

(1964) 07 GUJ CK 0003
In the Gujarat High Court

Case No : Letters Patent Appeal No's. 8, 9 and 10 of 1961

Kadi Municipality

APPELLANT

Vs

New Chhotalal Mills Company Ltd.

RESPONDENT

Date of Decision : 27-07-1964

Acts Referred:

Baroda B Class Municipalities Act, 1983 — Section 43, 44, 45
Bombay District Municipal Act, 1901 — Section 179(1), 179(2), 9

Citation : AIR 1965 Guj 293

Hon'ble Judges : P.N. Bhagwati, J; J.B. Metha, J

Bench : Division Bench

Advocate : S.N. Patel, for the Appellant; B.G. Thakore, for the Respondent

Judgement

Bhagwati, J.

(1) These three appeals involve common questions of law and the facts in all the three appeals are also similar barring difference only in the period in respect of which octroi duty has been claimed by the Kadi Municipality (herein after referred to as the Municipality) and paid by the New Chhotalal Mills Company Ltd (herein after referred to as the Company) and the amount of such octroi duty and it would therefore be sufficient if only the facts of the first appeal are set out in full and a mere reference to the period and the amount of octroi duty is made in so far as the second and third appeals are concerned. The history of the facts relevant for the purpose of these appeals dates back to 24th June 1933 when the Company purchased a Textile Mill from the Liquidator of the Laxmi Cotton Mills Company Limited at a public auction held by the District Judge, Mehsana. The Textile Mill was situate in Kadi comprised within the territories of the former State of Baorda. After purchasing the Textile Mill the Company started running it from June 1934. It appears that around this time the Company mad an application in the Baroda Government for exemption from certain taxes and duties and the Baroda Government by a Tharav dated 16th April 1935 granted those exemptions to the Company. We shall have occasion to examine the true

nature and character of this Tharav a little later but it is sufficient to state for the present that one of the exemptions granted by the Tharav was - and that is the exemption with which we are primarily concerned in these appeals - from octroi duty leviable by Municipality in respect of goods which might be brought within the mill premises by the Company. The exemption was not a total exemption but was a partial one in that octroi duty was exempted only to the extent to which it exceeded Rs.300/-. The period for which the exemption was twenty years. It appears that at the date when the Tharav was passed, the mill premises were not within the limits of the Municipality and there was accordingly no octroi payable by the Company in respect of goods which might be brought by it within the mill premises. On 11th February 1937, however, a notification was issued by the appropriate authority under the B Class Municipalities Act, being Act 32 of Samvat 1983, by which the Municipality was governed extending the limits of the Municipality so as to include within these limits the land on which the mill was situate. The mill premises having been brought within the limits of the Municipality, the Company became liable to pay octroi duty to the amount brought by it within the mill premises. In view, however, of the exemption granted to the Company, the liability of the Company to pay octroi duty to the Municipality was limited to Rs.300/- per year and the Company accordingly did not pay any amount exceeding Rs.300/- per year as and by way of octroi duty to the Municipality. In 1939 the B Class Municipalities Act, being Act, No. 32 of Samvat 1983 was repealed and substituted by the B Municipalities Act, being Act No.14 of 1949, but the exemption granted to the Company continued and the Company continued to pay not more than Rs. 300/- in respect of octroi duty to the Municipality. This state of affairs continued right up to 1st May 1949 when the Ruler of Baroda State ceded full and exclusive authority, jurisdiction and powers for and in relation to the governance of the Baroda State to the Government of India under a merger agreement entered into between him and the Government of India. The territories of the Baroda State were thereafter governed by the Government of Bombay in virtue of the power delegated to it by the Central Government under S. 3 (2) of the Extra-Provincial Jurisdiction Act, 1947, until the passing of the States Merger (Governors' Provinces) Order, 1949, by which

