two decisions of this Court. The first decision is *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, In that case, a Constitution Bench of this Court speaking through Hidayatullah, J. examined the question whether Octopi duty was leviable from *Burmah Shell Oil Storage & Distributing Company*, which was the appellant before this Court, when it brought within the municipal limits of Belgaum the goods (a) for consumption by itself; (b) for re-export either by itself or through dealers outside the area -- which as was admitted by the Municipality, entitled the Company to a refund of tax and (c) for sale by it directly to consumers or to dealers who distributed the goods within the area to ultimate consumers. Considering the case of the appellant before this Court, Hidayatullah, J. made the pertinent observations in connection with the legal position concerning the imposition of Octopi duty by the Municipality. Interpreting the words found in Entry 52 of the State List in the Constitution dealing with taxes on the entry of goods into a local area for consumption, use or sale therein, it was held as under:

"It is not the immediate person who brings the goods into a local area who must consume them himself, the act of consumption may be postponed or may be performed by someone else but so long as the goods have been brought into the local area for consumption in that sense, no matter by whom, they satisfy the requirements of the Boroughs Act and Octopi is payable. Added to the word 'consumption' is the word 'use' also. There may be certain commodities which though put to use are not 'used up' in the process. A motor car brought into an area for use is not used up in the same sense as foodstuffs. The two expressions use and consumption together therefore, connote the bringing in of goods and animals not with a view to taking them out again but with a view to their retention either for use without using them up or for consumption in a manner which destroys, wastes or uses them up."

14. At p. 233 of the Report, the following further observations were made in connection with the entry regarding Octopi on goods brought within the municipal limits for consumption, use or sale therein. Emphasising the word "therein" at the end of the entry, it was stated:

"The word 'therein' does not mean that all the act of consumption must take place in the area of the municipality. It is sufficient if the goods are brought inside the area to be delivered to the ultimate consumer in that area because the taxable event is the entry of goods which are meant to reach an ultimate user or consumer in the area. Indeed, the consumer may never consume them as, for example, a motorist buys a tin of oil and finds that it does not suit his vehicle and leaves it lying on his shelf. The goods must be regarded as having been brought in for purposes of consumption when a person brings them either for his own use or consumption, or to put them in the way of others in the area, who are to use and consume. In this process the act of sale is merely the means for putting the goods in the way of use or consumption. It is an earlier stage, the ultimate destination of the goods being 'use or consumption'. The earlier stage, namely, the sale by him, does not save the person who brought the goods into the local area from liability to the tax if the goods were brought inside for consumption or use. In other words, a sale of the goods brought inside, even though not expressly mentioned in the description of Octopi as it stood formerly, was implicit, provided the goods were not re-exported out of the area but were brought inside for use or consumption by buyers inside the area. In this sense the amplification of the description both in the Government of India Act, 1935 and the Constitution did not make any addition to the true concept of 'Octopi' as explained above. That concept included the bringing in of goods in a local area so that the goods come to a repose there."

15. In view of the aforesaid decision, it becomes obvious that the word "retention" is held to be a synonym with the word "repose", meaning thereby the article concerned must finally rest within the municipal limits. In the light of the aforesaid judgment of the Constitution Bench of this Court, therefore, it is obvious that before a municipality can impose Octopi duty on any commodity, it has to be shown that the commodity concerned was brought within the municipal limits for consumption, that is, for being totally used up so that it ceases to exist within the municipal limits themselves or it was to be used for an indefinite period within the municipal limits so that it ultimately rests within the municipal limits and does not go out subsequently, or the commodity concerned must be shown to have been brought within the municipal limits for the purpose of sale within the said limits. Having thus laid down the aforesaid legal position concerning the imposition of Octopi in the penultimate paragraph of the Report at p. 234, the Court observed that the Burmah Shell was liable to pay Octopi 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 Octopi 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.

