

(1988) 03 RAJ CK 0015
In the Rajasthan High Court
Case No : Civil Second Appeal No. 275 of 1976

J.K. Synthetics

APPELLANT

Vs

Municipal Council, Kota

RESPONDENT

Date of Decision : 08-03-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80, 9
Rajasthan Municipalities Act, 1959 — Section 104, 139, 141(1), 143, 149

Citation : AIR 1989 Raj 51 : (1988) 2 WLN 487

Hon'ble Judges : N.C. Sharma, J

Bench : Single Bench

Advocate : H.P. Parekh, for the Appellant; P.C. Mathur, for the Respondent

Final Decision : Dismissed

Judgement

N.C. Sharma, J.

1.This second appeal is directed by the plaintiff-Company against the decree of the Additional District Judge, Kota, dated May 7, 1976 whereby the decree of the Munsif (South) Kota, dated December 16, 1974, dismissing the suit of the plaintiff-Company for permanent injunction as against the respondent was confirmed.

2. Facts leading of the filing of the second appeal are that M/s. J. K. Synthetics Ltd., Kota, is a public limited company, with its factory at Kota. The plaintiff-Company, manufactures nylon yarn in its factory. The nylon yarn manufactured is winded around the metallic cops and the nylon yarn is sent in this state outside municipal Limits of Kota to its customers. According to the plaintiff-Company, the purchasers of nylon yarn after using the yam return the cops to the Company. The returned cops are again utilised for winding up the nylon yarn for re-sale of the yarn. It was pleaded that it is a condition of sale with the customers that they would return the cops after using the yarn and for that purpose a security amount is also taken in deposit by the plaintiff-company so that the purchasers

may return the cops in time. It was pleaded that the cops are mostly imported from outside India. The plaintiff-Company paid octroi duty to the Municipal Council, Kota when it brought the cops for the first time within the Municipal Limits and, therefore, octroi could not be demanded twice over by the respondent Municipal Council when they were received back from the customers after the latter had used the nylon yarn sold to them. However, the respondent Municipal Council on Dec. 18, 1962 for the first time demanded payment of octroi duty on the cops returned by the customers. The plaintiff-Company made an application to the Collector, Kota, u/s 285 of the Rajasthan Municipalities Act, 1959 (hereafter referred to as "the Act"). Before the Collector, the Municipal Council showed its willingness to enter into a mutual agreement with the plaintiff-company in this matter. It was represented on behalf of the Municipal Council before the Collector that all that it wanted was to be informed of the quantity of cops and their movement outside Kota Municipal limits so that it may be ensured that no cops are imported for use in Kota town. The Collector, therefore, remanded the matter to the Municipal Council for taking action in the light of the above observations. Consequently, the respondent Municipal Council and the plaintiff-Company entered into an agreement on June 17, 1963, whereby it was agreed that the respondent will not charge octroi duty on cop"s which were returned by the customers of the company after using the nylon yarn purchased by them. The plaintiff-company was acting in accordance with the agreement. It used to pay octroi duty on new cops brought within the Municipal limits and used to send statements to the Municipal Council with respect to the cops returned by the customers. Originally it was agreed that the customers should return the cops within six months of the purchase of nylon yarn by them but later on this period was extended to one year. However, on Dec., 26, 1967 the respondent Municipal Council sent a letter to the plaintiff-Company that octroi duty will be charged on cops and terminated the agreement entered into on June 17, 1963. The plaintiff challenged the termination of the agreement and also, the right of the respondent to levy octroi duty on the cops which were returned by its customers after using of the nylon yarn sold to them and instituted Civil Suit No. 238 of 1968 for the grant of permanent injunction against the respondent restraining the latter from levying and charging octroi duty on cops returned to the plaintiff-company by its customers after using of the nylon yarn sold by it.

3. Municipal Council, Kota, filed its written statement on Jan. 20, 1973. The Municipal Council admitted that there had been agreement between the parties on June 17, 1963. However, it pleaded that the plaintiff company itself did not comply with the terms of the agreement. It was alleged that under the shelter of the agreement the plaintiff-company started bringing new cops within Municipal limits. The Municipal Council, therefore, did not remain bound by the agreement. Apart from that it was also pleaded that the Municipal Council was entitled to charge octroi duty even when cops were brought back again within the Municipal Council limits. Pleas regarding jurisdiction and necessity of statutory notice to the Municipal Council were also raised.

4. The trial Court framed four issues in the case. It held that an agreement was entered into between the parties on June 17, 1983 that no octroi duty will be levied on the cops received back by the plaintiff-company but the plaintiff had to furnish full statement regarding cops winded up by nylon thread sent outside Kota Municipal limits and about the cops received back by it from the customers. However, it held that the plaintiff had not produced the relevant documents in the case. Neither the original agreement was produced nor the letters sent by the Municipal Council to the plaintiff and nor the replies sent by the plaintiff to the defendant Municipal Council were produced. The plaintiff had, therefore, not been able to establish that the defendant had committed breach of the agreement. It was contended before the trial Court on behalf of the plaintiff-company that the Municipal Council had no right to levy octroi duty on cops which were received back by the plaintiff-company from its customers. The Munsif (South), Kota did not agree with the above contention put forward by the plaintiff-company. It further held that the plaintiff-company had also failed to establish that it had not charged the price of the cops from its customers when it sold the nylon yarn winded up around the cops. He, therefore, held that the demand of the Municipal Council, Kota for payment of octroi duty was not unauthorised or illegal. It also held that if the plaintiff-company based its claim on the agreement, it could sue the Municipal Council for damages. Issue No. 2 was decided by the Munsif in this manner. On Issue No. 3, which was regarding necessity of serving notice, it was held that the plaintiff should have served a notice u/s 271(1) of the Act and the suit was not maintainable for want of service of notice. Lastly, it held that if the plaintiff had any grievance regarding its liability to be taxed by octroi duty, it had remedy to file an appeal before the Collector and the jurisdiction of the Civil Court to try this suit was barred. Thus on the basis of these findings on Issues Nos. 2 and 3 and on the question of jurisdiction, the Munsif dismissed the suit of the plaintiff.

5. The plaintiff filed Civil First Appeal No. 126 of 1975 which was decided by the Additional District Judge, Kota, on May 7, 1976. The Additional District Judge held that the plaintiff did not produce any document to show that the cops were not sold along with the nylon thread to its customers. According to him, it was incumbent upon the plaintiff to adduce evidence by producing sale memoos or any customer to establish that the price of cops was not charged by the plaintiff-company. According to the Additional District Judge, the statement of Vinay Kumar Gupta PW 1 that advance money was deposited by the customers for the return of the cops and that this advance deposit was to be forfeited in case the customers failed to return the cops showed that cops were sold and price was charged. According to him, when the article had been sold and price was charged, it attracted Section 104 of the Act. According to the Additional District Judge if any article was imported, within the Municipal limits of Kota for use, sale or consumption, it was liable to the payment of octroi duty. It could not be inferred that the Municipal Council had acted beyond its jurisdiction or in violation of the statutory provisions. With regard to agreement entered into

between the parties, it was stated that it clearly manifested a discretion in the Municipal Council to exempt the plaintiff from payment of octroi duty upon these articles. He held that the Civil Courts could not sit upon Municipal Council as an appellate authority because the matter was not within the jurisdiction of the Civil Court to adjudicate. Since the Municipal Council was not acting in violation of Section 104 of the Act, the jurisdiction of the Civil Court was barred. It was also held that it was necessary for the plaintiff company to serve the statutory notice upon the defendant before filing the suit. The Additional District Judge accordingly dismissed the appeal filed by the plaintiff-company. The Company has come in second appeal before this Court.

6. It was contended by Mr. Hastimal Parekh, appearing for the plaintiff-company, that no octroi was leviable on the import of cops and as a matter of fact the Municipal Council, Kota had no jurisdiction to impose any octroi tax on the import of cops what to say to subsequent transaction when the cops which were the property of the plaintiff-company were returned by the purchasers who purchased the nylon yarn. It was argued that the cops were packing material which was used for winding up the nylon yarn. It was next contended that it was established that what was sold by the plaintiff-company to its customers was nylon thread and cops were returned by the customers or the purchasers of nylon yarn after they had used the nylon thread. It was argued that when the cops were received again by the plaintiff-company from its customers, they neither changed their form nor became a new commodity or a component of the new commodity. It could not therefore, be said that the cops were imported by the plaintiff-company for using them. The cops were not sold by the plaintiff-company to its customers. The plaintiff-company only took security by way of deposit for the cops so that they may not be lost and the Additional District Judge was wrong in holding that the plaintiff-company also sold the cops along with the nylon yarn. Apart from that, an agreement was entered into between the parties on June 17, 1963 that no octroi duty will be leviable on the cops which were returned to the plaintiff-company by the customers after using the nylon thread. Municipal Council, Kota, was bound by the agreement. In pursuance of the agreement, the Municipal Council did not charge octroi duty from the year 1963 to 1967 and it was only in the year 1968 that the Municipal Council asked the plaintiff-Company to pay the octroi duty. It was not open to the Municipal Council to terminate the agreement and ask the plaintiff-company to pay the octroi duty on cops. Since the Municipal Council had no jurisdiction to charge any octroi duty on cops which the plaintiff-company got back from its customers and which cops had never been sold by the plaintiff-company, the jurisdiction of the Civil Court to try the suit was not ousted. As regards non-service of statutory notice, it was contended that it was a suit for permanent injunction and the very purpose of filing the suit would have been frustrated, if two months' notice was given by the plaintiff-company to the defendant. Mr. P.C. Mathur, learned counsel for the respondent Municipal Council supported the judgment of the Courts below.

7. Section 104(1) of the Act empowers of Municipal Council to levy an octroi on goods and animals brought within the limits of the Municipality for consumption, use or sale therein. Octroi can be levied at such rate and from such date as the State Government may direct by notification in the official gazette and in such manner as is laid down in the Act and as may be provided in the Rules made by the State Government. It appears that by Notification No. 8(6)LSG/61/II dated February 19, 1963 published in Rajasthan Gazette of Extraordinary. Part IV-C, of the same date, the State Government directed that every Municipal Board and Municipal Council levying octroi shall, from the date of publication of the notice in the official gazette, levy octroi on goods and animals brought within the limits of Municipality concerned, for consumption, use or sale therein at the rates in force in the concerned Municipality immediately before the commencement of the notice. By a notification dated November 15, 1962 published in Rajasthan Gazette Extraordinary Part IV-C dated November 20, 1963, the State Government had also framed the Rajasthan Municipalities (Octroi) Rules, 1962.

8. Before proceeding further it appears necessary to summarise the substance of the case of the plaintiff as contained in the plaint. Plaintiff's version as contained in Paras 4 and 6 of the Plaint has been that it pays octroi duty regularly with respect to the new cops imported for the first time by it within the Municipal limits of Kota Municipality. The grievance of the plaintiff-company is with respect to cops which are received back by it from its customers after the nylon thread sold to them is used by the latter and in relation to them it relied upon an agreement entered into between the parties on June 17, 1963. The background of this agreement was that the plaintiff-company had made an application u/s 285 of the Act before the Collector, Kota. In that application also, the plaintiff-company had stated that when the Company imported the cops, the octroi duty has been paid by it. It had made the grievance that after these cops were winded up, they were sent to the distributors of the yarn and again returned to the plaintiff-company for winding purposes. It contended that the cops were not used or consumed within the limits of Municipal Council. On behalf of the Municipal Council, it was represented that all that the Municipal Council wants was to be informed of the quantity of cops and movements outside Kota town so that it may be ensured that no cops are imported for use in Kota town. The Municipal Council was willing to consider the request of the plaintiff-company as contained in its letter dated Dec, 23, 1963. The Collector remanded the case to the Municipal Council for action in the light of the above observations. The relief claimed by the plaintiff-company in para 18 of the plaint was also to the effect that the Municipal Council, Kota may be restrained by permanent injunction from levying octroi duty on cops which were returned to it for winding up nylon thread and that the Municipal Council should be compelled to adhere to the agreement entered into on June 17, 1963.

9. In the ground of First Appeal also in para 4, the plaintiff-company clearly stated that it pays octroi duty on the cops which were imported for the first time within the Municipal limits of Kota and its only grievance was that octroi cannot

be charged on cops which are returned to the plaintiff-company by its customers for the reason that the plaintiff-company only sells the thread to its customers and not the cops and the cops only come back to it for rewinding. According to plaintiff-company the cops are not sold to the customers and no price is charged for the cops. However, in the grounds of second appeal, the plaintiff-company has enlarged the scope of its case by pleading in ground No. 5 that in fact no octroi duty is leviable even for the first time when the cops are imported by the plaintiff-company within the Municipal limits of Kota for being used for winding up the nylon thread and that the Municipal Council has no jurisdiction to impose any octroi tax on the import of the cops what to say of subsequent transactions when the cops which are the property of the plaintiff-company, are returned to it by the purchasers of the nylon yarn. This case was not at all pleaded by the plaintiff-company in its plaint filed before Munsif, Kota and such a plea was also not raised by it before the First Appellate Court. This plea cannot be allowed to be agitated in second appeal and more so when the case of the plaintiff-company was that it paid octroi duty without any objection when the cops were imported for the first time within Municipal limits, when the alleged agreement was only with respect to the cops which were returned by the customers and when the relief claimed was also with respect to the returned cops and for adherence to the agreement.

10. The precise finding arrived at by the Courts below may also be summarised. What the trial Court stated while deciding Issue No. 2 was that the plaintiff-company had not produced any document or account to show that it used to furnish information to the Municipal Council, Kota regarding the winded cops sent outside the Municipal limits and of their return and thus it failed to prove by best evidence in its possession that the Municipal Council, Kota, had committed breach of the agreement. It also held that the plaintiff-company had not produced any bill or the contract form with its customers in order to show that what was sold to the customers was only nylon thread and not the cops and further that there was condition in the contract with the customers that they will return the cops to the plaintiff-company. Thus, the plaintiff-Company failed to establish that it did not charge any price of the cops from the customers. Lastly, it was held that there were no provisions to show that octroi duty will not be charged simply because the duty had been paid at the time when the cops were for the first time imported within the Municipal limits.

11. The findings given by the Additional District Judge, Kota, may also be summarised as follows in his own words : --

"It is very clear from the evidence on the record that cops are used in the factory of the plaintiff for winding up nylon thread..... Municipal Council, Kota had rightly imposed tax for octroi upon any article which is used, sold or consumed within its jurisdiction u/s 104(2) of the Rajasthan Municipalities Act.

The argument made by the learned counsel for appellant cannot be appreciated that such article is not consumed or sold by the plaintiff so, it should not attract

Section 104 for imposition of tax, but evidence came on record and adduced by plaintiff does not brush aside such inference. It is very clear from testimony of P.W. 1 Shri Vinay Kumar Gupta that cops are used for winding of nylon thread for which agreement Ex. 2 has taken place between the parties. He could not produce any document pertaining to show that such cops are not sold when article of nylon is sold to the customers. It was incumbent upon plaintiff to adduce such evidence by producing any sale memo before the Court or any customer who could speak about supply of cops which are returned back and price is not charged for such cops upon customer but it has not been done. Shri Vinay Kumar has upon cross-examination by defendant to this effect and specific questions being put to him about any sale memo therein price was not charged for cops, but he has failed to produce any evidence before the court to this effect. It is stated by Shri Vinay Kumar that customers deposited advance money for return of cops. If the customers failed to return the cops their deposits stood forfeited. It manifests that cops are sold and price is charged. It is used for winding of thread. Where any article has been sold and price is charged, it attracts Section 104 of the Act of 1959 and argument made by learned counsel for appellant cannot be appreciated and allowed. If any article is imported within the jurisdiction of Municipal Council Kota for use, sale or consumption, it is liable for tax or octroi as imposed by Municipal Council to that place. It cannot be inferred that the defendant has acted beyond its jurisdiction or in violation of statutory provision or principle of law. Agreement Ex. 2 which took place between the parties clearly manifests discretion of Municipal Council to exempt the plaintiff from payment of octroi upon such article. It is for the Municipal Council Kota to consider these circumstances but, this Court cannot sit upon such body as an appellate Court because such matter is not within the jurisdiction of the Civil Court".

The version of defendant Municipal Council has been three-fold in their written statement. Firstly, the yarn is sent wound around the cops and when the cops are returned, they enter the Municipal limits as new item of goods and are liable to octroi duty on entering into Municipal limits. Secondly, the plaintiff-company itself did not comply with the terms of the agreement and committed breach. Lastly, the plaintiff-company has started abusing the terms of the agreement inasmuch as they started importing new cops within Municipal limits of Kota under the shelter of the agreement.

12. It is not disputed on either side that the agreement Ex. 2 was entered into between the parties. Mehmood Khan witness of the defendant Municipal Council had admitted in his statement that an agreement was arrived at between the plaintiff-company and the Municipal Council, Kota, and Ex. 2 is the copy of that agreement. His statement is that the plaintiff-company did not comply with term No. 5 of the agreement and, therefore, the agreement was cancelled. The statement of Vinay Kumar Gupta, Commercial Sales Officer of the plaintiff-company, is that the plaintiff-company used to import cops from outside India. Lately it had started its own factory at Kanpur to Manufacture cops. Whenever

new cops were imported within Municipal limits of Kota, octroi duty was paid by the plaintiff-company. He also deposed that the plaintiff-company had made an application to the Collector, Kota u/s 285 of the Act and the order of the Collector Kota was Ex. 1. He also mentions about the entering into an agreement between the parties and that Ex. 2 is the copy of the agreement. As a matter of fact, the controversy between the parties is on two points. According to the plaintiff's evidence, only nylon and polyster yarns were sold to the customers and not the cops around which they are wound The cops were returned by the customers. For that purpose security deposit was taken from the customers and if they did not return the cops, its price was recovered from the security deposit. The cops returned are again utilised in the winding up of nylon and polyster thread and the transactions of sale of yarn and return of cops goes on in the above manner. If the cops are damaged, they are sent for repairs to the factory of the plaintiff-company at Kanpur and after repair, they are utilised again. According to the plaintiff-company, it continued to comply with the directions of the agreement. According to the statement of Mehmood Khan D.W, 1, examined on behalf of the Municipal Council, the plaintiff-company did not comply with term No. 5 of the agreement and therefore, the agreement Ex. 2 was cancelled by the Municipal Council. It is stated by him that the plaintiff-Company did not use to furnish information about the wound up cops sent by it to the customers and about the return of the cops. He has said that when the wound up cops are sent outside, , the goods might have been sold by the plaintiff-company.