the territories of the Province of Bombay. During this period also and even thereafter the exemption from octroi duty in excess of Rs. 300/-per year continued to be enjoyed by the Company until 22nd October 1952 when the Government of Bombay by an order of that date purportedly made under S.74-A of the Bombay District Municipal Act, 1901, purported to cancel the exemption. This order was communicated to the President of the Municipality and the Municipality thereupon served a notice on the Company requiring the Company to pay octroi duty of Rs. 715-13-3 for the period from 22nd October 1952 to 31st October 1952 on the footing that the exemption was no longer available to the Company. The Company paid the amount under protest and after giving the requisite notice to the Municipality filed Suit No. 14 of 1953 in the Court of the Civil Judge, Junior Division, Kadi, for recovering that amount together with

interest. The Company also claimed a declaration that the Municipality was not entitled to recover any amount over and above Rs.300 per years as and by way of octroi duty from the Company so long as the Tharav existed and an injunction restraining the Municipality from levying or collecting as and by way of octroi duty any amount over and above Rs.300/- per year. The suit was resisted by the Municipality which contended that on the cession of sovereignty by the Ruler of Baroda State to the Government of India, the Tharav came to an end and the Company was, therefore, not entitled to any exemption from octroi duty from and after the date of such cession. The Municipality also contended that in any event the amount of octroi duty having been collected pursuant to the order dated 22nd October 1952 passed by the Government of Bombay, the Company was not entitled to any relief until the said order was set aside and the said order could not be set aside unless the Government of Bombay was made a party to the suit. The argument was that since the Government of Bombay was not made a party to the suit, the suit was liable to be dismissed. Now before we proceed to state what happened in the suit, it is necessary to point out that presumably realising that the order dated 22nd October 1952 was not a valid order, the Government of Bombay cancelled the same and issued a new order dated 14th July 1953 withdrawing the exemption granted under the Tharav. This order was not purported to be issued under S. 74-A of the Bombay District Municipal Act, 1901, or under any other specific provision of that Act. Having regard to this order it was contended on behalf of the Municipality, that in any event the exemption granted under the Tharav stood withdrawn by reason of this order and that the Company was, therefore, not entitled to any exemption at any rate from and after 14th July 1953.

(2) The learned trial Judge before whom the suit came to be tried took the view that the exemption granted under the Tharav continued to be in force, even after the merger of Baroda State and that the order dated 14th July 1953 in so far as it purported to withdraw that exemption was invalid and that the Company was, therefore, entitled to exemption from payment of octroi duty in excess of Rs. 300/- per year for a period of twenty years, as provided in the Tharav. The learned trial Judge also held that the period of twenty years was liable to be computed from the date of the Tharav and not from the date when the notification bringing the mill premises within the limits of the Municipality came into force. The learned trial Judge negatived the contention of the Municipality that the Government of Bombay was a necessary party to the suit and held that it was open to the Company to attack the validity of the order dated 22nd October 1952 without making the Government of Bombay a party to the suit when that order was sought to be set up by the Municipality as an answer to the claim of the Company. The learned trial Judge accordingly decreed the suit but limited the declaration and injunction to the period of twenty years from the date of the Tharav. The Municipality being aggrieved by this decree preferred an appeal before the District Court, but the appeal was unsuccessful and the decree of the learned trial Judge was confirmed by the Extra Assistant Judge who heard

the appeal. The Municipality thereupon preferred a Second Appeal in this Court. The Second Appeal came up for hearing before Shelat, J., as he then was. The learned Judge agreed with the conclusions reached by the learned Assistant Judge with only this difference that in his view the period of twenty years was liable to be computed from the date of the notification extending the limits of the Municipality and not from the date of the Tharav. The learned Judge accordingly confirmed the decree with this modification that the period of twenty years should be computed from 11th February 1937 and not from the date of the Tharav. It may also be mentioned, though that is not material for the purpose of these appeals, that the learned Judge altered the rate of interest on the amount of the decree from six per cent to four per cent. The Municipality thereupon applied for leave under Clause 15 of the Letters Patent and on leave being granted preferred Letters Patent Appeal No. 8 of 1961 in this Court.