16. The aforesaid authoritative pronouncement of the Constitution Bench of this Court, therefore, sets at rest the controversy in the present case. If it is the case of the writ petitioner that during the relevant period from 1980 to 1987 it brought within the municipal limits of the four respondent-Municipalities beverages packed in bottles and the bottles were not sold within the municipal limits and after the beverages were taken out of these bottles, these very bottles were returned to the petitioner and were taken back to Bareilly, then for claiming the refund of the Octopi paid on the weight of these bottles during the relevant period when the consignments entered the municipal limits from time to time, the writ petitioner had to follow the procedure laid down by the Municipality concerned under its rules for refund of taxes and had to comply with the statutory gamut of these rules. It had also to show that the burden of disputed Octopi duty was borne by it and was not passed on to consumers of beverages contained in these bottles. In other words, it would not be guilty of unjust enrichment if refund was granted. If the refund claim on furnishing the relevant proofs was not ultimately granted, the remedy of appeal provided under the rules had to be followed.

17. In this connection, we may also refer to a decision of a three-Judge Bench of this Court in the case of S.M. Ram Lal and Co. Vs. Secretary to Government of Punjab, Secy. to Govt. of Punjab being an unreported judgment of this Court. J.C. Shah, J, speaking for the three-Judge Bench considered the question whether the wool imported within the municipal limits of Faridabad in raw form for dyeing within the municipal limits could be said to have been used in the municipal limits or consumed therein so as to attract Octopi duty thereon. In this connection, the following pertinent observations were made in para 3 of the Report:

"It is common ground that the goods brought within the Notified Area Committee of Faridabad were not brought for consumption or sale. It was argued, however, that the goods were brought into the Notified Area Committee for use, and on that account Octopi was leviable. The expression 'use' is not defined in the Act. In its ordinary meaning the word 'use' as a noun, is the act of employing a thing; putting into action or service; employing for or applying to a given purpose. But the word 'use' occurs in Entry 52 List II of the Seventh Schedule to the Constitution sandwiched between 'consumption' and 'sale', and it must take colour from the context in which it occurs. It is a settled rule of interpretation that when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general: Maxwell on Interpretation of Statutes, 11th Edn., p. 321, The coupling of three words 'consumption', 'use' and

'sale' connotes that the underlying common idea was that either the title of the owner is transferred to another, or the thing or commodity ceases to exist in its original form. Unless it is proved that the wool brought within the limits of the Notified Area Committee, Faridabad, by the appellant was intended to be so employed that it was to become a new commodity or a component of a new commodity, no Octopi would be levied by the Notified Area Committee on the entry of wool."

18. It is, therefore, obvious that the underlying common idea behind all the three relevant words "sale", "consumption" or "use" within the municipal limits of the imported commodity so as to attract the levy of Octopi thereon would require proof of the fact that the commodity concerned got consumed completely within the municipal limits or was used for an indefinite period in such a way that it came to rest finally and permanently within the municipal limits or was sold within the municipal limits. It is no doubt true, as submitted by counsel for the writ petitioner, that out of the four Municipalities, Moradabad and Shahjahanpur Municipalities did not contest on the case of the writ petitioner that the empty bottles in which the imported beverages were packed by the writ petitioner belonged to the writ petitioner-Company and were not sold to anyone within the municipal limits but even if it is so, the moot question which would remain is to the effect whether the containers, namely, these bottles which were filled in with beverages imported for sale within the municipal limits could be said to have been consumed or used within the municipal limits. It is, however, to be noted that the other two Municipalities, namely, Pilibhit and Rampur Municipalities have not admitted the title of these bottles inhering with the writ petitioner and according to them the full market value of the bottles was also recovered by the writ petitioner from the wholesalers before despatching these bottles filled in with beverages. Therefore, the question whether the bottles were really sold by the writ petitioner to the wholesalers or retailers within the municipal limits of these four Municipalities will require resolution on consideration of relevant facts. But that apart, even assuming that the title of the writ petitioner in these bottles might not have been transferred to anyone else within the municipal limits, then the moot question will remain whether these bottles on which the disputed Octopi duty was levied by the respondent-Municipalities were brought within the municipal limits for consumption or use. So far as the question of consumption is concerned, it does not present any difficulty as it is no one's case that the empty bottles, if in fact found to be taken out of the municipal limits can be said to be consumed or destroyed within the municipal limits. However, a further question still would remain for investigation, namely, whether out of the total consignments of bottled beverages imported within the municipal limits, the entire consignments of the very bottles after getting emptied got re-exported or whether some of the said bottles forming part of the original consignments got destroyed by way of breakage etc. or were never returned by the consumers concerned and only rest of the imported bottles were re-exported by enabling the consumers and the retailers or wholesalers to get refund of the price of the