13. The first question, therefore, which calls for determination is whether, if the cops are returned, by the customers after using the yarn to the plaintiff-company, is the plaintiff-company liable to pay octroi on cops brought again within the Municipal limits of Kota Municipality or not? As already stated, Section 194(1)(2) of the Act provides in relation to octroi that every Municipality shall levy at such rate and from such date as the State Government may in each case direct by notification in the official gazette and in such manner as is laid down in the Act and as may be provided in the Rules made by the State Government in this behalf, an octroi on goods and animals brought within the limits of the Municipality for consumption, use or sale therein. Reference may here be made to the decision of their Lordships of the Supreme Court in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, *Burmah Shell Storage and Distributing Company* dealt in petrol and other petroleum products which it manufactured in its refineries situated outside the octroi limits of Belgaum Municipality. It brought its products inside the area of Belgaum Municipality either for use or consumption by itself or for sale generally to its dealers and licensees who in their turn sold them to others. The Company also directly sold its products to Government both Civil and Military and to local bodies and big private concerns. The Company had a Divisional Office and Depot in Belgaum. The Company in the normal course of its business operations appointed dealers and licensees and typical form of agreement between the company and such dealers and licensees had been exhibited in the case.

According to the company, the goods brought by it within the octroi limits could be divided into four separate categories, namely :--

- (1) Goods consumed by the Company;
- (2) Goods sold by the company through its dealers or by itself and consumed within the octroi limits by persons other than the Company:
- (3) Goods sold by the Company through its dealers or by itself inside the octroi limits to other persons but consumed by them outside the octroi limits; and
- (4) Goods sent by the Company from its Depot inside the octroi limits to extra Municipal points where they are brought and consumed by persons other than the company.

The Supreme Court was concerned in the appeal before it with respect to period of three years commencing on Oct. 22, 1955 and ending on a like day in 1958. Section 73 of the Bombay MunicipalBoroughs Act, 1925 provided for imposition by the Municipality of an octroi from animals or goods or both brought within the octroi limits for , consumption use or sale therein. The words "use or sale" were substituted for the words "or use" from May 5, 1954 by an Amending Act of 1954. In other words, before 1954, the word ""sale" did not figure in the description of octroi on animals or goods or both which the Municipality was authorised to impost. What happened was that when the Act was amended in 1954 by including the word "sale" in the description of the octroi, the rules and bye-laws were not re-framed nor was the procedure u/s 76 read with Section 58(j) followed to impose octroi on animals and goods sold within the octroi limits. Rule 4(1) of the Octroi Rules also continued as before. Burmah Shell Company, which had paid, octroi on all its products brought within the octroi limits of the Belgaum Municipality before the Amendment including the goods not consumed by itself but sold to others, started a correspondence saying that inasmuch as the law was newly amended to include "sale" in the description of octroi, the Rules and bye-laws ought to have been framed again and the procedure u/s 76 read with Section 58(j) followed As this was not done, the Company contended, the tax could not be collected on goods which were merely sold but not consumed inside the octroi limits. It may be mentioned that in the course of correspondence, the Burmah Shell Company did not object generally to the levy of octroi on goods brought inside the octroi limits for consumption, use or sale but asserted that octroi on goods which were sent out of the said limits were liable to be refunded which the Municipality was prepared to grant subject to the rates. Even before the High Court, the Advocate appearing for the Municipality stated that if any goods belonging to the company were actually sent outside the octroi limits of the Municipality, it was prepared to grant refund on proof thereof. That was the stand of the Municipality even before the Supreme Court. Burmah Shell Company also stated before the Supreme Court that it was liable to pay octroi on goods consumed by itself. The dispute thus narrowed down to the 2nd and 3rd categories mentioned above. In other words, the dispute was with

respect to -

(1) Goods sold by the Company through its dealers or by itself and consumed within the octroi limits by persons other than company, and

(2) Goods sold by the Company through its dealers or by itself inside the octroi limits , to other persons but consumed by them outside the octroi limits.

14. The contention was that the words "consumed or used" must be contrasted with the word "sale", because the "sale" introduced a person other than the one who brings the goods or animals within the Municipal limits and as the words "consumed or used" were not qualified to say that the consumption or use may be by any one, those words must necessarily denote consumption or use by the very person who brings the goods or animals. Before the amendment in the Bombay Municipal Boroughs Act, 1925, by Amending Act of 1954. it had selected only consumption and use and not sale as subject matter of octroi. After the amendment, the tax was intended to be collected even in respect of goods brought for sale but the procedure under Sections 75. 76 and 77 had not been followed as required by Section 60 of the Boroughs Act and the imposition of octroi on goods and animals brought in for sale failed to be ineffective (sic). His Lordship Hidayatuallah. J., stated that ever since the enactment of Bombay Municipal Boroughs Act, 1925 no dispute had been raised by any person that goods brought in for sale were exempt from octroi and all persons who brought the goods apparently paid this tax without objection. It was only in 1954 when the legislature included the word "sale" also, that the dispute was raised by persons who were affected and they were some of the persons who had paid the tax before even though the word "sale" was not there. Despite that it was observed that the conduct of the tax payer is not determinative of the meaning of the words ""consumption or use". It only showed how the term was always understood in this background his Lordship examined the connotation of the word "consumption". He held that the word "consumption" in its primary sense means the Act of consuming and in ordinary parlance means the use of an article in a way which destroys, wastes or uses up that article. But insome legal contexts the word "consumption"" has wider meaning. It is not necessary that by the act of consumption the commodity must be destroyed or used up. He referred to the decision in The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others, and stated that 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 some one else but so long as the goods have been brought into the local area for consumption in that sense that the expression "for the purpose of consumption" refers not merely to the individual importer or purchaser but as contemplating distribution eventually to consumers, no matter by whom, they satisfy the requirements of the Boroughs Act and octroi is payable. Then His Lordship noticed that 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 food-stuffs. 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 when used them up or for consumption in a manner which destroys, wastes or uses them up. In this context, it was held, that the word consumption must receive a larger meaning than merely the act of consuming in the generally understood sense. Reference was also made by his Lordship to the decision in *Anwarkhan Mahboob Co. Vs. The State of Bombay (Now Maharashtra) and Others, In Anwar Khan Mahboob Company's case*, it was said that consumption consists in the act of taking such advantage of the commodities and services produced as constitute the "utilisation" thereof. For each commodity, there is ordinarily what is generally considered to be the final act of consumption. For some commodities, there may be even more than one kind of final consumption. Thus grapes may be "finally consumed" by eating the mas food; they may also be consumed by drinking wine prepared from grapes. Again the final act of consumption may in some cases be spread over a considerable period of time. Books, articles of furniture, paintings may be mentioned as examples. It may even happen in such cases that after one consumer has performed part of the final act of consumption, another portion of the final act of consumption may be performed by his heir or successor in interest or a transferee.

15. Looking to the trade of *Burmah Shell Company* it was held that it brought the goods

(a) for consumption by itself -- which was of course within the term of octroi as described

(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 to distribute the goods within the area to ultimate consumers. So long as the goods are brought inside the area for sale within the area to an ultimate consumers, it makes no difference that the consumer does not consume them in the area but takes them out for consumption elsewhere. An illustration was put forward that a motorist who buys petrol within the Municipal area and goes outside it for a drive buys the petrol in the area for the purposes of consumption and the person who keeps and stores the petrol for sale in such circumstances keeps it for consumption therein. The consumer may never consume a tin of oil in his vehicle as he finds that it does not suit his vehicle and leaves it lying on his shelf. The goods must, however, 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 octroi 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. It was concluded in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, that even without the word "sale" in the Boroughs Act the position was the same provided the goods were sold in the local area to a consumer who bought them for the purpose of use or consumption or even for resale to others for the purpose of use or consumption by them in the area : it was only when the goods were re-exported out of the area that the tax could not legitimately be levied. Thus *Burmah Shell Company* was liable to pay octroi tax brought into local area (a) to be consumed by itself or sold by it to the consumers direct and (b) for sale to dealers who in their turns sold the goods to consumer within the Municipal area irrespective of whether (sic) consumers bought them for use in (sic) or outside it. The Company was, however not liable to octroi in respect of goods which it brought into the local area and which were re-exported. Lastly, it was (sic) that to enable the company to save itself from tax in the last mentioned contingency, it had to follow the procedure laid down by Rules for refund to, tax.

15A. In *Ram Krishna Ramnath Agarwal of Kamptee Vs. Secretary, Municipal Committee, Kamptee*, His Lordship Kania, C. J., speaking for the Court, pointed out the distinction between Excise duty and Octroi duty thus : --

"This discussion clearly shows that the relevant question is what is the nature of the tax. Excise duty is a tax on manufactured goods. Octroi duty is a tax on the entry of goods within a particular area.....Tobacco becomes subject to excise duty.....even before it is converted into bidis. The levy of such duty is therefore not in conflict with the levy of an impost on the entry of the goods within a certain area.

In this case the appellant was a trader in Kamptee who manufactured bidis and brought from outside tobacco to make bidis. It was held that there was nothing in the Excise Act to make its provisions contrary to the provisions of Section 66(1) (e), Central Provinces Municipalities Act or to the levy of octroi duty under the same.

16. In *The Central India Spinning and Weaving and Manufacturing Company, Limited, The Empress Mills, Nagpur Vs. The Municipal Committee, Wardha*, J. L. Kapur, J. brought out the distinction between "terminal tax" and "octroi duty" thus : --

"The "terminal tax" under item No. 58 of List I arises at the end of journey by railway wherever the end may be in relation to particular goods and under item No. 49 of List II the tax or cess on entry of goods whatever the nomenclature is imposable when the goods enter a local area for consumption use or sale therein.

The two sets of taxes are so distinct that they may be imposed simultaneously, one when they reach their destination at the end of a railway journey and the other when they enter the limits of a local area for the object above mentioned. But in both the cases the activity in regard to the motion of the goods ends, in the one case as the goods are carried no further by the railway and in the other as their entry is for consumption, use or sale. Keeping in view the terms and language and legislative history of the Section 66(1), we are unable to enlarge the terms of the section by mere construction so as to include within its operation goods which are in transit and are being transported across the jurisdictional limits of the municipality."

17. In *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others, Vivian Bose, J.*, in paras 49 and 59 of the reported judgment dealt with the question as to what did the words "for the purpose of consumption" in Explanation to Article 286(1) as it then stood, meant. His Lordship observed : --

"It is true, the word can be used in a wide as well as a narrow sense but I see no reason to restrict its meaning in the present case. What after all does "'consumption" mean ? In its economic sense it is just the use which a purchaser chooses to make of the goods purchased for his own purposes. He does not have to destroy them nor does he have to diminish their value or utility. A man who purchases a valuable piece of sculpture or painting for preservation in a national museum does not destroy it nor does he use it himself except for the purpose of presenting it to the museum. But he is a consumer. In the same way, a man who purchases goods for use in his business so that his business can be carried on by the constant feeding of a stream uses the goods and "therefore" consumes them even though he does not keep them himself.....

I cannot agree that goods cannot be "consumed" more than once. It all depends on how you view the matter. Little fishes swallow smaller fishes and are in turn eaten by fishes larger than themselves. In the end, the smallest of the series is consumed by the biggest. Consider the case of a curio dealer who collects antiques for the purpose of sale. The older they are and the more they have been used, the more valuable they become, but that would not prevent them from being "'consumed over again when a collector buys them for display in his house. I would therefore construe "'consumption" to mean the usual use made of an article for the purpose of trade and commerce. When dealer buys from dealer that is "consumption" for the purpose of the purchaser dealer's trade; when an ultimate purchaser buys from a retailer, that is also "consumption" for his purposes."

In the same judgment, Bhagwati J., however, struck a different note. After referring to the definition of "consumption" given in Webster New International Dictionary and Oxford New English Dictionary, he observed that a dealer who deals with the goods after purchasing the same does not consume the goods. He deals with or disposes of the same in the ordinary course of trade and he is a dealer or a trader in those goods. Delivery of goods for the purpose of

consumption in the delivery state therefore means the delivery for the purpose of using by the consumer and it has no application to the case of a dealer purchasing the goods across the border for dealing with or disposing of the same in the ordinary, course of trade. His Lordship did not accept the view of Bose, J. that the words "for the purpose of consumption" must be understood in a comprehensive sense as having reference both to immediate and ultimate consumption within the State and excluding only re-sale out of the State.

18. S.R. Das, J. in *State of Travancore-cochin and Others Vs. Shanmugha Vilas Cashew Nut Factory and Others*, observed : --

"There is really no substantial controversy as to the nature of the business carried on by the respondents. All of them are exporters of cashewnut kernels on a fairly big scale. They procure raw cashewnuts.....Then they put the raw cashewnuts through a certain process and obtain oil and edible kernels....Almost, most of the process is done by hand, part of it is also done mechanically by drums, oil is extracted out of the outer shells as a result of roasting. After roasting the outer shells are broken and the nuts are obtained. The poison is eliminated by the peeling off the inner skin, By this process of manufacture, the respondents really consume the raw cashew and produce new commodities. The resultant products, oil and edible kernels are well recognised commercial commodities. They are separate articles of commerce quite distinct from the raw cashewnuts....There is a transformation of the goods. The raw cashews are consumed by the respondents in the sense that a jute mill consumes raw jute, or a textile mill consumes cotton and yarn."

Similarly in *Anwarkhan Mahboob Co. Vs. The State of Bombay (Now Maharashtra) and Others*, , K. C. Das Gupta, J., while examining the question whether tobacco was delivered in the State of Bombay for consumption in that State, dealt with the different modes of "consumption" and expressed himself thus : --

"The act of consumption with which people are most familiar occurs when they eat, drink or smoke. Thus we speak of people consuming bread, or fish or meat or vegetables, when they eat these articles of food; we speak of people consuming tea or coffee or water or wine, when they drink these articles, we speak of people consuming cigars or cigarettes or bidis, when they smoke these. The production of wealth, as economists put it, consists in the creation of "utilities". Consumption consists in the Act of taking such advantage of the commodities and services produced as constitutes the "utilization" thereof. For each commodity, there is ordinarily what is generally considered to be the final act of consumption. For some commodities, there may be even more than one kind of final consumption. Thus grapes may be "finally consumed" by eating them as fruits; they may also be consumed by drinking the wine prepared from "grapes". Again, the final act of consumption may in some cases be spread over a considerable period of time. Books, articles of furniture, paintings may be mentioned as examples. It may even happen in such cases, that after one

consumer, has performed part of the final act of consumption, another portion of the final act of consumption be performed by his heir or successor-in-interest, a transferee or even one who has obtained possession by wrongful means. But the fact that there is for each commodity what may be considered ordinarily to be the final act of consumption, should not make us forget that in reaching the stage at which this final act of consumption takes place the commodity may pass through different stages of production and for such different stages there would exist one or more intermediate acts of consumption. Thus the final act of consumption of cotton may be considered to be the use of wearing apparel of the cloth produced from it.....It is usual and correct to speak of raw cotton being consumed in ginning, of ginned cotton being consumed in spinning, of spun yarn being consumed in weaving, of woven cloth being consumed in the making of wearing apparel. The final product the wearing apparel is ultimately consumed by men, women and children in using it as dress. In the absence of any words to limit the connotation of the word "consumption" to the final act of consumption, it would be proper to think that the Constitution-makers used the word to connote any kind of user which is ordinarily spoken of as consumption of the particular commodity.

Reverting to the instance of cotton, mentioned above, it will be proper to hold that when raw cotton is delivered in State A for being ginned in that State, it is delivered in State A; when ginned cotton is delivered in State B for being spun into yarn, it is delivered for consumption in State B; when yarn is delivered in State C for being woven into cloth in that State it is delivered for consumption in State C, when woven cloth is delivered in State D for being made by tailor in that State into wearing apparel, there is delivery of cloth for consumption in State D; and finally when wearing apparel is delivered in State E for being sold address in that State, it is delivery of wearing apparel for consumption in State E....This conversion of a commodity into a different commercial commodity by subjecting it to some processing, is consumption within the meaning of the Explanation to Article 286 no less than the final act of user when no distinct commodity is being brought into existence is being used up. At one stage of the argument what Mr. Pathak appeared to insist was that there must be distinction of the substance of the thing before the thing can be said to be consumed. That takes us nowhere, because we have still to find out what is meant by destruction of the substance.....

It must therefore be held on the facts of this case that when tobacco was delivered in the State of Bombay for the purpose of changing it into a commercially different article, viz., "bidi patti", the delivery was for the purpose of consumption. The purchaser in this case therefore falls within the meaning of the Explanation to Article 286(1)(a) and must be held to have taken place inside the State of Bombay."

19. There are yet another type of commercial transactions or commercial activities in trade and commerce. S. M. Ram Lal & Company carried on business

in woollen goods. They purchased wool at their Head office in Delhi and sent it for dyeing to their factory in Faridabad township in the District of Gurgaon. The Notified Area Committee of Faridabad claimed to levy octroi on the wool imported within the limits of Notified Area Committee. The appellants challenged the demand but the Punjab High Court rejected their writ petitions holding that wool was brought by the appellants within the limits of Notified Area Committee of Faridabad Township for "use" and octroi was on that account properly leviable. Their Lordships of the Supreme Court in *S.M. Ram Lal & Co. v. Secretary to Government of Punjab* 1969 UJ (SC) 373 construed and interpreted the word "use" in Entry 52 List II of the Seventh Schedule to the Constitution which tax the Notified Area Committee was competent to levy under Sub-section (2) of Section 61 of the Punjab Municipal Act, 1911 with the previous sanction of the State Government. Shah J., speaking for the Bench, observed : --

"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.....The compiling of three words

"consumption", "use" and "sale" connotes 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 octroi would be levied by the Notified Area Committee on the entry of wool..... The High Court was not justified in assuming merely because in the process of dyeing change in the appearance of wool was involved, and as dyed wool it may fetch a higher price in the market, that it becomes a different commercial commodity. The question was one of fact and largely depends upon the intention of the person importing wool and their dealings therewith. There is no evidence on the record to support the conclusion that in importing wool within the area of the Notified Area Committee for dyeing in the factory of the appellants, it was intended to convert it into a different commercial commodity."