(3) Letters Patent Appeal No.9 of 1961 arose out of a similar suit filed by the Company against the Municipality on 15th January 1953. The refund of octroi duty claimed in that suit was of Rs. 3,164-7-0, being the amount claimed by the Municipality and paid by the Company under protest, for the period of 3rd December 1952 to 30th December 1952. Letters Patent Appeal No. 10 of 1961, arose out of a third suit filed by the Company against the Municipality on 4th February 1954 and in the suit the Company claimed refund of Rs. 9,128-4-6, being the amount of octroi duty claimed by the Municipality and paid by the Company under protest, for the period 3rd August 1953 to 1st January 1954. There was an additional point taken by the Municipality in this third suit and that point was that, at the date of the suit, the Municipality had been superseded u/s 179(1) of the Bombay District Municipal Act, 1901, and no suit for refund could, therefore, lie against the Municipality. This point was negatived by the learned trial Judge but was accepted by the learned Assistant Judge with the result that a Second Appeal had to be preferred by the Company. Shelat J., negatived the validity of this point and took the view that the suit for refund was maintainable against the Municipality, and in this view of the matter, he declared the suit. Letters Patent Appeal No.10 of 1961 is directed against that decree passed by the learned Judge.

(4) It will be seen from the aforesaid statement of facts that the main question on these appeals is whether the exemption from payment of octroi duty in excess of Rs. 300/- per year granted to the Company under the Tharav continued in force after the merger of Baroda State and, if so, until what time. The arguments which have been advanced before us on this question lie in a narrow compass, but in order to understand and appreciate them, it is necessary to trace briefly the history of the constitutional and legislative changes in regard to the territories forming part of Baroda State which took place from time to time. Prior to the merger there were two statutes in Baroda State relating to Municipalities. One was A Class Municipalities Act, being Act No.1 of Samvat 1962 and the other was B Class Municipalities Act, being Act No.32 of Samvat 1983. The Municipality in the present case was governed by Class Municipalities Act, 32 of Samvat 1983.

Section 43 of that Act conferred power on the Municipality to levy octroi duty subject to the sanction of the Huzur i.e., the Ruler or his Government and in exercise of this power the Municipality had prior to the Tharav made rules imposing octroi duty within Municipal limits with the prior sanction of the Huzur. These Rules were in force at the date when the Tharav was passed but the mill premises not being then situate within Municipal limits, no octroi duty was payable by the Company in respect of goods brought within the mill premises. The mill premises were subsequently brought within Municipal limits by the notification dated 11th February 1937 and octroi duty thereupon became payable by the Company under the Rules subject to the limit of Rs.300/- laid down by the Tharav. In 1949, A Class Municipalities Act, 1 of Samvat 1962, was replaced and re-enacted as A Class Municipalities Act, 12 of 1949. Similarly B Class Municipalities Act, 32 of Samvat 1983, was also repealed and re-enacted as B Class Municipalities Act 14 of 1949. Section 48 of B Class Municipalities Act 14 of 1949 took place of Section 43 of B Class Municipalities Act, 32 of Samvat 1983 and was in the same terms as that Section. This State of affairs continued until 1st May 1949 when full and exclusive authority, jurisdiction and powers for and in relation to the governance of Baroda State were ceded by the Ruler of Baroda State to the Government of India and the administration of Baroda State was taken over by the Government of Bombay as the delegate of the Government of India in exercise of authority delegated to it u/s 3 (2) of the Extra-Provincial jurisdiction Act, 1947. The Government of Bombay in exercise of powers on it by Section 4 of the Extra-Provincial Jurisdiction Act, 1947, made the Administration of Baroda State Order which came into force on 1st May 1949. Clause 4 of the Order in so far as it is material for the purpose of these appeals was in the following terms:-

"4.Application and Continuance of Laws: --

(i) Subject to the provisions of this order, such provisions or such parts of provision-

(ii)

(a) of any law, or

(b)

(c) of any notification, order scheme, rule, forms or bye-law issued, or prescribed under any law.