bottles paid by way of advance security from the writ petitioner on return of these empty bottles for recycling. It is axiomatic that if the bottles in which beverages were brought within the municipal limits for sale to consumers had themselves got destroyed by breakage etc. or were not returned by consumers, they could be said to be consumed within the municipal limits and hence there would be no occasion for their export at any time thereafter. But apart from these vexed disputed questions of fact, a further question would remain whether these bottles can be said to have been used even temporarily within the municipal limits even on the assumption that they were not consumed or sold within the municipal limits. So far as this question is concerned, the High Court in the impugned judgment had taken the view that beverages in liquid form could not have entered the municipal limits nor could they have been brought within the municipal limits without being packed in receptacles or bottles. These bottles till they were emptied of their contents at the ultimate end of the consumers would remain filled with liquid beverages contained therein. Therefore, to that extent according to the High Court, the bottles could be said to have been brought within the municipal limits as containers for storing beverages and hence these bottles could be said to have been brought within the municipal limits for the purpose of use for storage even leaving aside the question whether they were brought within the municipal limits for the purpose of sale or consumption thereof. In support of this conclusion of the High Court, our attention was invited to the decision of a Division Bench of the Allahabad High Court in Prem Nath Monga Bottlers (P) Ltd. case, CMWP No. 6883 of 1973 decided on 11-2-1980 referred to earlier. Now a mere look at the said decision shows that relying on a decision of this Court in a sales tax case, the Division Bench of the High Court came to the conclusion that the bottles and shells were being used for the purpose for which they were intended to be used, namely, as containers and this use was not merely for bringing in the contents but was linked with the consumption of the contents and continued to be used till the final consumption of the contents by the actual consumers and that it was impossible to deny that a bottle which contained the beverage till the beverage was drunk by the actual consumer within the municipal limits was not used by the consumer or whoever had the custody of beverage till the consumption stage. Therefore, the bottles and crates containing beverage could be said to have been brought within the municipal limits for use till the beverages contained therein were sold to the dealers and retailers for ultimate consumption by the consumers. The aforesaid reasoning of the Division Bench of the High Court cannot bear scrutiny for the simple reason that this Court in the Constitution Bench decision in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, has clearly ruled that even though the use of the commodity brought within the municipal limits may not amount to its destruction or total using up, the commodity concerned while being brought in the municipal limits must have reposed within the municipal limits and was not taken out later on. If the writ petitioner's case on facts is found true, namely, that the bottles which contained beverages did not repose within the municipal

limits in empty form after their contents were consumed by the consumers and were actually taken out of the municipal limits, it could not be said, as assumed by the High Court that the goods were used within the municipal limits. We must, therefore, hold that if the writ petitioner satisfies the authorities concerned that the bottles containing the original consignments after getting emptied within the municipal limits were actually taken out of the municipal limits for recycling, then the writ petitioner would be entitled to claim proportionate refund of the Octopi duty assessed on the weight of such empty bottles only subject to the burden of such amount of duty not being shown to have been passed on to consumers of beverages or to anyone else. But that would require investigation of facts by the authorities concerned, if and when such claim for refund is lodged,