The Supreme Court remanded the case to High Court with directions to allow the parties to lead evidence on the question whether the entry of the wool belonging to the appellant into the limits of the Notified Area Committee was with the object of converting it into a different commercial commodity.

20. In *Hiralal Thakorlal Dalai v. Broach Municipality*, (1975) 3 SCC 876 the appellant carried on a wholesale business in certain commodities and acted as commission agent for others, both for purchase and sale. His business was carried on within the Municipal limits of Broach. His grievance was that he was buying commodities on behalf of other principals bringing them into the Municipal area and selling them from there to other principals in Manglore and

that such sales were not assessable to octroi under The Bombay Municipal Boroughs Act (18) of 1925 in view of the connotation of three expressions, "consumption use or sale" in the Municipal Act. The point thus was whether a person who brought goods into a taxable territory and sold it there for being taken outside the territory for consumption or use was liable to pay octroi. Three Judges constituting the Bench of the Supreme Court felt that there was "blurred areas of sale" within the territory which may attract a tax under Entry 52 of the State List in the Seventh Schedule to the Constitution left uncertain by the decision of the Court in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, which required further clarification particularly because the point was of some substance and affected Municipal finances and the business community in the whole country. The three Judges constituting the Bench regarded the matter deserving consideration by a larger Bench of the Supreme Court, referred it to the larger Bench.

21. *Hiralal Thakorlal Dalal Vs. Broach Municipality and Others*, : *Hiralal Thakorlal Dalal Vs. Broach Municipality and Others*, came before a larger Bench of the Supreme Court consisting of five Judges. The first petition was in respect of a consignment which was designated as a through consignment, and the second petition concerned goods in transit. Shinghal, J. speaking for the larger Bench, observed --

"This Court categorically held that the company was liable to pay octroi on goods brought into the local area(s) 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 brought them for use in the area or outside it, but it was not liable to octroi in respect of goods which it brought into the local area and which were re-exported.

The law on the subject-matter of the present controversy has thus been laid down in the *Burmah Shell*'s case and the present case squarely falls to be governed by it. We are also in agreement with that interpretation of the law. The learned counsel have not been able to advance any new argument justifying a reconsideration of the decision."

Thus the decision in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, is final on the points settled by it and in relation to facts governed by it.

22. *Bhaskar Textiles Mills Ltd.*, was a company incorporated under the, Indian Companies Act, 1956 having its mills located at village Ektali. The company mainly carried on spinning of cotton which in the manufacturing process was transformed from loose fibres into finished yarn. According to the appellant, the goods was brought into Municipal area not for the purpose of sale or for consumption but for the purpose of manufacture of yarn. The appellant took support from *Burmah Shell* case (*supra*) and on the strength of that authority contended that the goods were brought into the Municipal limits neither for

consumption nor for sale. Dealing with the contention, his Lordship R. B. Misra, J., in *Bhaskar Textile Mills Ltd. Vs. Jharsuguda Municipality and Others*, observed :-

"Assuming the contention to be correct, there is no escape from the conclusion that the goods are brought into the municipal limits at least for the purpose of "use". In this view of the legal position the imposition of octroi by the Municipality cannot be challenged on this ground."

23. The decision in *The Town Municipal Council, Kalghatgi Vs. Urmilla Kothari*, dealt an activity where goods imported into the Municipal limits for immediate exportation and on that basis the respondent claimed exemption from levy of octroi or supervision-fee. The case involved a substantial question of law relating to the validity of the levy or what was styled as "supervision-fee u/s 124 of the Karnataka Municipalities Act, 1964, read with Rule 26 of the Rules framed thereunder. The facts were that iron ore was lifted by the respondent in the trucks from Hubli rail yard and carried to Karwar and Belekeri harbours. The trucks of the respondent carrying the iron ore have enroute to pass in the course of transit through the limits of various town Municipalities situated on the high-way of which town Municipal Council, Kalghatgi happened to be one, but they did not unload and reload the iron ore at any intermediary point or stop. The question whether the article was brought into the Municipal limits for the purpose of immediate exportation. It was held that the above expression in Section 124 of the Act was indicative of an element of repose and rest of the goods within the Municipal limits and they do not comprehend within their sweep. The continuous process of transit of goods, by vehicles which merely used the State high-way passing through the area which lie within the Municipal limits. In that case the iron ore was carrying in the trucks of the respondent merely passed through the area which lay within the Municipal limits and was not unloaded and re-loaded at any place within the Municipal area. As such, the important element of repose and rest which the words "brought into the Municipal limits for the purpose of immediate exportation" implied was absent in that case. Their Lordships of the Supreme Court relied upon the decision in *The Central India Spinning and Weaving and Manufacturing Company, Limited, The Empress Mills, Nagpur Vs. The Municipal Committee, Wardha*,

24. In *Brown v. State of Maryland* (1827) 12 Wheat 419, 442 Chief Justice Marshall dealing with the word "imperative" stated as follows : --

"The practice of most commercial nations conforms to this idea. Duties according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus sea-stores, goods, imported and re-exported in the same vessel, goods landed and carried over landed or the purpose of being re-exported from some other port, goods forced in by stress of weather and landed, but not for sale are exempt from the payment of duty. The whole course of legislation on the subject shows that in the opinion of the legislature the right to sell is connected with the payment of the duty."

25. In *Wilson v. Robertson* (1855) 24 LJQB 185 where Section 33 of the 48 Geo: 3 c. Civil imposed a duty on all goods "imported into or exported from Berwick Harbour" and the harbour extended from Berwic Bridge down the Tweed to the sea, but not above the bridge and the goods were brought up the river in a seagoing vessel which, having first used the Harbour Commissioners' rings and posts in order to moor the vessel while lowering the masts, passed through Barwick Bridge and unloaded her cargo about 200 yds. above the bridge and beyond the limits of the harbour; it was held that these goods were not "imported into" a harbour and as such liable to duty.

26. In *Automotive Manufacturers (P) Ltd. etc. Vs. Government of Andhra Pradesh and Others, etc.*, the appellant received among other automobile equipment, motor chassis, motor vehicles etc. from manufacturers outside the State of Andhra Pradesh. Section 3 of the Andhra Pradesh Motor Vehicles Taxation Act, 1963, levied tax on every motor vehicle used or kept for use in a public place in the State. The argument on behalf of the appellant was that a chassis as such could neither be used nor kept for use in a public place before a body was fitted to it and so long as the said step was not taken, the question of levy of tax under the Act would not arise. Mitter, J. while dismissing the appeal referred to the different meanings of the word "use" in the Oxford dictionary some of which are as follows: --

"to make use of as a means of instrument; to employ for a profitable end".

It was held by the Supreme Court that it is not necessary for a chassis to have a body attached to it before it can be used within the meaning of the Act inasmuch as it can be used by the man who hires it and such use of it on public roads would be enough to attract the levy. Ordinarily chassis with bodies attached to them have commercially profitable use but even without a body, a chassis can be used and is actually used when it is taken over public roads.

27. I may next turn to the decision of this Court in *Gauri Shanker Vs. Municipal Board, Jhunjhunu and Another*, dealing with the validity of bye-laws levying octroi on animals brought within municipal limits. It was observed that presumption is that import is for consumption unless a contrary declaration is filed.

28. In *Parekh Automobile v. Municipal Council, Jodhpur*, 1977 WLN (UC) 137 the facts were that the petitioner Parekh Automobile Company had a retail outlets for the sale of petroleum products at Dangiavas. The petitioner had been allotted retail outlet by Indian Oil Corporation for sale of Petroleum products such as diesel oil, mobile oil etc. at Dangiavas which was admittedly outside the limit of Jodhpur Municipal Council According to the petitioner Indian Oil Corporation had got its depot near Rah Ka-bag Station at Jodhpur where it stored petroleum products. Indian Oil Corporation from its depot at Jodhpur supplied the petroleum products to various pump stations situated within the limits of Jodhpur Municipal Council as well as situated outside the limits of that Council in several

districts such as districts of Jodhpur, Pali, Barmer. Jalore, Nagaur etc. including the retail out let of the petitioner at Dangiavas. On July 25, 1975 the Municipal Council, Jodhpur suspended the transport passes facilities to Indian Oil Corporation and took the stand that octroi tax would be charged from the respondent No. 2 on the goods brought within the Municipal limits even though they are exported by it outside the Municipal limits if they are sold within the limits of Municipal Council although such goods were meant for use and consumption of the consumers outside the Municipal limits. The case of the petitioner was that the goods were not sold at Jodhpur but actually the sale took place at Dangiavas the retail outlet of the petitioner. Secondly, even if the sale is held to have taken place at Jodhpur merely on that account octroi cannot be levied unless the goods sold are meant for the use of consumption of the consumer within the municipal limits. On behalf of the petitioner two contentions were put forward : --

(1) The Municipal Council is not entitled to levy the octroi on the petroleum products which were re-exported by the Indian Oil Corporation to the retail outlet of the petitioner at Dangiavas as the goods were neither brought for consumption or use in the limits of the Municipal Council Jodhpur nor sold in the Municipal area.

(2) Even if it be assumed that the petroleum products which had been exported to the petitioners' out let at Dangiavas had been sold at Jodhpur then too the Municipal Council Jodhpur had no jurisdiction to levy the octroi and realise the same as goods so sold were not meant for use of ultimate consumer in the Municipal area. It was urged that the taxable event for the purpose of levy of octroi duty takes place only if the octroi of the goods in the limits of Municipal Council was meant for the use of ultimate consumer or user. The petroleum products which had been exported to the petitioners' retail out let at Dangiavas were meant for the use of ultimate consumer for use outside the limits of the Municipal Council and, therefore, they were not chargeable to octroi.

Reliance was placed on behalf of the petitioner on the decision of the Supreme Court on *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, and *Hiralal Thakorlal Dalal Vs. Broach Municipality and Others*, The learned single Judge held that in the case before him undisputably the goods in question were re-exported by the Indian Oil Corporation from its depot to its retail out-let for the use or consumption of the ultimate consumer outside the Municipal limits and, therefore, the Municipal Council was not entitled to levy octroi on goods so exported by the Indian Oil Corporation of its retail out-let for use and consumption by the ultimate consumer outside the local limits of the Municipal Council, Jodhpur. He was also disposed to hold that the Municipal Council had no jurisdiction to levy octroi on the goods re-exported by the Indian Oil Corporation to the retail out-lets of its dealer located outside the Municipal limits for the use of the ultimate consumer outside the Municipal limits. His Lordship M.L. Joshi, J., further observed that

even if the sale took place within the limits of the Jodhpur Municipal Council, but the goods were exported outside the octroi of Jodhpur Municipal Council for the use and consumption of the ultimate consumer outside the octroi limits of Jodhpur, when the taxable event does not take place in the octroi limits of Jodhpur and the Municipal Council had, therefore, no jurisdiction to levy octroi on the goods so exported.

29. The Municipal Council, Jodhpur filed special appeal before a Division Bench of this Court and the judgment of the Division Bench is reported in 1980 WLN 107 : (AIR 1981 NOC 25). His Lordship C.M. Lodha, dismissing the special appeal filed by the Municipal Council, Jodhpur observed : --

"The main point for decision, therefore, is whether it can be said in the facts and circumstances of the present case that the petroleum products which are supplied to the petitioner by the Indian Oil Corporation from the depot at the retail outlet of the petitioner at Dangiavas (situated outside the limits of Municipal Council) for consumption or use outside the limits of the Municipality would attract the levy of octroi. This point, it appears to us, has been finally decided by their Lordships of the Supreme Court in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, This case makes it clear that the words "use or sale" could not make any difference so far as the event of taxability is concerned, so according to the Supreme Court, "sale" simpliciter will not attract the levy of the octroi. Thus, the sine qua non for levy of octroi is consumption. Consequently, no octroi can be levied in respect of goods which are re-exported for consumption or use out-side the Municipal limits. The point again came up for consideration before the Supreme Court in *Heeralal Thakor Lal Dalai v. Broach Municipality* AIR 1976 SC 1446. The grievance of the petitioner in that case was that the Municipality had collected octroi on goods which were imported, within octroi limits of the Municipality, but which were re-exported and the court observed that the law on the subject-matter had been laid down quite clearly in the *Burmah Shell's* case and the case squarely falls to be governed by it."

It was held by the Division Bench that no octroi was leviable on the petroleum products re-exported by the Indian Oil Corporation to the retail out-lets situated outside the Municipal limits for consumption and use outside the limits. It may be mentioned that it was contended on behalf of the Municipal Council, Jodhpur that according to Rule 9 of the Rajasthan Municipalities (Octroi) Rules, 1962, since the goods were brought within octroi limits, they became liable to octroi unless a declaration as contemplated by Rule 9 had been made by the person bringing goods. In that case no declaration was made by the Indian Oil Corporation, and, therefore, it was urged that the goods must be treated as having been brought within Municipal limits for consumption use or sale therein. This argument was rejected on the ground that in the case before them special facilities for current accounts have been given to the Indian Oil Corporation which supplied petroleum products to the petitioner in accordance with Rule 13 of the Rules. The

contention of the counsel for the petitioner was also accepted that at the time of entry of petroleum or diesel, it was not possible for the Indian Oil Corporation to give a declaration as to how much petrol or diesel would be re-exported to retail outlets situated outside the Municipal limits and, therefore, the necessity of giving a declaration was futile. It may be mentioned that M/s. Parekh Automobile had also filed Special Appeal No. 31 of 1977 for refund of the octroi charged from the petitioner on the petroleum products re-exported outside the Municipal limits of Jodhpur on the basis that the Municipal Council had given an undertaking that it would refund the octroi charged from the petitioner in case the writ petitions were allowed. The learned single Judge had disallowed the refund on two grounds. Firstly that the undertaking was confined to the refund of the amount charged from the petitioner by the Municipal Council and not from the Indian Oil Corporation. Secondly, the petitioner had not succeeded in establishing his case for refund of octroi charged from the Indian Oil Corporation. The Division Bench held that the octroi had been paid by the Indian Oil Corporation to the Municipal Council and not by the petitioner. It, therefore, observed that the Municipal Council would have to refund to the Indian Oil Corporation the amount of octroi paid on the petroleum product re-exported by it to Dangiavas outlet for supply to the petitioner and the petitioner may recover the same from the Indian Oil Corporation.

30. A perusal of para 3 of the judgment of the learned single Judge in Parekh Automobile case 1977 WLN 137 goes to show that the petitioner had alleged in his petition that as the Indian Oil Corporation was a public sector undertaking, it had not to pay octroi tax on such consignment at the time of entry of goods within the limits of Municipal Council because Corporation was provided current account facilities u/s 133 of the Rajasthan Municipalities Act. It was further alleged that the Municipal Council, Jodhpur on 25th July, 1975 suspended the transport passes facility to the Indian Oil Corporation and took the stand that octroi tax would be charged from Indian Oil Corporation on the goods brought within the Municipal limits even though they are exported by it outside the Municipal limits, if they are sold within the limits of Municipal Council although such goods were meant for use and consumption of the consumers outside the Municipal limits. (Underline is mine). The recital in the judgment of the Division Bench in para 3 of its judgment reported in 1980 WLN 107 : AIR 1981 NCC 25 with regard to the stand taken by the Municipal Council, Jodhpur is markedly, different from that stated by the learned single Judge in para 3 of his judgment. The Division Bench mentioned in para 3 that the petitioner's case was that all of a sudden on July 25, 1975, the Municipal Council suspended the transport passes facilities given to the Oil Corporation and began to charge octroi from the Oil Corporation on the petroleum products brought within the Municipal limits even; though they were re-exported by it outside the Municipal limits for consumption out-side the limits. The expression "if they are sold within the limits of Municipal Council" finding place in the judgment of the learned single Judge is missing in the recital made by the Division Bench in para 3 of its judgment The learned

single Judge had mentioned in para 6 of his judgment that the Municipal Council in its reply had stated that whenever the sale is made by Jodhpur depot (of Indian Oil Corporation) at Jodhpur, octroi is chargeable irrespective of the fact where it is consumed or used. Both the learned single Judge and the Division Bench relied upon the decision of their Lordships of the Supreme Court in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, and *Hiralal Thakorlal Dalal Vs. Broach Municipality and Others*, Para 19 of the reported judgment of the learned single Judge would go to show that the Advocate General appearing on behalf of the Municipal Council, Jodhpur had seriously contended that the question as to where the sale took place was a question of fact which involved the determination of complicated question of disputed fact While meeting this argument of the Advocate General the learned single Judge in the last portion of para 19 observed as under:-- :

"However, in view of my decision that even if the sale takes place within the limits of Jodhpur Municipal Council but the goods are exported outside the octroi limits of Jodhpur Municipal Council for the use or consumption of the ultimate consumer outside the octroi limits of Jodhpur, then the taxable event does not take place in the octroi limits of Jodhpur. The Municipal Council has therefore, no jurisdiction to levy octroi on the goods so exported..... Municipal Board has, therefore, to be restrained by way of mandamus not to levy octroi on the goods exported by respondent No. 2 for the use of the ultimate user outside the octroi limits of Municipal Council even if the sale takes place within the octroi limits of the Municipal Council, Jodhpur.