(d)As were in force immediately before the appointed day in the Baroda State shall continue in force until altered, repealed or amended by an order under the Extra-Provincial Jurisdiction Act, 1947(XLVII of 1947):

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Only some enactments specified in the Schedule were extended to the Baroda

State by sub-clause (ii) of Clause 4 but the Bombay District Municipal Act, 1901, was not amongst them. Then came the Baroda State (Application of Laws) Order, 1949, (hereinafter referred to as the Application of Laws Order), which was also made by the Government of Bombay in exercise of its powers u/s 4 of the Bombay Provincial Jurisdiction Act, 1949. Paragraph 3, 5 and 6 of this order are material for the purpose of these appeals and they were in the following terms: --

: 3. Application of enactments to Baroda State: --

(i) All enactments specified in Parts I and II of Schedule I and all notifications, orders, schemes, rules and by-laws issued, made or prescribed under such enactments and in force in the Province of Bombay immediately before the coming into force of this order shall extend to and be in force in the Baroda State subject to any amendments to which the said enactments are for the time being generally subject in the Province of Bombay.

(ii) All references to the Province of Bombay in the enactments, notifications, orders, schemes, rules and by-laws mentioned in sub-paragraph (i) shall be construed as including references to the Province of Bombay and the Baroda State.

(iii) The enactments (including rules) specified in Schedule II and all other enactments not repealed under paragraph 5 and the notifications, orders, schemes, rules and by-laws, issued, made or prescribed thereunder and in force in the Baroda State immediately before the coming into force of this order shall continue in force in the territories of the said State and shall have application, until altered, repealed or amended by competent authority".

* * * * *

"5. Repeal of enactments in force in the Baroda State: --

(i) The following enactments (including the rules) are hereby repealed, namely:--

(ii)

(a) all the enactments specified in Schedule III in force in the Baroda State immediately before the coming into the force of the order.

(b)

(c) Sections 1, 2 and 36 to 45 (both inclusive) of the Government of Baroda Act (VI of 1940), and

(d)

(e) All other enactments in force in the Baroda State and corresponding to the enactments in force in the province of Bombay and extended to the Baroda State under paragraph 3.

(f)

(iii) All orders, notifications, schemes, by-laws and all rules by whatever name or description called under any enactment repealed by the provisions of sub-0paragraph (I) are also hereby repealed.

(iv)

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6. Saving of Local Authority's Courts and Tribunals: --

All municipalities whether constituted under the A Class Municipalities Act (No XII of 1940) or that B Class Municipalities Act (No XIV of 1949) of the Baroda State (hereinafter called: The Baroda Municipalities Acts") shall be deemed to have been constituted under the Bombay District Municipal Act, 1901 (Bom III of 1901), for the areas for which they were originally constituted and all committees, officers and authorities constituted or appointed under the Baroda Municipalities Act shall be deemed to have been constituted or appointed under the corresponding provisions of the Bombay District Municipal Act, 1901 (Bom III of 1901) and shall continue in office, exercise powers and perform functions for the period for which they would have continued in office, exercised powers and performed functions under the Baroda Municipalities Acts under which they were originally constituted".

* * * * *

Amongst the enactments extended to the Baroda State by Paragraph 3 was the Bombay District Municipal Act, 1901. Soon thereafter the States Merger (Governor's Province) Order, 1949, was passed by the Central Government as a result of which the process of integration of Baroda State which started with merger on 1st May 1949 was completed and the territories of Bombay. Since the territories of Baroda State became, as a result of this last order, part of the territories of the Province of Bombay, the Governor of Bombay issued Bombay Merged States (Laws) Ordinance, 1949, extending various enactments in force in the Province of Bombay to the territories of Baroda State and the Ordinance was subsequently replaced by the Bombay Merged States (Laws) Act, 1950. The Bombay Municipal Act, 1901, was one of the enactments extended to the territories of Baroda State and in its application to the territories of Baroda State, certain amendments were made in that Act which only one is material so far as we are concerned. That amendment was the introduction of Section 74-A which empowered the State Government at any time by order in writing to withdraw any exemption from or concession in respect of any tax granted to any person by the Government of the former Baroda State by an order issued under A Class Municipalities act 12 of 1949. It was in purported exercise of this power that the State Government issued the order dated 22nd October 1952 withdrawing the exemption granted to the Company under the Tharav. But this order was obviously has inasmuch as the power conferred on the State Government under

S.74-A was only in respect of exemption in respect of tax granted to any person by the Government of Baroda by an order issued under A Class Municipalities Act 12 of 1949, whereas the Municipality in the present case was a Municipality governed by B Class Municipalities Act, 14 of 1949, and the Tharav granting exemption to the Company from octroi duty payable to the Municipality could not be said to be a Tharav issued under A Class Municipalities Act, 12 of 1949. It was presumably for this reason that the State Government cancelled this order and passed a fresh order dated 14th July 1953 which did not purport to be made u/s 74-A.