19. In this connection, we may also refer to a decision of the Orissa High Court to which our attention was invited by learned counsel for the respondent-Municipalities. In *Balasore Talkies (Pvt.) Ltd. and Vs. Balasore Municipality and Others*, a Division Bench of the Orissa High Court had to consider the question whether cinematography films brought within the municipal limits for exhibition could be validly subjected to Octopi duty. The contention of the importer was that the cinematography films were not being consumed or used within the municipal limits as after the period for exhibiting these films by way of picture shows in cinema halls was over, these very films were taken out of the municipal limits. The High Court on the facts of the case took the view that it could not be said that the films were not consumed or used as such within the municipal limits. It is obvious that on the facts of the case before the Orissa High Court, the said view was quite justified as the cinematography films imported in original form would naturally get exhausted by passage of time during which it will have to be subjected to projection through a projector on the cinema screen on as many occasions as the picture shows were held day in and day out spread over weeks and by the time the picture shows were over and the films were taken out of the municipal limits these films would never remain the same as originally imported. Lot of wear and tear would reduce their efficacy. Therefore, on the facts of that case, the Division Bench of the High Court was justified in taking the view that the term "use" is of wider connotation than consumption. Any article that is put to such application suffers waste or deterioration to some extent, though not totally destroyed or used up and, therefore, it could be held to have been used up to that extent. On the facts and circumstances of the present cases, the aforesaid decision is of no avail to the respondent-Municipalities as it is nobody's case that if empty bottles were actually taken out of the municipal limits after their contents were discharged within the municipal limits, they would get used up even partially only because they remained for some time within the municipal limits containing the beverages without having reposed therein.

20. Learned counsel for the State of Uttar Pradesh placed reliance on the dictionary meaning of the term "repose" as found in *Shorter Oxford Dictionary*, Vol. 2, 3rd Edn., p. 1799, wherein one of the meanings of the word "repose" is mentioned as "temporary rest or cessation from activity". That may be the

dictionary meaning but the term "repose" in the context of Octopi duty is treated by the Constitution Bench of this Court in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, as a synonym for final resting of the commodity without being later on taken out of municipal limits. It must, therefore, be held that the commodity which is imported within the municipal limits must either be sold or consumed or used up completely or must be subjected to a continuous use without total exhaustion but in every case the commodity concerned must not have left the municipal limits. The word "repose" as explained by the Constitution Bench in the aforesaid decision, therefore, has a special meaning and, therefore, the dictionary meaning of the word "repose" cannot be of any assistance in the context of the Octopi levy as interpreted by this Court in *Burmah Shell case*, CMWP No. 6883 of 1973 decided on 11-2-1980.

21. We may also mention that our attention was invited by learned counsel for the parties to certain decisions of this Court dealing with sales tax in deciding the question whether the value of the bottles could be subjected to sales tax and liable to be included in the taxable turnover including the value of the beer contained therein. The decisions in *Premier Breweries Vs. State of Kerala*, and *Tata Engineering and Locomotive Company Limited and another Vs. The Municipal Corporation of the City of Thane and others*, cannot be of any avail to the learned counsel for the writ petitioner as strictly speaking, we are not concerned here with such a question in these proceedings, and especially when we have direct decisions of the Constitution Bench of this Court in *Burmah Shell case*, CMWP No. 6883 of 1973 decided on 11-2-1980 and *S.M. Ram Lal case*, 1969 UJ 373.

22. As a result of the aforesaid discussion, therefore, we hold that if beverages in liquid form contained in bottles are brought within the municipal limits and after such beverages are taken out of these bottles, those very empty bottles are found to have been re-exported from the municipal limits without being sold therein, the Octopi duty paid on the weight of such bottles earlier could be subjected to claim for refund by the exporter of such empty bottles if the relevant factual data is found to the satisfaction of the authorities before whom such claim is lodged. The first point is, therefore, answered by holding that if the writ petitioner proves to the satisfaction of the authorities that the very bottles in which beverages were imported in a given contingency for sale and consumption within the municipal limits were actually taken out of municipal limits as empty bottles for recycling without the writ petitioner losing title to these bottles in the meanwhile, the Octopi duty paid at the time of their entry on the weight of bottles could be subjected to claim for refund subject to the rider that it is also shown by the writ petitioner that the Octopi duty on such empty bottles had not been passed on to the consumers or any other person so that the writ petitioner will not be found to be guilty of unjust enrichment by getting such refund. This question has also to be examined by the authorities before whom claim of refund is lodged. As held by the Constitution Bench of this Court in *Mafatlal Industries*

Ltd. and Others Vs. Union of India (UOI) and Others, the question of unjust enrichment pertaining to such refund claims has to be examined by the authorities concerned. Before parting with discussion on Point 1, we may also mention that one decision of this Court in Nagar Mahapalika, Meerut Vs. M/s. Prem Nath Monga Bottlers Pvt. Ltd. and another, was pressed into service by learned counsel for the writ petitioner. In our view that decision is of no avail to the writ petitioner on the facts of the present case. This Court in the said decision was concerned with the question whether the exemption of Octopi granted to mineral water bottles would include aerated water bottles also. It was held that the mineral water bottles would include the latter type of bottles also. Such is not the controversy before us. Point 1 is answered accordingly.