31, However, in the ultimate relief granted by the learned single Judge in para 25 of the reported judgment, the expression "even if the sale takes place within the octroi limits of Municipal Council, Jodhpur" do not find place. In this para the learned single Judge granted the following relief : --

"In the result I partly allow the writ petition and restrain the Municipal Council from charging or releasing of the octroi on the goods brought within the Municipal Council by the respondent No. 2 but re-exported by it outside the Municipal limits to its retail outlets for the use and consumption of the ultimate consumer outside the limits of the Municipal Council."

The Division Bench in para 4 of its judgment mentioned the substance of the reply of the Municipal Council to the writ petition. It stated that the reply of the Municipal Council was that octroi was chargeable at the place where the sale is made irrespective of the fact where the goods are consumed or used, and therefore, its contention was that since the sale by the respondent is made at Jodhpur octroi is chargeable even though the goods are re-exported outside the Municipal limits by the Oil Corporation. It is thus clear that the stand taken by the Municipal Council, Jodhpur was that if the sale took place within the limits of the Jodhpur Municipal Council, then octroi was chargeable even if goods were consumed or used outside Municipal limits. While dealing with the findings given by the learned single Judge in para 5 of the reported judgment, the Division

Bench stated that the learned single Judge had held that assuming that the sale takes place within the limits of Municipal Council, since the goods were exported outside the limits of the Municipal Council for use or consumption by the ultimate consumer outside the limits, the taxable event does not take place within octroi limits of the Municipal council. The Division Bench did not examine the question in the light of the stand that had been taken by the Municipal Council, Jodhpur on 25th July, 1975, or in its reply or in the light of the findings of the learned single Judge that even if the sale takes place within the limits of Municipal Council, since the goods were exported outside the limits of the Municipal Council for use or consumption by the ultimate consumer outside the limits, octroi was not chargeable. On the other hand, the point formulated in para 8 of the judgment of the Division Bench, it was observed : --

"The main point for decision therefore is whether it can be said in the facts and circumstances of the present case that the petroleum products which are supplied to petitioner by the Oil Corporation from the depot at the retail outlet of the petitioner at Dangiavas (situated outside the limits of Municipal Council) for consumption or use outside the limits of the Municipality would attract the levy of octroi In the above point formulated the expression that "even if or assuming that the sales take place within the limits of Municipal Council" does not find place. The conclusion arrived at by the Division Bench following the two Supreme Court decisions referred to above was that no octroi was leviable on the petroleum products re-exported by the Indian Oil Corporation to the retail outlets situated outside the Municipal limits for consumption and use it outside the limits.

32. It may be stated that in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, the petitioner Company brought petrol and other petrol products from its refineries within the limits of Belgaum Municipality and goods brought by it fell within the following four categories: --

- (i) goods consumed by the company;
- (ii) goods sold by the company through its dealers or by itself and consumed within the octroi limits by person other than the company;
- (iii) goods sold by the company through its dealers or by itself inside the octroi limits to other persons to consume by them outside the octroi limits; and
- (iv) goods sent by the company from its depot inside the octroi limits extra-Municipal points where they are brought and consumed by persons other than the company.

Originally Section 73(1)(iv) empowered the Municipality to impose octroi on animals or goods or both brought within the octroi limits for consumption or use therein. The word "sale" was not there. There was an amendment of the Act in May 1954 whereby the word "sale" was also inserted with the result that octroi could be imposed by the Municipality when the goods were brought within octroi

limits for consumption, use or sale therein.

Before this amendment by including the words "sale" the company used to pay octroi on all its products brought within the octroi limits of the Belgaum Municipality including the goods not consumed by itself but sold to others. However, after the amendment made in May 1954, the company contended that the tax could not be collected on goods which were merely sold but not consumed inside the octroi limits. In the course of the correspondence, the company did not object generally to levy of octroi on goods brought inside the octroi limits for consumption, use or sale but asserted that octroi on goods which were sent out of the said limits was liable to be refunded. Thus the Municipality was prepared to grant special rebate to the rates. Even before the High Court, the counsel appearing for the Municipality stated that if any goods belonging to the company was actually sent outside the octroi limits, the Municipality was prepared to grant refund approved thereof. That was the stand of the Municipality before the Supreme Court. The company also stated before the Supreme Court that it was liable to pay octroi on goods consumed by itself. Thus the dispute had narrowed down to second and third categories mentioned above. In the result, the Supreme Court held that the company was liable to pay octroi tax on goods brought into the 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 consumer brought them for use in the area outside it. It was laid down that the company was not liable to pay octroi in respect of goods which were brought into the local area and which were re-exported. In order to enable the company to save itself from tax in that case, it had to follow the procedure laid down, by Rules for refund to tax. Dealing with the category (b) just hereinbefore mentioned, it was observed that so long as the goods brought inside the area for sale within the area to an ultimate consumer, it makes no difference that the consumer does not consume them in the area but takes them out for consumption elsewhere. The word "therein" does not mean that the act of consumption must take place in the area of the Municipality, the taxable event was the entry of goods which was meant to reach the ultimate user or consumer in the area. In my view, on a proper appreciation of the law laid down by their Lordships of the Supreme Court in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, if the petrol was sold within the octroi limits of Municipality by the company, it was liable to pay octroi although the goods were used and consumed by the consumer outside the Municipal octroi limits.

33. Reference may next be made to the decision of a learned single Judge of this Court in *Firm Ramsarndas v. State of Rajasthan* (S. B. Civil Writ Petn. No. 875 of 1979) decided by his Lordship M. C. Jain, J., on Oct. 8, 1980. In that case the petitioner firm was carrying on the business of retail sale of country liquor at Sri Ganganagar. According to the petitioner firm, empty bottles, in which liquor was supplied, was also supplied to the petitioner firm by Stiri Ganganagar Sugar Mills which was situated within the Municipal limits of the Municipal Council, Sri

Ganganagar on payment. The petitioner after selling liquor to consumers, sent back the empty bottle to Sri Ganganagar Sugar Mills which again supplied liquor to the petitioner. In this process, the empty bottles were sent time and again to Sri Ganganagar Sugar Mills. The Municipal Council, Sri Ganganagar was charging octroi tax on these empty bottles at Rs. 5A per quintal. It may be mentioned that the petitioner firm had exclusive privilege of retail sale of country liquor at 5 shops out of which two shops of Gol Bazar and Lakar Mandi were situated within the Municipal Limits of Sri Ganganagar and the rest three shops were situated outside the Municipal limits of Sri Ganganagar. According to the petitioner, the empty bottles were sent for refilling and could not be said to have been sent for sale, use or consumption on the basis of which alone octroi tax was chargeable. It was urged in that case that the bottles, in fact, were a medium for filling and sending the liquor. It was also stated that when the empty bottles were imported for the first time, for the use by Shri Ganganagar Sugar Mills, octroi was charged and the charge of octroi tax could not be made again and again when the empty bottles were sent for the purpose of re-filling, it could be an multiple levy of octroi tax which was never contemplated by the Act. It was urged that the realisation of octroi tax on empty bottles, when they were sent to Sri Ganganagar Sugar Mills and for again exporting them after re-filling them with the liquor was wholly illegal and without jurisdiction. On behalf of the Municipality, it was contended that the empty bottles imported by the petitioner firm were made use of or utilised by the petitioner by getting them refilled within the Municipal limits and the empty bottles are not re-exported in the same condition. According to the Municipality, the empty bottles when brought into the Municipal limits were for the purpose of being used for re-filling liquor and attracted the liability of octroi. In the alternative it was urged that all the bottles were imported were not exported and so to the extent bottles were not re-exported, octroi tax was liable to be charged on difference of the bottles imported and exported. The learned single Judge held that empty bottles are imported not with a view to retain them within the Municipal limits but with a view to re-export them and merely because they are filled, it cannot be said that their condition is changed. Bottles are simply containers and the liquor contained in them, can be put out as such, their condition remains the same and they do not become a different commercial commodity. It was, therefore held that the petitioner firm was not liable for payment of octroi tax on the import of empty bottles, if they were, subsequently exported in a filled condition. It was observed that empty bottles are imported not with a view that the same may be retained within the Municipal limits for being finally used up, consumed or utilised. The empty bottles are being made use of for re-filling and ultimately filled up bottles are not meant for sale, use or consumption within the Municipal limits. The learned single Judge referred to the decisions in *Parekh Automobiles v. Municipal Council, Jodhpur* 3977 WLN 137. *Burmah Shell's case* AIR 1963 SG 906 and *S. M. Ramlal's case* 1969 UJ 373 (supra) and came to the conclusion that no octroi tax was leviable on empty bottles imported by the petitioner firm and thereafter re-exported on being re-filled. The learned Judge next dealt with the contention

of the Municipality that all the bottles brought within the Municipal limits were not re-exported by the petitioner firm. For that the learned single Judge held that octroi could be levied on the difference between the empty bottles imported and after being re-filled, re-exported and the Municipal Council can realise octroi on this difference of bottles. On behalf of the Municipality it was submitted that for a declaration is required to be made by the petitioner firm at the time of the entry of empty bottles under Rule 9 of the Rajasthan Municipalities (Octroi) Rules, 1962 and when no declaration was made, the goods shall be treated as having been brought within the Municipal limits for consumption, use or sale therein. The learned Judge did not consider this question in view of the fact that the petitioner firm had not claimed any refund and the Municipal Council had realised octroi on the empty bottles imported by the petitioner firm till issuance of an interim stay order passed by the Court. The question remained with regard to the quantity of petrol imported and exported by the petitioner firm after the grant of stay order before the expiry of period of licence. For that purpose the petitioner firm was directed to produce the account of the empty bottles imported and re-exported from the stay order of the court up to the last date of the period of licence and the Municipal Council was declared to have power to realise octroi after determination of the difference of the empty bottles imported and re-exported.

34. It would be useful to reproduce some observations of his Lordship M. C. Jain, J. in *Firm Ramsaran's case* (supra) --

"In a case like the present one, it cannot be said that the empty bottles have finally been used up or consumed or have been converted into a different commercial commodity. The sine qua non for levy of octroi is consumption. In the process of re-filling of empty bottles, in my opinion, the element of consumption is absent but in case the empty bottles are reached within the Municipal limits and are made use of for the purpose of refilling, it could certainly be said that the empty bottles have been used or consumed in the sense of levy of octroi. The element of retention of such bottles within the Municipal limits will attract the levy of octroi, but this element is absent when the empty bottles are re-exported after being re-filled.

35. Similar matter came for consideration before another learned single Judge of this Court in *Hamid Khan v. Municipal Council, Sri Ganganagar* (S. B. Civil Writ Petn. No. 1625 of 1981) decided by his Lordship Shri D. P. Gupta, Acting Chief Justice on March 1, 1982. In that writ petition, one of the questions that was raised by the petitioner was with regard to levy of octroi on empty bottles which were imported within the limits of Municipal Council and were exported outside such Municipal limits after getting the bottles re-filled. His Lordship D. P. Gupta, J. relied upon the decision of this Court in the case of *Firm Ramsarandas*. His attention was invited on behalf of the Municipality to Rule 9 of the Rajasthan Municipalities (Octroi) Rules. His Lordship held that in case the petitioner submits a declaration under clauses (ii) and (iii) of sub-rule (1) of Rule 9 of the Rules,

then the Municipal Council was not entitled to charge octroi tax on the empty bottles imported by the petitioner within the Municipal limits on the ground that such empty bottles were meant for temporary retention and eventually transportation outside the Municipal limits, after being refilled. It was observed that in case the petitioner failed to submit a declaration under Rule 9 in respect of his intention of eventually transporting the bottles, the Municipal Council will be free to charge octroi on the presumption that such empty bottles were brought within the Municipal limits for consumption, use and sale therein.

36. His Lordship A. K. Mathur, J. in Civil Writ Petition No. 2160 of 1986 decided on July 29, 1986 (*Ganganagar Sugar Mills v. Municipal Council, Mandore*) followed the decision of his Lordship Shri D, P. Gupta, J. in *Hamid Khan's* case.

37. Reference may also be made to some decisions of other High Courts. In *R.B. Shirke Brothers Vs. Ratnagiri Municipal Borough*, In that case the plaintiff was doing transport business with its head office at Ratnagiri. He had a workshop there and he paid wheel tax also on the vehicles in question with the R.T.O. The address supplied by the plaintiff in respect of these vehicles was also Ratnagiri. In the circumstances, when the vehicles in question were brought within Municipal limits with goods, it was held that there cannot be any doubt that the two vehicles were brought within the octroi limits for use. It is true that these were transport vehicles and would be plied all over the country and, therefore, they may not be stationary at one place. The activity of these vehicles, however, would definitely originate from Ratnagiri. It held that the Civil Judge was right in holding that the vehicles were brought within the Municipal limits for use.

38. In *Vrajlal Manilal and Co. v. Corpn. of City of Nagpur* 1976 LR 1335 (Bom) the plaintiff, which was a "bidi" manufacture firm, was held liable to pay octroi duty in respect of tissue paper which was brought by it within the limits of Municipal Corporation of the City of Nagpur for getting its mark printed at Nagpur. It was held that the tissue paper had clearly been used and in the process of printing has been consumed with the object of making a wrapping paper usable by the plaintiff alone.

38A. In *Elgin Mills Co. Ltd. Vs. The Nagar Mahapalika, Kanpur and Others*, raw materials like steam, coal, dyes and chemical cotton yarn were used for manufacturing cotton textiles. It was held that steam coal was burnt away in the process of producing steam for supplying energy for movement of the machinery and was thus consumed. Likewise the machinery or spare parts of the machinery were all used and consumed in course of time. Similarly dyes and other chemicals were consumed.

39. In *Avadh Agencies v. Nagar Mahapalika* 1980 LR NOC 23 the question was regarding levy of octroi duty on beverages on the basis of weight of beverages plus its container. It was held that beverages contained in bottles can be consumed or used only when bottles are also used. User of beverages constitutes user of bottles notwithstanding that the used empty bottles can be used again

for re-filling. Levy of octroi duty on weight of beverages contained in bottles was held not illegal."

40. On the other hand, in *Jai Hind Bottling Co. v. Nagar Mahapalika* 1978 LR NOC 102 it was held that where the bottles used by firm for bottling soft drinks were specially manufactured and were required to be returned by the wholesale distributors of such drinks to the firm under, an agreement, after the soft drinks had been sold or consumed, such use of empty bottles were held not to be covered by the entry "empty bottles" in the notifications dated 1-4-1973 and 1-9-1976 issued in connection with the levy of octroi and were held not to be subject to octroi.

41. As already stated, the question which calls for determination is whether, if the cops are returned by the consumers after using the nylon or polyester yarn to the Company, is the latter liable to pay octroi on cops received by it again within the Municipal limits of Kola? It has already been observed that it was plaintiffs case in para No. 5 of the plaint itself that when the plaintiff-company for the first time brought cops within the Municipal limits of Kota after purchasing them, it regularly paid octroi duty to the Municipal Council Kota. The relief claimed in the suit in para 15 of the plaint was also to the effect that a permanent injunction maybe issued against the defendant restraining it from levying and charging octroi duty on cops which was returned to the plaintiff-company and that the Municipal Council should adhere to the agreement entered into on June 17, 1963 and further it may be restrained from taking action in pursuance of its letters dated Dec. 26, 1967, Jan. 27, 1968. The defendants' version has been that the plaintiff company under the shelter of the agreement dated June 17, 1968 started bringing within the municipal limits Kota new cops and as such the Municipal Council, could not be bound down for ever by the agreement. In the agreement also, it was agreed to between the parties that octroi duty would be paid by the plaintiff company according to Rules on the new cops brought within municipal limits after purchasing them.

42. In my view, the kind of activity alleged to be carried on by the plaintiff-company, though distinct, comes very much close to the activities carried on in the cases of *Firm Ramsarandas v. State of Rajasthan* (S. B. Civil Writ Petn. No. 875 of 1979 decided by his Lordship M. C. Jain, J. on Oct. 8, 1980); *Hamid Khan v. Municipal Council, Sriganganagar* (S. B. Civil Writ Petn. No. 1625 of 1981 decided by his Lordship D. P. Gupta. Acting Chief Justice (as he then was) on March 1, 1982) and *Ganganagar Sugar Mills v. Municipal Council Mandore* (Civil Writ Petn. No. 2160 of 1986) Be it noted here that a Special Appeal against the judgment of the learned single Judge A. K. Mathur. J., in the case of *Ganganagar Sugar Mills v. Municipal Council Mandore* has been filed and has been admitted by the Division Bench and the same is still pending. In the case of *Firm Ramsarandas* supra, the distinguishing fact was that in that case it was *Shri Ganganagar Sugar Mills* which for the first time brought the empty bottles within the octroi limits of Ganganagar Municipality and it paid octroi tax on the empty

bottles to the Municipality at Rs. 5/- per quintal. Shri Ganganagar Sugar Mills supplied liquor in those bottles to the petitioner Firm Ramsarandas. The petitioner firm, after selling liquor to consumer at its retail sale shops both within Ganganagar Municipal limits and outside ii, sent back the empty bottles for re-filling the bottles to Sri Ganganagar Sugar Mills with liquor. It was thus not the petitioner firm who for the first time brought the empty bottles within the Ganganagar Municipal octroi limits. The petitioner firm in that case, having purchased the bottles along with liquor from Sri Ganganagar Sugar Mills, sent the empty bottles after consumption of liquor both inside and outside Municipal limits through its 5 retail shops for the purpose of re-filling with liquor.