(5) It is against this background that we have to consider the main question arising before us, namely, whether the exemption granted under the Tharav continued in force after the merger of the Baroda State. But before we consider this question we must refer to one extreme contention advanced by Mr.S.N.Patel, learned advocate appearing on behalf of the Municipality, which if successful, would enable him to by-pass this question and to eliminate most of the difficulties which beset his other arguments. The contention was that the Tharav had no binding effect ab initio and there was, therefore, no question of its continuing in force after the merger of the Baroda State. Now to this contention a preliminary objection was raised by Mr.B.G.Thakore, learned advocate appearing on behalf of the Company. He submitted that this contention could not be allowed to be raised in these Letters Patent Appeals since it had not been taken before the learned Judge who heard the Second Appeals and for the matter of that it had not been taken even before the learned Assistant Judge or the learned trial Judge. He pointed out the limits of our jurisdiction hearing a Letters Patent Appeal and relied on three decisions of the High Court of Bombay, namely, Shripad Shivram Sardeshpande Vs. Shivram Bhikaji Patki, Sattappa Gurusattappa Hukeri Vs. Mahomedsaheb Appalal Kazi, and Ramabai Govind Vs. Raghunath Vasudeo, . It is clear from these decisions that a new point which has not been urged before the Judge hearing a Second Appeal cannot be allowed to be urged for the first time of the hearing of a Letters Patent Appeal. Now it cannot be disputed that this point which is sought to be raised by Mr.S.N.Patel was not alleged before the learned Judge at the time of the hearing of the Second Appeals nor was it taken before the learned Assistant Judge or the learned trial Judge. We cannot, therefore, permit this point to be raised for the first time of the hearing of this Letters Patent Appeals before us. But apart from this objection founded on the fact that these are Letters Patent Appeals, there is another cogent reason why we cannot permit the Municipality to raise this point. This point is now sought to be raised is in complete contradiction of the basis on which the case has been argued in all the three Courts. The case has throughout proceeded on the basis that the Tharav was a valid and binding Tharav up to the date of the merger and the only argument was that it cease to be in force on merger. It was never the case of the Municipality so far that the Tharav did not have any binding effect at all right from the commencements. The Municipality cannot, therefore, be allowed to take up a stand altogether inconsistent with the

stand taken up by it up to the State. But even if we were to allow the Municipality to raise this point we do not think there is any substance in it. The only reason suggested on behalf of the Municipality in support of the contention that the Tharav had no binding effect ab-initio was that the B Class Municipalities Act did not make any provision for granting exemptions from payment of octroi duty and that the Baroda State had, therefore, no power to make the Tharav granting such exemption. The argument was that there being no power under the B Class Municipalities Act to grant exemption, the Tharav if valid, amounted to an amendment of the Act and this it was not open to the Baroda State to do by merely making a Tharav, for the only way in which an amendment to the Act could be carried out was by following the same traditional form of enactment and making what purported to be an express amendment of the Act. Now there is no substance in this contention. It must be remembered that the Ruler of the Baroda State was an absolute monarch and there is no prohibition on the power of an absolute monarch to act in such manner as he likes. There is no constitutional requirement which compels an absolute ruler to amend his enactment in any particular form. He being the fountain of all authority, his will is law howsoever expressed and whatever he says has binding effect, whether it be a legislative, executive or judicial act. If, therefore, the Ruler or his delegate the Diwan made the Tharav granting exemption from octroi duty payable under the Rules framed under the B Class Municipalities Act, the Tharav must have binding effect and it cannot be argued that if the Tharav was to have the effect of amending the B Class Municipalities Act, it should have been enacted in any particular form or should have been expressly made as an amendment to the Act. We are, therefore, of the view that there is no substance in this contention urged on behalf of the Municipality and it must be rejected.