23. In the light of the decision on Point 1, Point 2 will naturally require consideration of the question as to what type of directions can be issued in the present case. It is obvious that the dispute centers round the levy of Octopi on the weight of the containers, namely, the bottles imported and brought within the municipal limits of the four respondent-Municipalities between 1980 and 1987 and as there was already stay of recovery of Octopi duty from the High Court on the weight of such bottles from 1983 pending the writ petitions till 1987, the writ petitioner had no occasion to put forth their claim for refund till then. It is of course true that for earlier period from 1980 to 1983 when there was no stay from any court, the writ petitioner could have lodged claims for refund but presumably because the writ petitioner thereafter raised this contention before the High Court and the writ petitions remained pending before the High Court for a number of years such claims were not lodged. Under these circumstances, the writ petitioner cannot be shut out from asking for refund on relevant consignments by submitting appropriate data. Consequently, on the peculiar facts of this case, we hold that it would be unfair and un equitable to prevent the writ petitioner from lodging any claims for refund of Octopi duty paid on the weight of re-exported empty bottles during the relevant period from 1980 to 1987. If the writ petitioner's claim for refund regarding the exported empty bottles covered by the consignments concerned is found justified during the period when there was stay against such recovery, nothing further would survive and the assessments for the same will close the chapter. However, if the claim is not justified then the question would survive for the authorities to proceed further for recovery of the unpaid Octopi duty on the bottles covered by these consignments as they were till then restrained from claiming such duty. So far as earlier period of 1980 to 1983 is concerned, if the claim of the writ petitioner for refund is found to be justified on the facts concerning the given consignments and on the principle of unjust enrichment the writ petitioner is not required to be non-suited, then the question of refund would survive for consideration and appropriate refund orders will have to be passed by the authorities. The writ petitioner shall be permitted to lodge such claims backed up by relevant material before the authorities concerned within the period of 12 weeks from today. The writ petitioner will have to support such claim for refund by producing relevant

evidence on the following points:

- (a) Nature of the consignments concerned with their dates and the number of bottles packed with beverages brought within the municipal limits with their weight;
- (b) Proof regarding the fact that these bottles were not sold within the municipal limits to wholesalers, retailers or to any other person;
- (c) Number of bottles covered by the consignments concerned which were subsequently taken out as empty bottles beyond the municipal limits for recycling and weight of such empty bottles;
- (d) Whether the bottles which are actually found to have been taken out of the municipal limits were the very same bottles containing beverages brought within the municipal limits by way of relevant consignments;
- (e) Whether the value of such bottles and amount of Octopi duty on their weight was passed on to the consumers or not?

24. When the relevant facts and figures are placed before the authorities supported by relevant documentary evidence and if the authorities concerned get satisfied about the same then only the question of refund for the period from 1980 to 1987 or the question of non-recovery of Octopi duty on the weight of bottles covered by the consignments for the relevant period would survive for consideration and if the authorities take any adverse decision in this connection on the diverse claims of the writ petitioner, it will be open to the writ petitioner to challenge such assessments by filing appeals under the rules and relevant provisions of the Act. Point 2 for consideration is answered by issuing the aforesaid relevant directions.

25. We may also mention, in this connection, that if such claims are lodged by the writ petitioner within the time aforesaid, then only will they be examined at the earliest and preferably within a period of a further 12 weeks from the lodging of such claims and after hearing the petitioner or his representative, appropriate assessment orders and consequential refund orders, if any, may be passed by the authorities concerned.

26. The appeals are allowed accordingly to the aforesaid extent. The judgment and order of the High Court are set aside. The writ petitions filed by the writ petitioner before the High Court will stand granted in the aforesaid terms with no order as to costs all throughout.