43. The decision of their Lordships of the Supreme Court in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality, S. M. Ram Lal and Co. v. Secretary to Government of Punjab* (1969 UJ (SC) 373) and in *Hiralal Thakorlal Dalal Vs. Broach Municipality and Others*, in my opinion, dealt with different kind of goods and somewhat different type of activities. Petrol and other petroleum products were admittedly brought by Burmah Shell Oil Storage and Distributing Company from its refineries situated outside the octroi limits of Belgaum Municipality in Burmah Shell's case (*supra*) inside the limits of Belgaum Municipality either for its own consumption or for sale inside the octroi limits for consumption or for being sent from its depot inside the octroi limits to extra-municipal points for consumption by persons other than the company. The decision rested on the interpretation of the expression "for the purpose of consumption therein" in the absence of the word "sale" in Section 73 of the Bombay Municipal Boroughs Act, 1925 at the relevant time. The word "consumption" was held to have been used in wider sense and not in its primary sense of being "destroyed, wasted or used up". The transaction of "sale" was held merely to be a means for putting the goods in the way of use or consumption. Following observations of his Lordship Hidayatullah J., are noteworthy : --

"Added to the word "consumption" is the word "use" also. There may be certain commodities which though put to use are not used up on the process. A motor car brought into an area for use is not used up in the same sense as foodstuffs..... The goods must, however, 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 In other words, a sale of goods brought inside, even though not expressly mentioned in the description of octroi 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."

It has already been mentioned that the word "consumption" had also been given a wider meaning by Vivian Bose J. in *The State of Bombay and Another Vs. The*

United Motors (India) Ltd. and Others, and by K, C. Das Gupta J. in Anwarkhan Mahboob Co. Vs. The State of Bombay (Now Maharashtra) and Others,

44. The commodity or goods in Burmah Shell Company's case (AIR 1963 SC 006) . (supra) was petrol or petroleum products which could even be finally consumed and used up by its immediate use. In Hiralal Thakorlal Dalal Vs. Broach Municipality and Others, the activity was clearly of purchase and sale. The only question for determination in that case was whether a commission agent who acting for others, while buying commodities on behalf of his principals, brought them within the municipal area and sold them from there to other principals outside the municipal area, attracted octroi duty to such commodities and it was held that the law on the subject-matter in controversy was governed by the decision in Burmah Shell Company's case and that the decision in Burmah Shell's case did not require reconsideration.

45. In S. M. Ram Lal and Co.'s case 1969 UJ 373 the Supreme Court remanded the case to High Court with direction to allow the parties to lead evidence on the question whether the entry of the wool belonging to the appellant into the limits of the Notified Area Committee was with the object of converting it into a different commercial commodity because" then only the wool could be said to have been intended to be employed for a given purpose. In that context, it was said that merely because in the process of dyeing, change in the appearance of wool was involved and as dyed wool it might fetch a higher price in the market it cannot be said that it became a different commercial commodity.

46. In The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others, Vivian Bose J., had observed : --

"In the same way, a man who purchases goods for use in his business so that his business can be carried on by the constant feeding of a stream uses the goods and ""therefore" consumes them even though he does not keep them himself I cannot agree that goods cannot be "consumed" more than once. It all depends on how you view the matter..... I would, therefore, construe "consumption" to mean the usual use made of an article for the purposes of trade and commerce."

K. C. Das Gupta J., in Anwarkhan Mahboob Co. Vs. The State of Bombay (Now Maharashtra) and Others, stated:-

"Consumption consists in the act of taking such advantage of the commodities and services produced as constitutes the "utilization" thereof.

As said by Shah J., in S. M. Ramlal and Co.'s case 1969 UJ 373 (supra), the word "use", in its ordinary meaning as a noun, is the act of employing a thing, putting into action or service, employing for or applying to a given purpose. Similarly, in Automotive Manufacturers (P) Ltd. etc. Vs. Government of Andhra Pradesh and Others, etc., Mitter J. referred to the different meanings of the word " use" in the Oxford Dictionary some of which are as follows :--

"to make use of as a means or instrument, to employ for a profitable end."

In *Bhaskar Textile Mills Ltd. Vs. Jharsuguda Municipality and Others*, where, by manufacturing process, loose cotton fibres were transformed into finish yarn, it was held that there can be no escape from the conclusion that the goods were brought into municipal limits at least for the purpose of "use" and, therefore, the imposition of octroi by the Municipality cannot be challenged.

47. In the facts and circumstances of the case, there can be no room for doubt that the petitioner-company brought the metallic cops within the octroi limits of Kota municipality for employing them or making use of them as a means to wind up around them the nylon or polyester yarn. The nylon or polyester yarn could not be marketed until, and unless it was wound up around the cops. The cops were thus used in making the nylon or polyester yarn marketable. Just as hot and soft drinks and beverages cannot be marketed to customers, until and unless bottled, so also nylon or polyester yarn cannot be marketed without being wound up around the cops. Bottles and cops in such cases are used as containers or as meant to make the goods or commodities marketable. We have got other instances like cylinders containing gas, revolving drum containing liquids and cisterns for holding water or other liquids which are used as containers for gas, liquids or other liquids and without their being employed or utilised gas, liquids or water can neither be contained nor marketed. There are again hollow barrels around which electric wires are wrapped. All such articles are purchased and brought within municipal limits by manufacturers and dealers to use them in order to make their products marketable. They may not be consumed in the sense of being destroyed, wasted or used up but there can be no escape from the conclusion that they are brought within the octroi limits for being used therein and consequently do attract octroi duty.

48. The real question for determination is whether having once being subjected to octroi duty when goods like cops, bottles, barrels, cisterns are for the first time brought within octroi limits for the above use, would they again be exigible to octroi duty when they are returned by the customers after consuming the commodity wrapped around them or contained therein to the company or concern for being wrapped again by yarn or for being refilled? As already observed, the use to which goods like cops, empty bottles, barrels, cisterns are employed is to make the goods produced or manufactured marketable is a constant use. They are purchased and brought within the octroi limits by a dealer so that his business can be carried on by the constant feeding by such sort of containers to facilitate his trade or commerce of sending the goods produced or manufactured by him within the octroi limits. The use of these articles is a constant use despite the fact that the dealer who produces or manufactures the goods to be marketed does not continuously keep the articles within him and they go to and come back from his customers time and again. The articles remaining the same and having been already subjected to octroi duty cannot be taxed again merely because in the course of constant use, they are returned to

him for the same purpose again. The onus would, however, be on the dealer to establish that cops brought by him within the octroi limits have already been subjected to octroi duty when they were, after being purchased by him, brought for the first time within the octroi limits for constant use by him therein and that the very articles were only returned to him by his customers for the constant use to which they are put by him in the course of his trade or commerce. To serve this very purpose an agreement was entered into between the plaintiff-company and the Municipal Council, Kota on June 17, 1963 whereunder it was agreed between them that the plaintiff-company would be liable to octroi on new cops purchased by them and for the first time brought as new cops within the municipal octroi limits. With respect to cops returned by the customers, it was agreed that when the plaintiff company will send the cops wrapped by nylon yarn, he would furnish its information in triplicate to the Municipal Council One copy of the information will be delivered in the office of the Municipal Council, the second copy will be delivered at the octroi outpost and the third copy would be retained by the plaintiff company. When the cops would be received back by the plaintiff-company from its customers the former will satisfy at the octroi out-post that the cops are not new purchases but were only returned by his customers and on doing so, the returned cops would not be subjected to octroi duty again. This was quite a satisfactory and working arrangement. The agreement dated 17-6-63 continued till 26-12-67. It was on 26-12-67 that the President, Municipal Council, Kota wrote to the plaintiff-company that from the examination of its record, it was found that while Supplying the goods, price of the cops was realised by it and when the cops were returned by the customers, the price realised was refunded. According to the Municipal Council, this was virtually a regular sale and purchases of the cops and as such octroi duty was chargeable from the plaintiff-company at the time of rebringing of such cops.

48A. According to the plaintiff company, when it sent the nylon-yarn winded up around cops to its customers, it took the price of cops from the customers as advance and it refunded the price taken as advance on return of the cops. This arrangement between the plaintiff-company and its customers did not amount to sale of the cops. All that it was that the amount in advance was taken as security for return of cops and on return of the cops by the customers, the amount taken advance as security was refunded. The only onus on the plaintiff-company was to establish to the Municipal Council and to satisfy it that the cops brought by it within municipal octroi limits were not new cops but the cops which were returned to it by customers and which had already been subjected to octroi duty. For that, as already stated, the agreement dated 17-6-63 was a satisfactory and workable arrangement between the plaintiff company and the Municipal Council, Kota.

49. Mahmood Khan D.W. 1, on behalf of the Municipal Council, Kota has deposed that the plaintiff-company did not comply with Clause 5 of the agreement according to which the company had to send a monthly statement to the Municipal Council showing a complete account of cops imported and exported by

it together with balance at the end of the month by the 5th of the succeeding month. On the other hand, Vinay Kumar Gupta P.W. 1 has deposed on behalf of the plaintiff-company that the company used to keep accounts of the cops returned by the customers and the same was also sent to the Municipal Council. Neither any such account was produced by the company nor the statements stated to have been sent to the Municipal Council, Kota were got produced. The trial Court has found that the plaintiff-company did not produce the best documentary evidence to establish that it had complied with the terms of the agreement dated 17-6-63. There does not appear to be any error in this finding. It was for the plaintiff-company to establish that on its part it had complied with the terms contained in Clauses 2, 3 and 5 of the agreement. To establish that, it was incumbent for it to produce the copy of the notice which it was bound to give to the Municipal Council while sending the winded cops to the Municipal Council and to get produced the monthly statement alleged to have been furnished by it to the Council but that best evidence was not produced by it. In the absence of that evidence, it is not possible to hold that the Municipal Council, Kota committed breach of the agreement dated June 17, 1963. The working arrangement entered into between the parties, in order to satisfy the Municipal Council that the cops brought within Municipal octroi limits were those very cops which had already been subjected to octroi duty, thus failed. The agreement dated June 17, 1963 should not be misunderstood as an agreement creating against or exempting the plaintiff-company from, any liability to pay octroi duty. The liability to pay octroi duty or exemption from it cannot be subject-matter of an agreement. In *Mathra Prashad and Sons Vs. State of Punjab*, it was observed :
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"If the law requires that a certain tax be collected, it cannot be given up, and any assurance that it would not be collected would not bind the State Government, whenever it chooses to collect it"

In a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. A construction, for example, which would have the effect of making a person liable to pay the same tax twice in respect of the same subject-matter would not be adopted unless the words were very clear and precise to that effect.

50. It may be noted that in *Firm. Ramsarandas's case* (supra) also, when the empty bottles were imported for the first time, by *Shri Ganganagar Sugar Mills* for its use, octroi was charged. In relation to bottles returned to the petitioner for refilling of liquor within the municipal limits of *Ganganagar Municipality* and for sending them again outside Municipal limits to its customers in the continuous process of return, refilling and transportation outside Municipal limits, reference was made to Rule 9 of the *Rajasthan Municipalities (Octroi) Rules, 1962* and also in the cases of *Hamid Khan v. Municipal Council, Ganganagar* and *Ganganagar*

Sugar Mills v. Municipal Council, Mandore (all supra). In my view, Rule 9 would have hardly any relevance to the facts of the present case. The basic law is that octroi is chargeable u/s 104(1)(2) of the Act on goods brought within the limits of the municipality for consumption, use or sale therein, Octroi duty is neither leviable under the Act on goods brought within the limits of a municipality for immediate transportation outside the municipality and nor on goods brought within the limits of a Municipality for temporary retention within municipal limits and eventual transportation outside municipal limits. In both these cases, the goods covered are those which are not at all brought within the limits of the municipality for consumption, use or sale therein. The sole object for which the goods are brought in both the cases is for immediate transportation of the very goods outside the municipal limits or for eventual transportation of those very goods after temporary retention within municipal limits without being consumed, used or sold at all within the municipal limits. In the case of present nature, the goods are predominantly brought within the municipal limits for being used as a means for winding up the nylon thread and then the nylon thread so winded up around the cops is sold to customers and sent outside municipal limits without the cops being sold as, according to the plaintiff, the cops remain the property of the plaintiff-company and are returned to it for its re-use. Such transactions or activities in relation to cops cannot be branded as bringing the cops within the municipal limits, not for consumption, use or sale within the municipality, but only for immediate transportation of cops as such outside the municipality or only for temporary retention within the municipal limits and eventual transportation of cops outside municipal limits. Immediate transportable goods only enter, pass and get out of the municipal limits. When there is temporary detention of the goods within the municipal limits for eventual transportation out of the same, the goods have directly to be sent to the bonded warehouse to be stocked as provided in Rules 12 and 16 of the Rules and released therefrom in accordance with Rules 21 to 25 of the Rules. Clearly, therefore, Rule 9(1)(ii) and (iii) of Octroi Rules, 1963 has no application whatsoever when the cops are brought by the petitioner company for its own use of winding up the nylon thread in the course of its trade or commerce and the nylon thread after being wrapped around the cops is sold by it to its customers with an understanding that after using the yarn, the customers would return to the plaintiff its cops and take back the refund of the amount advanced by them to the plaintiff-company as security for the return of the cops. Such cops are liable to octroi duty when they are, after their purchase, brought for the first time within the municipal octroi limits for the purpose of "use" therein and would not be subject-matter of tax again when they are received back from the customers after using up the yarn under an arrangement with the plaintiff-company for the simple reason that the same subject-matter brought within the municipal limits by the same person of its own goods is not contemplated and provided for to be taxed again u/s 104 of the Rajasthan Municipalities Act, 1959. The onus, however, as already held above remains on the plaintiff-company to establish that cops brought by "him within the octroi limits have already been subjected to octroi tax by the municipality in

his hands because until contrary is proved or satisfied, presumption is that import of the goods is for consumption, use or sale within the municipal limits.

51. Next question deserving determination is with regard to the jurisdiction of the Civil Courts to try a suit of the present nature. "Section 139 of the Act provides : --

"139.. Appeals relating to taxation.-- In the case of a tax assessed upon the annual letting value of buildings or lands or both an appeal against an order passed under Sub-section (4) of Section 117 or under Sub-section (2) of Section 118, and, in the case of any other tax, an appeal against an assessment or any alteration of an assessment and, in all cases in which no appeal has been made as aforesaid, an appeal against a notice of demand u/s 149, may be made to the Collector or such other officer as may, be empowered by the State Government in this behalf."

Section 140 provides for the period of limitation of thirty days next after the date of the receipt of the notice of assessment or alteration of the assessment or, if no notice has been given, of thirty days next after the date of the first demand under the assessment or alteration of assessment and also makes the deposit of the amount claimed as a condition precedent to the hearing and determination of appeal with a proviso to dispense with the requirement of deposit of the amount by the appellate authority on such terms and conditions as it may impose. Section 141 provides for reference to the High Court in following terms :

"(1) If during the hearing of an appeal u/s 139 a question as to the liability to, or the principles of assessment of a tax arises on which the officer hearing the appeal entertains reasonable doubt he may, either of his own motion or on the application of a person interested, draw up a statement of the facts of the case and the point on which doubt is entertained and refer the statement with his own opinion on the point for the decision of the High Court.

(2) On a reference being made under Sub-section (1), the subsequent proceedings in the case shall be as nearly as may be in conformity with the rules relating to reference to the High Court contained in C. XLVI of the First Schedule of the CPC 1908 (Central Act V of 1908) or such other Rules as are made by the High Court u/s 122 of that Code."

Then Section 143 of the Act provides : --

"143. Bar to jurisdiction of civil and criminal Courts in matter of taxation.-

(1) No objection shall be taken to a valuation or assessment nor shall the liability of a person to be assessed or taxed be questioned in any other manner or by any other authority than is provided in this Act.

(2) the order of the appellate authority confirming, setting aside or modifying an order in respect of valuation or assessment or liability to assessment or taxation shall be final provided that it shall be lawful for the appellate authority, upon

application or on its own motion to review any order passed by it in appeal by a further order passed within three months from the date of the original order."

The determination of the question of jurisdiction of Civil Courts must rest on the terms of the statute establishing the liability. Willes J., in *Wolverhampton New Waterworks Co. v. Hawkesford* (1859) 6 CB 336 . described three class of cases in this regard : --

"One is, where there was a liability existing at common law, and that liability is affirmed at by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has election to pursue either that or the statutory remedy. The second class of case is, where the statute gives the right to sue merely; but provides, no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.....The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class."

Judgment of Willes J., in *Wolverhampton New Waterworks Co. v. Hawkesford* (supra) was approved of by the House of Lords in *Neville v. London Express Newspaper Limited* (1919) AC 368.

52. In the *Secretary of State for India-in-Council v. Roy Jatindra Nath Choudhary* AIR 1924 PC 175 the Government decided to make survey of the Backergunj district in accordance with the provisions of the Bengal Tenancy Act (VIII of 1935). Whilst the revenue survey was proceeding -- itself a work of great labour, minuteness and complexity -- it was considered desirable to make a survey also of the alluvial accretions that had taken place to the north and east of the two rivers Sapleza and Baleswar by the recission of the rivers between the years 1872 and 1900. The plaintiffs instituted suit contesting the propriety and legality of subjecting the emergent lands to Government revenue. The plaintiffs alleged in their plaint that "no new survey was made of any land on the banks of the rivers Sapleza and Baleswar in accordance with Government Notification No. 1967 T.R. dated 2nd Oct., 1900, issued under Act IX of 1847 and that no map was prepared under the said Act.

Therefore, they contended, all the operations in connection with the Diara proceedings were ultra vires and void. Section 6 of the Act IX of 1847 provided -- whenever on inspection of such new map, it shall appear to the local revenue authorities that the land has been added to any estate paying revenue directly to Government, they shall without delay assess the same with a revenue payable to the Government according to the Rules in force for assessing alluvial increments, and shall report their proceedings forthwith to the Board of Revenue whose orders thereupon shall be final. Lord Shaw observed : --

"It appears to their Lordships that it is a convenient and proper procedure that in an eminently practical matter, affecting measurements, surveys and maps of localities with which the assessing officials on the one hand and owners on the other have presumably intimate knowledge, such objection should be tabled to, and considered and reported upon to the Board of Revenue. The words of this statute imposing finality upon the orders of the Board of Revenue in such a situation appear to their Lordships not only to be imperative but most salutary."