(6) Coming now to the merits of the controversy in regard to the question, whether the exemption granted under the Tharav continued in force after the merger, there were two contentions urged by Mr.S.N.Patel on behalf of the Municipality in support of his plea that the Tharav ceased to be in force on merger. The first contention that he urged was that the act of acquisition by the Government of India of full and exclusive authority, jurisdiction and powers for and in relation to the government of the Baroda State was an act of State and that the Company was, therefore, not entitled to enforce in the Municipal Courts of India the right of exemption granted under the Tharav unless such right was recognized by the Government of India or the Government of Bombay as the delegate of the Government of India. He contended that there was nothing to show that this right was recognized by the Government of India or the Government of Bombay, but on the contrary it was clear from the orders dated 22nd October 1952 and 14th July 1953 that this right was expressly repudiated. The conclusion which was sought to be pressed on the basis of this argument was that inasmuch as this right was not recognized by the Government of India or the Government of Bombay as the new sovereign after the completion of the act of State, the Company could not enforce the exemption against the

Municipality in the Municipal Courts on this contrary. The second contention was ---and that was a contention in the alternative ---that the Tharav was an order u/s 43 of the B Class Municipalities Act, 32 of Samvat 1983 and consequently an order u/s 48 of the B Class Municipalities Act 14 of 1949 and since by virtue of the operation of Paragraph 5 (I) of the Application of Laws Order, the B Class Municipalities Act 14 of 1949 was repealed, the said order made u/s 48 of the B Class Municipalities Act 14 of 1949 was also repealed under Paragraph 5 (ii) of the Application of Laws Order. Though this latter was merely an alternative contention, it would be convenient to dispose it of first, before we enter upon a discussion of the first contention, which was the main contention urged on behalf of the Municipality.

(7) This contention was based on the premise that the Tharav was an order u/s 43 of the B Class Municipalities Act, 32 of Samvat 1983. But this premise is in our opinion not well-founded and for several reasons. In the first instance the Tharav is not expressly made u/s 43 of the Act. Of course this is not a circumstance which is of much importance by itself, but it is certainly a circumstance which coupled with other circumstance throws light on the true nature of the source of the authority from which the Tharav stems. Then again it will be seen that the Tharav does not make any reference to the B Class Municipalities Act 32 of Samvat 1983. It does not grant exemption from payment of octroi duty under that Act or under any particular Act. It is a Tharav granting exemption from payment of octroi duty in excess of Rs. 300/- to the Municipality whatever be the law for the time being in force under which the Municipality may claim to recover octroi duty from the Company. It is also a circumstance of some importance that the Tharav is a composite Tharav granting exemption in regard to several matters some of which are in no way connected with B Class Municipalities Act, 32 of Samvat 1983, such as for example Income Tax, super-tax, Mokhrana tax etc. But more important than all these circumstances is the fact that there was no power u/s 43 to grant exemption from tax dealt with in that section. It is no doubt true that u/s 43 the power of the Municipality to levy octroi duty was subject to the sanction of the Huzur but the sanction of the Huzur contemplated by section 43 was the sanction of the Huzur to the Rules u/s 45 and did not import any exempting power in the Huzur. Section 44 provided for the making of the Rules for the imposition of any of the taxes in respect of which power was conferred u/s 43. Section 45 then provided for obtaining of the sanction of the Huzur and it was only if the Huzur sanctioned the Rules framed by the Municipality for imposing tax, that the Rules could become effective to authorize imposition of tax. It is, therefore, clear that the sanction of the Huzur contemplated by section 43 was the sanction of the Huzur to be obtained u/s 45 on the giving of which alone, could the Rules authorizing imposition of tax become effective and binding and this provision did not empower the Huzur to grant exemption from tax. In this connection we might profitably compare section 43 with section 59 of A Class Municipalities Act 1 of Samvat 1962 where, by sub-section (2), clause (I) power was expressly conferred on the Huzur to

grant exemption from any tax to an industrial undertaking. We are, therefore, of the opinion that the Tharav was not an order u/s 43 of the B Class Municipalities Act 1 of 1962. We may in fairness to Mr.S.N.Patel state that though this contention was not given up by him, he did not make any serious attempt to press for its acceptance by us.