It was, however, observed that two conditions must be noted, the first is that mentioned viz.; that fundamental irregularity, that is to say, a defiance of or non-compliance with the essentials of the procedure would still "give ground for questioning the proceedings in a Court of law. The second proposition is that the burden of establishing such essential and fundamental violation of statutory requirements rests upon the person alleging it. Unless this last rule be adhered to it is manifest that the way will be opened to endless objections to procedure, even though there are substantially on questions of fact, and the object of the statute namely, the assessment of lands, will thereby fail. In other words, practice of "propounding riddles" was deprecated.

53. The next is the oft-quoted decision of the Judicial Committee in AIR 1940 105 (Privy Council) Section 188 of the Sea Customs Act, which was incorporated in the Land Customs Act of 1924, provided for an appeal from any decision or order passed by an officer of customs under the Act to the Chief Customs Authority. Every order passed in appeal u/s 188 was made, subject to the power of revision conferred by Section 191, to be final. Section 191 provided for revision to the State Government,

54. Lord Thankerton, dealing with the question as to the jurisdiction of the Civil Courts to entertain the suit, observed : --

"By Sections 188 and 191 a precise and self-contained code of appeal is provided in regard to obligations which are created by the statute itself and it enables the appellants to be carried to the Supreme Head of the Executive Government. It is difficult to conceive what further challenge of the order was entertained to be executed other than a challenge in the Civil Courts.....Their Lordships are of opinion that in this case the jurisdiction of the Civil Court is excluded by the order of Collector of Customs on the appeal u/s 188, and it is unnecessary to consider whether prior to taking such appeal u/s 188, the respondents would have been entitled to refer to the Civil Courts or whether they have been confined to the right of appeal u/s 188.

The determination of this question must raise on the terms of the particular statute which is under consideration, and decisions on other statutory provisions are not of material assistance, except in so far as general principles of construction are laid down.....In the case referred to in (1936) 71 MLJ 40 , Varadachariar. J., held that jurisdiction was not excluded In circumstances similar to the present case, except that there had been no appeal u/s 181, and for the

reasons already explained, their Lordships do not find it necessary to consider the question.....It was submitted on behalf of the respondents that an exclusion of the subject's right to resort to the Civil Courts would be ultra vires of the Indian legislature in view of the provisions of Section 32, Government of Act. 1915, which are enacted Section 65, Government of India Act of 1935, and reference was made to (1913) 40 Ind App 48, which was effects of tortious trespass on land, but their Lordships opined, neither Section 32 nor the principle involved in the decision in (1913) 40 I A 48 affect the validity of an Act of the Indian Legislature which creates an obligation and provides an exclusive Code for its determination, such an obligation is not covered with Sub-section (2) of Section 32.

Their Lordships of the Judicial Committee relied upon the judgment of Willes J., in *Wolverhampton, New Water Works Company v. Hawkersford* (1859 6 CB (NS) 336) (supra). In AIR 1940 105 (Privy Council) the respondents had availed of the remedy of appeal to the Collector of Customs provided u/s 188 and, therefore, their Lordships of the Judicial Committee refrained to consider the question whether, prior to taking appeal u/s 188, the respondent would have been entitled to resort to the Civil Courts or whether they would have been confined to the right of appeal u/s 188. It was also observed that it was settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It was also well settled that even if jurisdiction is excluded, the civil Courts have jurisdiction to examine into case where the provisions of the Act have not been complied with or the statutory tribunal had not acted in conformity with the fundamental principles of judicial procedure. But the case of *Mask & Co.*, there were not allegations of that nature. It was, therefore, held that Civil Courts have no jurisdiction to entertain the suit filed by the respondent. The controversy in the suit was that according to the respondent, the goods should have been assessed as raw betel nuts subject to duty ad valorem by the Custom Collector has assessed the consignment as boiled betel nuts subject to a duty on a tariff value and the suit was to recover the excess amount collected from the respondent by levying duty upon tariff value instead of levy duty upon the invoice value.

55. Reference may next be made to the decision of their Lordships of the Privy Council in *Raleigh Investment Co. Ltd v. the Governor General in Council* AIR 1947 PC 78. Appellant in that case was a joint stock Co. incorporated in the Isle of man, having its registered office in that Island and its main office in England. At all material times it held the bulk of the shares in 11 companies carrying on business in British India. All these companies were incorporated in British India having their registered offices and headquarters in Calcutta. The nine remaining companies (called the Sterling Companies) were, as to some of them incorporated in Isle of man and as to the rest incorporated in England. The business of the Sterling Co. in India was managed by local boards but the ultimate control laid with the London Boards the meetings of the Sterling

companies were held in England and the dividends that were received by the appellant from the Sterling companies were declared, paid and received in England. No part of them was ever remitted to British India. On 6-1-1934, the proper Income Tax Officer by notice required the appellant to make a return of its total income (and total world income) for the assessment year 1939-40. A return was made in the correspondence which followed the appellant raised the point that Explanation 3 to para 4(1) Income Tax Act, 1922 as amended, if it applied to dividend declared and paid outside British India to persons not residence in British India was ultra vires the Indian Legislature. However, the Income Tax Officer assessed the appellant and tax attracted by the execution of the dividends from the sterling companies amounted to Rs. 4,35,290.50. The appellant gave a notice of appeal to the Appellate Assistant Commissioner of Income Tax. However, later on the appellant informed the Appellate Assistant Commissioner that it did not propose to proceed with the appeal. The Appellate Assistant Commissioner confirmed the assessment expressing the opinion that the constitutional question raised by the appellant could not be entertained in an appeal under the Income Tax Act by the provisions of which the Income Tax Authorities were bound. Thereafter the appellant instituted a suit in the High Court of Calcutta in its ordinary original Civil Jurisdiction claiming a declaration that in so far Explanation 3 and the other provisions of the Income tax Act purport to authorise the assessment and charging the tax of a nonresident in respect of dividends declared or paid outside British India but not brought into British India, those provisions were "ultra vires the legislative powers of the Federal Legislature and that, therefore, the appellant was not liable to assess or charge to tax in respect of dividends from the Sterling Companies and that the assessment was illegal and wrongful. The appellant also claimed an injunction restraining the Income Tax Department from making assessment in future years in respect of dividends from Sterling companies and further prayed for refund of Rs. 4,35,290/50 together with interest. On behalf of the respondent, it was contended before the Calcutta High Court in its ordinary original civil jurisdiction, firstly, that the impugned provision was not ultra vires the Indian legislature and secondly, that whether the impugned provision was or was not ultra vires, the High Court in its original civil jurisdiction was precluded from entertaining the suit by reason of Section 226, Government of India Act, 1935 and also by reason of Section 67 of the Indian Income Tax Act, 1922. The High Court held that the provisions contained in Explanation 3 to para 4(1) of the Income Tax Act 1922 was ultra vires and that jurisdiction to entertain the suit was not denied by either of these two sections. On appeal, the Federal Court held that Section 226 of the Government of India Act, 1935 barred the maintenance of the suit before the High Court in its ordinary civil jurisdiction and they expressed their view that the impugned provision was not ultra vires the Indian legislature. In the proceedings before the Federal Court the point as to jurisdiction arising u/s 67 of the Act of 1922 was not taken. Lord Uthwatt, speaking for the Judicial Committee, observed that jurisdiction cannot be given by consent and it was pars judicious to take jurisdiction into consideration and

Section 67 of the Income Tax Act has to be considered. Their Lordships of the Judicial Committee having come to the conclusion that Section 67 of the Income Tax Act 1922 barred the maintenance of the suit and, therefore, they did not think it proper to express any opinion on the effect of Section 226 of Government of India Act, 1935 or on the validity of the impugned provision. Section 67 of the Income Tax Act, 1922 ran as follows : --

"No suit shall be brought in any civil court to set aside or modify any assessment made under this act and no prosecution, suit or other proceeding shall lie against any officer of the Crown for anything in good faith done or intended to be done under the Act".

The contention advanced for the appellant in Raleigh Investment Company's case was that an assessment was not an assessment "made under the Act" if the assessment gave effect to a provision which was ultra vires the Indian legislature. His Lordship Uthwatt observed : --

"In construing the section it is pertinent to ascertain whether the Act contains machinery which enables an assessee effectively to raise in the courts the question whether a particular provision of the Income Tax Act bearing on the assessment is or is not ultra vires. The presence of such machinery, though by no means conclusive, marches with a construction section which denied an alternative jurisdiction to enquire into the same subject-matter".

His Lordship then examined the machinery provided by the Act to determine the question whether or not a provision in the Act was ultra vires u/s 30, an assessee whose only ground of complaint was that effect had been given in the assessment to a provision which he contended was ultra vires might appeal against the assessment. If he were dissatisfied with the decision on appeal -- the details relating to the procedure are immaterial -- the assessment could ask for a case to be stated on any question of law for the opinion of the High Court, and, if his request were refused, he might apply to the High Court for requiring a case to be stated and to be referred to the High Court. Any decision of the High Court upon the question of law can be reviewed on appeal. It was in that setting that Section 67 was construed. His Lordship laid down:--

"The obvious meaning....of the phrase "assessment made under the Act" is an assessment finding its origin in an activity of the assessing officer acting as such. The circumstance that the assessing officer has taken into account an ultra vires provision of the Act is in this view immaterial in determining whatever the assessment is "made under the Act". The phrase describes the provenance of the assessment; it does not relate to its accuracy in point of law. The use of the machinery provided by the Act, not the result of that use, is, the test.....The section on the appellant's construction is robbed of all practical content.....In conclusion their Lordships would observe that the scheme of the Act is to set up a particular machinery by the use of which alone total income assessable for Income Tax is to be ascertained....Jurisdiction to question the assessment

otherwise than by use of the machinery expressly provided by the Act would appear to be inconsistent with the statutory obligation to pay arising by virtue of the assessment."

His Lordship concluded : --

"the only doubt, indeed, in their Lordships' mind, is whether an express provision was necessary in order to exclude jurisdiction in Civil Court to set aside or modify an assessment."

The decision in *Raleigh Investment Company's case* AIR 1947 PC 78 was reiterated by their Lordships of the Judicial Committee the AIR 1948 102 (Privy Council) However, no doubt has been entertained that the Civil Court has power to entertain a suit in which the question is whether the executive authority has acted ultra vires (See AIR 1945 156 (Privy Council) and AIR 1948 33 (Privy Council))

56. The effect of the decision in *Raleigh Investment Company's Case* AIR 1947 PC 78 (supra) came for consideration before their Lordships of the Supreme Court in *The State of Tripura Vs. The Province of East Bengal*, where the then Ruler of princely State of Tripura had instituted a-suit against the Province of Bengal in the court of the Subordinate Judge, Dacca contesting the validity of a notice sent by the Income Tax Office, Dacca Range on 1-4-1944 under the Bengal Agricultural Income Tax Act, 1944 calling upon the Manager of the Zamindari Estate belonging to the Tripura State, but situated in Bengal outside the territory of that State, to furnish a return of the total income derived in the previous year for lands in the Estate used for agricultural purposes and the proposed assessment on the grounds that the "Province of Bengal had authority to impose tax on any income of an Indian State or its ruler" and that, in any case the Income Tax Officer, Dacca Range, had no authority or jurisdiction to issue the said notice to the manager of the Estate outside British India. The reliefs sought were a declaration that the Bengal Agricultural Income Tax, Act, 1944, in so far as it purported to impose a liability to pay agricultural Income Tax on the plaintiff as a ruler of an India State was ultra vires and void and that, in any case, the Income Tax Officer, Dacca Range had no authority or jurisdiction to issue the said notice to the" manager of the Estate outside British India. The reliefs sought were a declaration that the Bengal Agricultural Income Tax Act, 1944, in so far as it purported to impose liability to pay agricultural Income Tax on the plaintiff as a ruler of an Indian State was ultra vires and void and that, in any case, the notice served by the Agricultural Income Tax Officer, Dacca Range was void and no assessment could be made on the basis of such notice and a perpetual injunction to restrain the defendants from taking any steps to assess the plaintiff to agricultural Income Tax. Upon the partition of India, Province of Bengal ceased to exist and, therefore. Province of East Bengal was substituted as the defendant. It was contended by Mr. Setalvad, Attorney-General of India, appearing as intervener before the Supreme Court that even assuming that the service of the notice calling for a return of income was wrongful nor, it was not "actionable" as

Section 65 of the Bengal Act barred suits in Civil Courts" to set aside or modify and assessment made under this Act"Patanjali Sastri, J., speaking for the majority, rejected the contention. Fazal Ali, J., however, gave a dissenting judgment on the point. Reliance was placed before the Supreme Court on the decision in Raleigh Investment Company Limited case AIR 1947 PC 78 (supra). His Lordship Patanjali Sastri, J., observed in paras 13 and 14 of the reported judgment as follows : --

"The short answer to this contention is that the suit in question is not a suit "to set aside or modify an assessment" made under the Act, as no assessment had yet been made when it was instituted, and the subsequent completion of the assessment was made by the Pakistan Income Tax authorities on terms agreed to between the parties and sanctioned by the Court.....

The position here is entirely different. The gist of the wrongful act complained of in the present case is subjecting the plaintiff to the harassment and trouble by commencing against him an illegal and unauthorised assessment proceeding which may eventually result in an unlawful imposition and levy of tax."

Fazal Ali, J., in his dissenting judgment observed : --

"However that may be, it seems to me that the Privy Council in arriving at their decision were influenced not only by the language of Section 67, Income Tax Act, but also by the complete machinery furnished by that Act for dealing with all questions arising in regard to the assessment, including the question of vires as would appear from the fact that while laying down that there was no jurisdiction to question the assessment except by use of the machinery expressly provided by the Act.

.....I think that, for the purpose of understanding the full scope of Section 65, we must read not only the first part of the section which bars suits to set aside"or modify an assessment, but also its latter part which provides that "no suit or other proceeding shall lie against any officer of the crown for anything in good faith.....intended to be done under this Act."

The latter part of the section clearly excludes the jurisdiction of the court to prevent the Income Tax Officer from proceeding with an assessment which has; already been started.....In my opinion, it will be a strange construction of the section to hold that although it bars suits to modify or set aside an assessment and though it bars all proceedings to restrain the officer who is making the assessment from proceeding with it, yet it leaves it open to a party to stop an assessment by claiming an injunction against the Provincial Government or the State instead of the Officer concerned. There is no reference to the Provincial Government or the State at all in the first or the second part of the section, but the section as a whole concerns only with excluding the jurisdiction of the Civil Court in regard to certain acts done or intended to be done in connection with the assessment of agricultural Income Tax, and, on a fair construction, it must be held to bar all suits in connection, with assessment.

57. In Firm Seth Radha Kishan (Deceased) Represented by Hari Kishan and Others Vs. The Administrator, Municipal Committee, Ludhiana, the dispute between the parties was whether Sambhar Salt imported by the appellant into octroi limits of the Ludhiana Municipality was salt common or salt of other kind than common salt for the purpose of levy of terminal tax. On salt common, the rate of terminal tax prescribed was 3 pies per maund while on "salt of all kinds other than common salt", the rate was Rs. 10/- per maund. The Municipal Committee had collected from the appellant terminal tax on the salt imported at Rs. 10/- per maund. The appellant filed a suit against the respondent in the Civil Court, Ludhiana, claiming refund of the terminal tax recovered from him with interest. The question which came for consideration was whether the Civil Court has jurisdiction to entertain the suit. The provisions of Sections 84 and 86 of the Punjab Municipal Act (3 of 1911) were more or less similar to the provisions contained in Sections 139 and 141 of the Rajasthan Municipalities Act, 1959. His Lordship Subba Rao, J., speaking for the Court, after referring to various decisions observed : --

"The law on the subject may be briefly stated thus :-- u/s 9 of the CPC the Court shall have jurisdiction to try all suits of Civil nature except suits of which cognizance is either expressly or impliedly barred. A statute, therefore, expressly or by necessary implication, can bar the jurisdiction of Civil Court in respect of a particular matter. The mere conferment of special jurisdiction on a tribunal in respect of the said matter does not in itself exclude the jurisdiction of civil courts. The statute may specifically provide for ousting the jurisdiction of civil courts; even if there was no such specific exclusion, if it creates a liability not existing before and gives a special and particular remedy before and gives a special and a particular remedy for the aggrieved party, the remedy provided by it must be followed. The same principle would apply if the statute had provided for the particular forum in which the remedy could be had. Even in such cases, the civil court's jurisdiction is not completely ousted. A suit in a civil court will always lie to question the order of a tribunal created by a statute, even if its order is, expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions.

The liability to pay terminal tax is created by the Act and a remedy is given to a party aggrieved in the enforcement of that liability. As has been already indicated, against the order of the Municipal Committee levying terminal tax, an appeal lies to the Deputy Commissioner and a reference to the High Court. Applying one of the principles stated supra, the party aggrieved can only pursue the remedy provided by the Act and he cannot file a suit in a civil court in that regard. Provisions of Sections 84 and 86 of the Act exclude the jurisdiction of the civil court in respect of the tax levied or the assessment made under the Act.....The committee has...power under the Act and the Notification issued by the State Government to impose the said tax. The only dispute was as regards the rate of tax payable in respect of the salt brought by the appellant into the limits of the Municipal Committee. The rate depended upon the character of the

salt. The ascertainment of the said fact is necessary step for fixing the rate and it is not possible to say that in ascertaining the said fact the authorities concerned travelled outside the provisions of the Act. The learned counsel contends that if a municipal committee levies terminal tax on an article not liable to tax under the Act, a suit would lie and, therefore, the same legal position should apply even to a case where the municipal committee levies the tax in respect of an article under an entry not applicable to it. We do not see any analogy between these two illustrations, in the former, the municipal committee does not act under the Act, but in the latter it only commits a mistake or an error in fixing the rate of tax payable in respect of a particular commodity, one is outside the Act and the other is under the Act, one raises the question of jurisdiction and the other raises an objection to a matter of detail. We, therefore hold that in the present case the mistake, if any, committed in imposing the terminal tax can only be corrected in the manner prescribed by the Act. The appellants has misconceived their remedy in filing the suit in the civil court."

58. Reference may next be made to the decision in *Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh*, The appellant's case was that under Madras General Sales Tax Act, it was only on purchase of groundnuts that tax was payable but tax had been recovered from him on turnover representing sale of groundnuts. The appellant filed suit for the recovery of the tax illegally recovered from him. The question for determination was whether suit was barred on account of the provisions contained in Section 18A of the Madras General Sales Tax Act, 1939. His Lordship Gajendragadkar, J., referred to the decision of the Privy Council in AIR 1940 105 (Privy Council) and in *Raleigh Investment Co. Ltd.* case AIR 1947 PC 78 (supra) and observed :-

"The expression ""any assessment made under this Act" is, in our opinion, wide enough to cover all assessments made by the appropriate authorities under this Act whether the said assessments are correct or not. It is the activity of the assessing officer acting as such officer which is intended to be protected and as soon as it is shown that exercising his jurisdiction and authority under this Act, an assessing officer has made an order of assessment, that clearly falls within the scope of Section 18A. The fact that the order passed by the Assessing Authority may in fact be incorrect or wrong does not affect the position that in law, the said order has been passed by an appropriate authority and the assessment made by it must be treated as made under this Act.....

In this connection, it is necessary to emphasize that while providing for a bar to suits in ordinary Civil Courts in respect of matters covered by Section 18A, the legislature has taken the precaution of safeguarding the citizens' rights by providing for adequate alternative remedies... It is in the light of these alternative remedies provided by the Act that the scope and effect of Section 18A must be judged. Thus considered, there can be no doubt that where an order of assessment has been made by an appropriate authority under the provisions of this Act, any challenge to its correctness and any attempt either to have it set

aside or modified must be made before the appellate or revisional forum prescribed by the relevant purpose would be barred u/s 18A.....The presence of the alternative machinery by way of appeals which a particular statute provides to a party aggrieved by the assessment order on the merits, is a relevant consideration and that consideration is satisfied by the Act with which we are concerned in the present appeal.

59. A tax on the amount of octroi duty refundable was not one of the taxes which the Bombay Municipal Corporation could impose. It was neither one of the specified taxes nor was it a tax which the State legislature had power under the Constitution to impose in the State. Apart from this absence of power to impose such a tax, there was categorical prohibition in Sub-section (4) of Section 127 of the Bombay Provincial Municipal Corporation Act, 1949 against the imposition of any such tax by the corporation. In the background of these facts, the question whether plaintiffs suit was barred by limitation on account of Section 487 of the Act was considered by their Lordships of the Supreme Court in *Poona City Municipal Corporation Vs. Dattatraya Nagesh Deodher*, which section provided that suit shall be instituted against the Corporation in respect of any act done or purported to be done in pursuance of execution or intended execution of the Act until one month's notice was given or unless it was commenced within six months next after the accrual of the cause of action. It was held that benefit of Section 487 would be available to the Corporation only if it was held that the deduction of ten per cent was an act done or purported to be done in pursuance of execution or intended execution of the Act". What was plainly prohibited by the Act could not be claimed to be purported to be done in pursuance or intended execution of the Act. This decision is on the question of limitation.

60. Reference may next be made to the decision in *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, The plaintiff company in that case had filed a suit against Dhamangaon Municipality claiming refund of Rs. 12,511-66 on the ground that it was recovered illegally by the Municipal Committee and paid by it under mistake. In the plaint, it was contended by the Company that after the coming into force of S section 142-A of the Government of India Act, 1935 (which came into effect 1st April, 1939)" till Jan. 25, 1950 a tax on trade profession or ceiling in excess of Rs. 50/- per annum could not be imposed by a Provincial Government or by a local body. Nor again, could existing tax on trade, profession or ceiling be raised further so as to exceed Rs. 50/- per annum: The Company further pointed out that after the coming into force of the Constitution, the upper limit of the tax was raised to Rs. 250/- per annum and that as the company was already paying more than this amount per year at the rate of one anna per "bojha" and one anna per bail, recovery from them at the enhanced rate of 4 annas was illegal with effect from April 1, 1939. Last of the contention advanced on behalf of the appellant was based upon the decision of the Privy Council in *Raleigh Investment Company's case* AIR 1947 PC 78 (supra). The argument was that the Municipalities Act contained adequate provisions dealing with refund of taxes and that the provisions of Section 85(2) of the C.P.

Municipalities Act, 1922 barred a suit for recovery of a tax wrongfully recovered by the Municipal Committee. His Lordship Mudholkar, J., who delivered the majority judgment, referred to Sections 83 and 85 of the Act and observed that there was no express provision like that of Section 31(1) or Section 33(4) of the Income Tax Act entitling the assessee to a hearing either in the appeal or revision petition. It was stated that the provisions the C.P. Municipalities Act could not possibly apply to a case where the right to obtain a refund or repayment was based upon the ground that the action of the Committee was in violation of a constitutional provision. Section 85, therefore, could not, in any event be said to provide a machinery for obtaining refunds in case of this kind. His Lordship proceeded on the footing that the Act did not provide a machinery for making a claim for refund or repayment in such cases. His Lordship observed : --

"No doubt the power to make an assessment is conferred by the Act and, therefore, making an assessment would be within the jurisdiction of the assessing authority. But the jurisdiction can be exercised only according, as well as with reference to the valid provisions of the Act. When, however, the authority travels beyond the valid provisions it must be regarded as acting in excess of its jurisdiction. To give too wide a construction to the expression " under the Act" may lead to serious consequence of attributing to the legislature, which owes its existence itself to the Constitution; the intention of affording protection to unconstitutional activities by limiting challenge to them only by resort to the special machinery provided by it in place of the normal remedies available under the Code of Civil Procedure, that is, to a machinery which cannot be as efficacious as one provided by the general law. Such a construction might necessitate the consideration of the very constitutionality of the provision which contains this expression. This aspect of the matter does not appear to have been considered in *Raleigh Investment Co.*'s case AIR 1947 PC 78 (supra) :

We have already adverted to the provisions of Sections 83 and 85 of the Act which are the only provisions brought to our notice as providing a machinery under the Act for challenging an assessment and we have pointed out that they do not cover a case like the present. Again the provision for an appeal before a Deputy Commissioner who is an authority who performs numerous functions under different laws, functions which are executive, as well as administrative and judicial cannot be regarded as on par with one which provides for an appeal before an Appellate Assistant Commissioner under the Income Tax Act, an authority whose duties are confined to matters arising under that Act. Further, the latter Act contains a safeguard in the shape of an appeal to the Income Tax Appellate Tribunal which deals exclusively with matters arising under that Act is an independent tribunal. In the circumstances it must be held that even in the class of cases to which the provisions of Sections 83 and 85 of the Municipalities Act apply they cannot be said to provide a sufficiently effective remedy to an assessee to challenge the assessment made against him or to a person who is aggrieved by the action of the Committee levying or refusing to refund a tax. It

is true that Sub-section (2) of Section 83 provides for a reference to the High Court but even that provision cannot be said to be a sufficiently efficacious remedy for challenging the assessment made on an assessee. For whether to make a reference or not is at the discretion of the appellate or revisional authority and the Act does not confer upon the person aggrieved a right to move the High Court as, does the Income Tax Act, to require a reference to be made in an appropriate case. We may again point out that there is a complete absence of a provision corresponding to Section 67 of the Income Tax Act barring the institution of a suit in so far as refusal of refund of tax is concerned.....Further, the of the corollaries flowing from the principle that the Constitution is the fundamental law of the land is that the normal remedy of a suit will be available for obtaining redress against violation of a constitutional provision. The Court must, therefore, lean in favour of construing a law in such a way as not to take away this right and render illusory the protection afforded by the Constitution. So, whatever be the position with respect to Section 67 of the Indian Income Tax Act, so far as Section 83(3) of the Act is concerned, we find it reasonably possible to construe it as" not depriving a person of his right to obtain redress from a civil court in respect of an amount recovered from him as a tax in violation of Article 276 of the Constitution.....

There is a real distinction between those cases where a suit was held to be incompetent and the cases which we have before us. Thus where the question merely is whether the assessment had been made according to law, the Assessing Officer of the Municipality having jurisdiction on the subject-matter and over the assessee the provisions of Section 84(3) may be a bar to a suit. Where however, the question raised is as to the jurisdiction of the Assessing Officer to proceed against the assessee and levy on or collect from him an amount in excess of that permitted by the Constitution, the matter would be entirely out of the bar of that provision. Here since the Assessing Officer had no authority to levy a tax beyond what Section 142-A of the Government of India Act, 1935 permitted or what Article 276 permits his proceedings are void in so far as they purport to levy a tax in excess of the permissible amount and authorise its collection and the assessment order is no answer to the suit for the recovery of the excess amount. To this extent, even the order of assessment cannot obtain the protection of Section 84(3) of the Act and, therefore, the appellant's suit is maintainable."

61. His Lordship Raghubar Dayal, J., on his behalf and on behalf of Bachawat, J., gave a dissenting judgment, His Lordship followed the view expressed by the Privy Council in Raleigh Investment Company's case AIR 1947 PC 78 and stated that Section 84(3) of the C.P. Act by its terms, refers to an objection to assessment and not to ""assessment under the Act or assessment made under the Act." This made the provisions of Section 84(3) much wider in scope than those of Section 67 of the Indian Income Tax Act were. It was observed that it appeared that the Privy Council considered a special provision barring the taking of objection to assessment of tax by any authority to be unnecessary. It said at

p. 81 of AIR:-

"The only doubt indeed;, in their Lordships" mind is whether an express provision was necessary in order to exclude jurisdiction in a Civil Court to set aside or modify an assessment."

His Lordship also relied upon the decision of the Supreme Court in *Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh*, and held that the appellant's suit had been rightly dismissed as the correctness of the assessment of the tax could not be challenged by a suit in a civil court in view of Section 84(3).

62. Then there is seven-Judges judgment in *Kamala Mills Ltd. Vs. State of Bombay*, The appellant's case was that during the period 26th Jan. 1950 to 31st March 1951, it sold goods inside and outside the State of Bombay. The total value of good sold by the appellant outside the State of Bombay was Rs. 40,20,623-12-0 and Rs. 1,08,946-14-0. On these sales, general sales tax and special sales tax was levied. The appellant instituted a suit on the original side of the Bombay High Court, and claimed to recover the said amount from the respondent on the ground that it had been illegally levied against it. According to the appellant, the illegality of the impugned assessment, levy, imposition and collection was discovered by it soon after the Supreme Court pronounced its judgment in *The Bengal Immunity Company Limited Vs. The State of Bihar and Others*, on the 6th September, 1955. The appellant's case further was that Section 20 of the Act did not bar the institution of the present suit, and, in the alternative, if it was held that it created a bar, the said section was ultra vires the Constitution of India and void. The High Court held that Section 20 of the Bombay Sales Tax Act 1946 was a bar to the institution of the suit and on this preliminary ground dismissed the suit of the appellant. Section 20 of the said Act reads as under : --

"20. Save as it provided in Section 23, no assessment made and no order passed under this Act or the rules made thereunder by the. Commissioner or any person appointed u/s 3 to assist him shall be called in question in any Civil Court, and same as is provided in Sections 21 and 22, no appeal or application for revision shall be against any such assessment or order.

Gajendragadkar C.J., delivering the unanimous judgment of the Court, relied upon the decision in *Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh*, and the Privy Council decisions in AIR 1940 105 (Privy Council) and in *Raleigh Investment Co. Ltd. v. Cover nor-General in Council* AIR 1947 PC 78 observed as under : --

"Section 20 protects "assessment made under the Act or the rules made thereunder" by appropriate authorities. There can be little doubt that the clause "an assessment made" cannot mean the "assessment properly or correctly made. The said clause takes in all assessments made or purported to have been made under the Act..... An order of assessment though erroneous, and though

based on an incorrect finding of fact is, nevertheless, an order of assessment within the meaning of Section 20; and Section 20, in terms, provides that it will not be called in question in any Civil Court.

This question has been recently considered by this Court in *Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh*, This Court observed that the expression "any assessment made under this Act" is wide enough to cover all assessments made by the appropriate authorities under this Act whether the said assessments are correct or not..... If we examine the relevant provisions which confer jurisdiction on the appropriate authorities to levy assessment on the dealers in respect of transactions to which the charging section applies, it is impossible to escape the conclusion that all questions pertaining to the liability of the dealers to pay assessment in respect of their transactions are expressly left to be decided by the appropriate authorities under the Act as matters falling within their jurisdiction..... The whole activity of assessment beginning with the filing of the return and ending with an order of assessment, falls within the jurisdiction of the appropriate authority and no part of it can be said to constitute a collateral activity not specifically and expressly included in the jurisdiction of the appropriate authority as such...

Reverting then to Section 20, it seems to us plain that the words used in this section are so wide that even erroneous orders of assessment made would be entitled to claim its protection against the institution of a civil suit. Several decisions have been cited before us where similar questions have been considered. We may usefully refer to some of them. In AIR 1940 105 (Privy Council) the Privy Council reversed the conclusion of the High Court and confirmed the view taken by the trial Judge (that the suit was barred u/s 188 Sea Customs Act).....

In *Raleigh Investment Co. Ltd. v. Governor-General in Council* AIR 1947 PC 78 the Privy Council held that Section 67 of the Indian Income Tax Act barred a suit where the plaintiff sought to challenge an assessment order made by the appropriate, tax authorities under the provisions of the said Act..... In every case, the question about the exclusion of the jurisdiction of Civil Court either expressly or by necessary implication must be considered in the light of the words used in the statutory provision on which the plea is rested, the scheme of the relevant provisions their object and their purpose. We would also like to make it clear that we do not think it is necessary in the present case to consider whether the majority opinion in the case of *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, was justified in casting a doubt on certain observations made by the Privy Council in *Raleigh Investment Co.*'s case AIR 1947 PC 78 or on the validity or the propriety of the conclusion in respect of the effect of Section 67 of the Income Tax Act..... Our conclusion, therefore, is that Section 20 should be construed in the same manner in which Section 18A of the Madras General Sales Tax Act was construed by this Court in *Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh*,

63. Reference may then be made to the decision in *Bata Shoe Co. Ltd. Vs. City of Jabalpur Corporation*, : In respect of the articles which were imported by the retail shops at Jabalpur within the limits of the then Jabalpur Municipal Committee between April 1, 1943 and March 31, 1945, the plaintiffs Bata Shoe Co. Ltd., had paid to the Municipal Committee a sum of Rs. 16,526 odd as octroi duty. This duty was assessed by the Municipal Committee on an amount which was 40% less than the retail price of the goods which were brought within the Municipal limits. In the year 1946-47 the Municipal Committee decided to reopen and revise the assessment by charging the octroi duty on an amount which was only 6 1/4% less than the retail price of the goods. The Municipal Committee further decided to levy double the duty by way of penalty. Plaintiffs preferred an appeal against the decision of the Municipal Committee to the Sub-Divisional Officer who modified the decision of the Municipal Committee by permitting them to charge the octroi duty on an amount which was less by 12 1/2% than the retail price of the goods. Revision application" preferred by the plaintiffs to the Board of Revenue was rejected on the ground that it was not maintainable. In conformity with the appellate order, but under protest, plaintiffs paid to the Municipal Committee a sum of Rupees 21,071-1-3. Defendants demanded a further sum of Rs. 10,604-2-6 alleging that they had overlooked asking for it through mistake. Plaintiffs paid that amount too on September 22, 1948 under protest. On June 20, 1949, plaintiffs filed a suit against the Municipal Committee for recovery of the total amount of Rs. 31,677-3-9 with interest on the ground that the defendants were not entitled to recover the amount by way of octroi duty and penalty. The trial Court decreed the suit of the plaintiffs. It rejected the contentions both as regards the jurisdiction of the Civil Court to entertain the suit and as regards limitation. The High Court in appeal had held that the re-assessment of octroi duty which was ultimately fixed in appeal by the Sub-Division Officer could not be questioned by the plaintiffs in the Civil Court. The first question for consideration before the Supreme Court was whether the Civil Court had jurisdiction to entertain the suit brought by the plaintiffs. Section 83(1) of the C.P. and Berar Municipal Act, 1922 provided for appeal against the assessment or levy of any tax under the Act to the Deputy Commissioner or to such other office as may be empowered by the Provincial Government in that behalf. Section 84(3) of the Act reads thus :

"no objection shall be taken to any valuation, assessment or levy nor shall the liability of any person to be assessed or taxed be questioned in any other manner or by any other authority than is provided in this Act."

His Lordship Chandrachud J.. relied upon the decisions in *Wolverhampton New Water Works Company v. Hawkesford* (1859) 6 CB 336 AIR 1940 105 (Privy Council) *Neville v. London Express New Paper Ltd.* 1919 AC 368 and *Kamala Mills Ltd. Vs. State of Bombay*, and held that the Act of 1922 provided an effective remedy to an aggrieved party to challenge the assessment of octroi duty and to claim refund of duty illegally paid or recovered. It was held that civil suit was impermissible in view of the provisions contained in Section 84(3) of the Act. On

behalf of the plaintiffs, reliance had been placed on the decision of the Supreme Court in *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, ; *Ballabhadas Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur*, and *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, in support of their contention that the Civil Court had jurisdiction to entertain the suit. These decisions were distinguished by his Lordship on the ground that the tax recovered in those cases was unconstitutional. His Lordship observed : --

"It is unnecessary to examine each one of those propositions for the short reason that as in the case of *Bharat Kala Mandir and B. M. Lakhani*, so in the case of *Dhulabhai*, the recovery of sales tax was unconstitutional and the suit for that reason, was held maintainable..... The decision in *Bharat Kala Bhandar* is distinguishable for the weightier reason that the tax recovered in that, case was unconstitutional and no provision of a statute could be construed as laying down that no court shall have jurisdiction to order a refund of a tax collected in violation of a constitutional provision. If there were a provision which so provided or which could be so construed, that provision would itself be unconstitutional."

Dealing with the case in hand before the Supreme Court, His Lordship observed "These provisions show in the first place that the defendants indubitably possess the right and power to assess and recover octroi duty and double duty on goods which are brought within the municipal limits for sale or consumption or use therein. The circumstance that defendants might have acted in excess of or irregularly in the exercise of that power cannot support the conclusion that the assessment or recovery of the tax is without jurisdiction. Applying the test in *Kamla Mills* if the appropriate authority while exercising its jurisdiction and powers under the relevant provisions of the Act, holds erroneously that an assessment already made can be corrected or that an assessee is liable to pay double duty when Rule 14(b), in fact, does not justify such imposition, it cannot be said that the decision of the authority is without jurisdiction. Questions of the correctness of the assessment apart from its constitutionality are, as held in *Dhulabhai*, for the decision of the authorities set up by the Act and a civil suit cannot lie if the order of those authorities is given finality..... Both the Act and the Rules contain provisions.....enabling the aggrieved party effectively to challenge an illegal assessment or levy of double duty. By reason of the existence and availability of those special remedies, the ordinary remedy by way of a suit would be excluded on a true interpretation of Section 84(3) of the Act..... It may be that..... there was no justification for imposition of double duty. But the error could be corrected only in the manner provided in the Act and by the authority prescribed therein. The remedy by way of a suit is barred."

64. A review of above decisions would go to show that in *The State of Tripura Vs. The Province of East Bengal*, assessment of agricultural Income Tax had not been made by the Income Tax Officer, Dacca Range. He had only sent a notice calling upon the Manager of the Zamindari Estate to furnish a return of the total income. The ruler of the princely State of Tripura in his suit had sought the reliefs that the

relevant Act in so far as it purported to impose a liability to pay agricultural Income Tax on him as a ruler of an Indian State was ultra vires and void and in any case, the notice served by the Agricultural Income-tax Officer, Dacca Range was void and no assessment could be made on the basis of such notice. The Ruler had also prayed for a permanent injunction to restrain the defendants from taking any steps to assess him to agricultural Income Tax. Patanjali Sastri, J., speaking for the majority, rejected the contention that such a suit was barred in civil Courts. The short answer given to this contention was that the suit in question was not a suit "to set aside or modify an assessment" made under the Act, as no assessment had yet been made when the suit was instituted. The gist of the wrongful act complained of in that case was subjecting the plaintiff to the harassment and trouble by commencing against him an illegal and unauthorised assessment proceeding which may eventually result in an unlawful imposition and levy of tax.

65. In Firm Seth Radha Kishan (Deceased) Represented by Hari Kishan and Others Vs. The Administrator, Municipal Committee, Ludhiana, , it was contended on behalf of the assessee that if a municipal committee levies terminal tax on an article not liable to tax under the Act, a suit would lie and, therefore, the same legal position should apply even to a case where the Municipal Committee levies the tax in respect of an article under an entry not applicable to it. His Lordship Subba Rao, J., rejected this analogy and observed : --

"We do not see any analogy between these two illustrations, in the former, the municipal committee does not act under the Act, but in the latter it only commits a mistake or an error in fixing the rate of tax payable in respect of a particular commodity, one is outside the Act and the other is under the Act, one raises the question of jurisdiction and the other raises an objection as to a matter of detail."

It has already been mentioned that the provisions of Sections 84 and 86 of the Punjab Municipal Act (3 of 1911) were more or less similar to the provisions contained in Sections 139 and 141 of the Rajasthan Municipalities Act, 1959. It was observed : --

-Even in such cases, the Civil Court's jurisdiction is not completely ousted. A suit in a Civil Court will always lie to question the order of a tribunal created by a statute, even if its order is, expressly or by necessary implication made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provision".

66. So far as other decisions referred to above are concerned, in all of them assessment had already been made under the Act by the concerned Tribunal. In Secretary of State for India in Council v. Roy Jatindra Nath Chowdhary. AIR 1924 PC 175 . the survey work had already started, In AIR 1940 105 (Privy Council) the Customs Collector had already assessed the consignment as boiled betel nuts instead of as raw betel nuts. In Raleigh Investment Company's case AIR 1947 PC 78 the Income Tax Officer had already made the assessment after the

assessee had filed the return, In Firm Seth Radha Kishan (Deceased) Represented by Hari Kishan and Others Vs. The Administrator, Municipal Committee, Ludhiana, the Municipal Committee had already assessed and collected terminal tax on the salt imported. So also in Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh, tax had been recovered from the turnover representing sale of groundnuts. In Kamala Mills Ltd. Vs. State of Bombay, the general and special sale tax had already been levied and the levy was challenged in the suit. None of these just abovementioned cases were cases where the relief sought was for permanent injunction restraining the competent authority from making the assessment or levying the tax. In all these cases, assessment already made or purported to have been made under the respective Acts were challenged. It may also be mentioned that in Kamala Mills Ltd. Vs. State of Bombay, it was clearly observed : --

"We would also Like to make it clear that we do not think it is necessary in the present case to consider whether the majority opinion in the case of Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon, was justified in casting a doubt on certain observations made by the Privy Council in Raleigh Investment Company's case (AIR 1947 PC 78) (supra)".

It may further be noted that their Lordships of the Privy Council in AIR 1940 105 (Privy Council) took pains to observe : --

"It is unnecessary to consider whether prior to taking such appeal u/s 188, the respondents would have been entitled to refer to the Civil Courts or whether they have been confined to the right of appeal u/s 188.... In the case referred to in (1936) 71 M LJ 40, Varadachariar, I, held that jurisdiction was not excluded in circumstances similar to the present case, except that there had been no appeal u/s 181, and for the reasons already explained, their Lordships do not find it necessary to consider the question."

It may also be noted that the majority judgment of their Lordships of the Supreme Court in The State of Tripura Vs. The Province of East Bengal, where a suit for declaration and permanent injunction where assessment of tax had not so far been made was held not be barred, has not been overruled by any subsequent decisions of the Supreme Court already discussed above.

67. Coming, therefore, to the provisions contained in Sections 139 and 141 of the Rajasthan Municipalities Act, 1959, it is clear that Section 139 of the Act provides for appeal against an assessment or any alteration of assessment and also for an appeal against notice of demand. As already stated, in the instant case, the Municipal Council, Kota had neither made any assessment nor any alteration of assessment and nor issued any notice of demand as against the plaintiff company for octroi duty. All that the Municipal Council had done was that it had only sent a letter on Dec. 26, 1967 to the plaintiff-company that octroi duty would be charged on cops and it terminated the agreement entered into on June 17, 1963. Clearly no appeal could lie u/s 139 of the Act against this letter

as it was neither an assessment nor an alteration of assessment and nor a notice of demand u/s 149. Since no appeal could lie u/s 139, the plaintiff-company could not possibly have any occasion to raise a question as to its non-liability to the levy of octroi tax because u/s 141(1) such a question could be raised or could have arisen only during the hearing of the appeal and further then only the officer hearing the appeal if he entertained reasonable doubt, could either suo motu or on the application of the plaintiff- company draw up a statement of the facts of the case and the point on which the doubt was entertained and refer the statement with his own opinion on the point for the decision of the High Court. The bar of jurisdiction created by Section 143 of the Act comes into play when there was an assessment or alteration in assessment of octroi duty by the Municipal Council, Kota or when a notice of demand was issued by it u/s 149 of the Act. Then the question of liability on the plaintiff- company could only be decided in the manner provided by Sections 139 and 141 of the Act and not otherwise. It was clearly observed in *Firm Seth Radha Kishan v. Administrator, Municipal Committee, Ludhiana* (AIR 1963 SC. 1547) (supra) :-

"The law of the subject may be, briefly stated thus :-- u/s 9 of the CPC the Court shall have jurisdiction to try all suits of civil nature except suits of which cognizance is either expressly or implied barred..... The same principle would apply if the statute had provided for the particular forum in which the remedy could be had. Even in such cases, the Civil Court's jurisdiction is not completely ousted. A suit in a civil Court will always lie to question the order of a tribunal created by a statute, even if its order is expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions."

68. Even in seven Judges' judgment in *Kamala Mills Ltd. Vs. State of Bombay*, it was observed : --

"In every case, the question about the exclusion of the jurisdiction of Civil courts either expressly or by necessary implication must be considered in the light of the words used in the statutory provision on which the plea is rested, the scheme of the relevant provision, their object and their purpose."

Their Lordships did not think it necessary to consider whether the majority opinion in the case of *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, was justified in casting a doubt on certain observations made by the Privy Council in *Raleigh Investment Company's case* AIR 1947 PC 78 or on the validity of the propriety of the conclusion in respect of the effect of Section 67 of the Income Tax Act. The position might have been different, had the Municipal Council made assessment of the octroi duty to be charged from the plaintiff-company or would have issued a notice of demand requiring the plaintiff-company to pay or deposit a specified amount as octroi or duty. In that event, the remedy provided for in Sections 139 to 141 of the Act would have become immediately available to the plaintiff-company and the bar created by Section 143 would have immediately been attracted. The plaintiff-company, however,

filed the civil suit before any assessment of octroi duty was made or before any notice of demand was served under the Act. The relief claimed by the plaintiff-company was for a permanent injunction against the Municipal Council, Kota restraining it from levying octroi duty on cops which were returned to it for winding up nylon thread and for compelling the Municipal Council to adhere to the agreement entered into on June, 1963. Civil suit of such a nature is neither expressly nor impliedly barred by any of the provisions contained in the Act. I, therefore, disagree with the findings of the Court below that the Civil Court had no jurisdiction to entertain and try the suit of present nature. In my opinion, the present suit was not barred in Civil Courts.

69. I shall next consider the question whether it was necessary for the plaintiff-company to serve a notice u/s 271(1) of the Act to the respondent and whether the suit was not maintainable for want of service of notice. Reference may be made to the averments made by the plaintiff-company in para 12 of the plaint in this respect. The plaintiff-company has said that in the light of the circumstances leading to the suit, it was not necessary to serve upon the Municipal Council, Kota the statutory notice because in case the Municipal Council was not prevented from committing breach of the agreement, the plaintiff-company was likely to suffer irreparable loss. Municipal Council might have recovered the octroi duty amount by a distress warrant and consequently it would not have been possible to estimate the damage which the plaintiff-company might have suffered. From the above averments contained in para 12 of the plaint, it would appear that the plaintiff-company had placed reliance upon the provisions contained in Sub-section (3) of Section 271 of the Act which runs as under : --

"(3) Nothing in Sub-section (1) shall be construed to apply to a suit wherein the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the commencement of the suit or proceedings."

It is true that the plaintiff-company had instituted the present suit claiming the relief of permanent injunction against the Municipal Council, Kota, but I am not ready to hold that the object of the suit would have been defeated by giving of the notice or the postponement of the commencement of the suit. Before any octroi duty could be assessed and levied, the authorised officer of the Municipal Council was to inspect, examine, weigh and otherwise deal with the article. He could have required the plaintiff-company to communicate to him any information and exhibit to him any bill, invoice or document of title relating to the article (see Section 130). The Officer would have tendered to the plaintiff-company a bill specifying the article taxable, the amount claimed and the rate at which the tax is calculated. The Municipal Council had to present a bill to the plaintiff-company for the sum claimed as due u/s 147. If the amount of the octroi duty as claimed was not paid within fifteen days, the Municipal Council would have issued a notice of demand u/s 149 of the Act. If the plaintiff-company upon whom a notice of demand would have been served did not, within forty days

from the service of the notice, pay the sum demanded or did not show any cause to the satisfaction of the Municipal Council why he should not pay the same or plaintiff-company did not prefer an appeal in accordance with Section 139 against the demand, then only the sum claimed be levied u/s 150 of the Act under a warrant of distress. Keeping in view the above procedure provided in the Act, it cannot be held that by giving the statutory notice u/s 271 (1) of the Act and postponement of the suit, the object of the suit would have been defeated.

70. The question then remains whether the suit filed by the plaintiff-company against the Municipal Council, Kota was in respect of an act done or purporting to have been done in its official capacity. It appears that the President, Municipal Council sent a letter No. 348/MCK/67 dated December 26, 1967 to the plaintiff-company having following contents in it : --

"From the examination of your record, it is found that while supplying the goods, price of the cops is realised by you, and when the cops are returned by the party, the price realised by you is refunded. This is virtually a regular sale and purchase of the cops, and as such octroi duty is liable to be charged from you at the time of import of such cops.

The octroi samiti have, therefore, decided to realise octroi duty on the import of cops with immediate effect."

This letter of the Municipal Council, Kota has been made by the plaintiff as cause of action for filing the present suit. It appears from this letter that after examination of the record of the plaintiff-company, the Municipal Council had determined the method by which the plaintiff-company brought the cops within the municipal limits. According to it, the plaintiff-company used to sell the cops also along with the nylon yarn to its customers after realising the price of cops. The price of cops were refunded by the plaintiff-company in case the customers returned the cops. It may be that the Municipal Council misconstrued or wrongly inferred the nature of transaction between the plaintiff-company and its customers in relation to the cops supplied and received back, but it can by no stretch be said that the Municipal Council was acting or doing something without jurisdiction against statutory or constitutional provisions. The decisions in Poona City Municipal Corporation Vs. Dattatraya Nagesh Deodher, and in Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon, had distinguishable features. Poona City Municipal Corporation case was a case in which the Municipal Corporation had imposed a tax on the refund of the octroi duty collected by it on the goods imported within the municipal limits of the city. The Supreme Court held that the Municipal Corporation had no power to impose the tax and that in fact there was a prohibition against the imposition of such a tax by the Corporation in the Constitution as well as in Section 127(4) of the Act.

71. In Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon, the case was that the coming into force of Section 142A of the Government of India Act, 1935 (which came into effect from 1st April, 1939) till Jan., 1950, a tax on trade,

profession or calling in excess of Rs. 50/- per annum could not be imposed either by a Provincial Government or by a local body. Nor again could an existing tax on trade, profession or calling be raised further so as to exceed Rs. 50/- per annum. After the coming into force of the Constitution, the upper limit of the tax was raised to Rs. 250/-per annum and that as the plaintiff-company was already paying more than that amount per year, it filed suit for the refund of the amount. The principal contention that was pressed was that plaintiff-company's suit was bad for non-compliance with the requirements of Section 48 of the C.P. Municipalities Act, 1922. The majority judgment was delivered by J. R. Mudholkar, J., who observed : --

"We must not lose sight of the fact that what the appellant has claimed in the suit is the repayment by the Municipal Committee of an amount recovered by it in excess of that which under the Constitution it was competent to recover from the appellant..... We may further observe that where there is an express prohibition in statute against a local authority from imposing a tax, as for instance, the recovery in the Statute construed by this Court in the Poona City Municipal Corporation Vs. Dattatraya Nagesh Deodher, or where a prohibition can be implied whether it be with regard to an item of taxation or with regard to the rate of tax or the quantum of tax payable by an individual assessee the action of a local authority or of any of its instrumentalities in transgressing that prohibition must be regarded as being in excess of its jurisdiction..... There is a real distinction between those cases where a suit was held to be incompetent and the kind of cases which we have before us. Thus there the question merely is, whether the assessment had been according to law, the Assessing Officer of the Municipality having jurisdiction on the subject-matter and over the assessee, the provision of Section 84(3) may be a bar of suit where, however, the question raised is as to jurisdiction of the Assessing Officer to proceed against the assessee and levy on or collect from him an amount in excess of that permitted by the Constitution, the matter would be entirely out of the bar by that provision.""

72. Dealing with Section 48 of the C.P. Municipalities Act. his Lordship observed as follows : --

"Cases of this type must be distinguished from those like the present in which we must imply a constitutional or statutory prohibition against the act done. Where such prohibition exists or can be implied, anything done or purported to be done by an authority must be regarded as wholly without jurisdiction and is not entitled to a protection of the law under colour of which that act was done."

In the case before him, the Municipal Council, Kota was not seeking to recover octroi duty in excess of that which under the Constitution or statute it was competent to recover as was in the case of Poona City Municipal Corporation Vs. Dattatraya Nagesh Deodher, and in Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon, There was no express prohibition in the Rajasthan Act against recovery of octroi duty on metallic cops brought within municipal limits

for consumption, use or sale therein. There was no prohibition regarding rate of tax or the quantum of tax payable by an individual assessee. The action of the Municipal Council, Kota cannot be termed as without jurisdiction. The only controversy between the plaintiff-company and the Municipal Council, Kota was whether the cops brought within the municipal limits of Kota were new cops or purchased cops from the customers or whether the cops brought were plaintiff-company's own cops which were returned by its customers after using the nylon yarn for being re-winded by the plaintiff-company. This was a matter which could be enquired into and investigated by the Municipal Council, Kota in order to determine the liability of octroi duty on the cops brought within its municipal limits by the plaintiff-company. In my opinion, the act done by the Municipal Council, Kota was an "act done in its official capacity" and, therefore, the present suit could not be instituted against it by the plaintiff-company unless a notice as required by Section 271(1) of the Act was served upon it. On this ground, the suit of the plaintiff-company is not maintainable.

73. Before parting with this judgment, it may be observed that in view of the judgments of this Court in *Ramsarandas v. State of Rajasthan* (supra), *Hamid Khan v. Municipal Council, Sriganganagar* (supra). *Ganganagar Sugar Mills v. Municipal Council, Mandore* and in this case, it is advisable and proper that the State Government or the Municipal Councils should provide in the octroi rules and incorporate therein some procedure and provisions to avoid double or multiple levy of octroi on the goods which have already been subjected to octroi duty when they were for the first time brought by a person within the municipal limits for use and which were again brought in by that very person or returned to him as his own goods by his customers to whom the goods had not been sold by such person. The reason is that in my opinion. Rules 9. 12. 16 and Rules 21 to 25 of the existing rules do not cover such types of cases.

74. In view of my conclusion that it was necessary for the plaintiff-company to have served a statutory notice u/s 271(1) of the Act upon the Municipal Council, Kota before instituting the present suit, the same was not maintainable and is liable to be dismissed on that ground.

75. Consequently, this second appeal fails and is hereby dismissed. In the facts and circumstances of the case, the parties are left to bear their own costs throughout.