(8) That takes us to the main contention urged in these appeals, namely, that there being no recognition by the Government of India or the Government of Bombay of the exemption granted under the Tharav, the exemption could not be enforced against the Municipality in these proceedings. Now the proposition no longer be disputed that when a territory is acquired by a sovereign for the first time whether by conquest or by cession following upon treaty, that is an act of State, and where this happens a subject of the ex-sovereign can make good in the Municipal Courts of the new sovereign only those rights which that sovereign has through his officers recognized and the rule of the predecessor avails him nothing. Vide State of Gujarat Vs. Vora Fiddali Badruddin Mithibarwala, . Having regard to this proportion it is clear that the act of acquisition by the Government of India of full and exclusive authority, jurisdiction and powers for and in relation to the governance of the Baroda State being an act of State, the exemption granted under the Tharav could not be enforced by the Company after merger unless the Company could show that there was recognition of the exemption by the Government of India or the Government of Bombay as the delegate of the Government of India after merger. Now the establishing recognition the Company contended that the Tharav was law made by the Baroda State and, being law in force at the date of merger, it was continued by reason of Paragraph of the Administration of the Baroda State Order and was further continued by reason of Paragraph 3 (iii) of the Application of Laws Order and the exemption granted under it was, therefore, enforceable against the Municipality. The answer of the Municipality to this contention was a two-fold one; first, the Municipality contended that the Tharav was not law so as to fall within the scope and ambit of the provision contained in paragraph 4 of the Administration of Baroda State Order or Paragraph 3 (iii) of the Application of Laws Order. Secondly the Municipality urged that in any event the Tharav even if law, was repealed by Paragraph 5 (I) of the Application of Laws Order. These rival contentions raised the question as to the true nature of the Tharav whether it was law or it was merely an executive act on the part of the Baroda State and, if it was the former, whether it was repealed by Paragraph 5(I) of the Application of Laws Order.

(9) The question as to when an Act or an order of an absolute Ruler in whom is vested full sovereignty and who is the fountain of all authority, executive, legislative or judicial, can be said to be by law, was for sometime a question of some doubt and difficulty but having regard to the latest pronouncements of the Supreme Court in Maharaja Shree Umaid Mills Ltd. Vs. Union of India (UOI), AND State of Gujarat Vs. Vora Fiddali Badruddin Mithibarwala, and the decision given by the Supreme Court on 9th March 1964 in Rajkumar Narsingh Pratap Singh Deo Vs. State of Orissa and Another, , the question must be now regarded as

settled and the only dispute which can arise is a regards the application of the test formulated by the Supreme Court in these decisions, we do not think we can do better than quote the following passage from the judgment of Gajendragadkar C.J. in the last mentioned case of Rajkumar Narsingh Pratap Singh Deo Vs. State of Orissa and Another, for the purpose of ascertaining the true test to be applied for determining whether a particular act of an absolute Ruler is al or an executive act:

"In dealing with this aspect of the matter, it is hardly necessary to examine and decide what distinguishes a law from an executive order. A theoretical or academic discussion of this problem would not be necessary for our present purpose, because all that e are considering at this stage is whether or not it would be possible to consider by references to the character of the order its provisions, its context and its general setting whether it is a legislative order or an executive order. Though theorists may not find it easy to define a law as distinguished from executive orders, the main features and characteristics of law are well recognized. Stated broadly, a law generally is a body of rules which have been laid down for determining legal rights and legal obligations, which are recognized by Courts. In that sense, a law can be distinguished from a grant, because in the case of a grant, the grantor and the grantee both agree about the making and the acceptance of the grant; not so in the case of law. Law in the case of an absolute monarch is his command which has to be obeyed by the citizens whether they agree with it or not. Therefore, we are inclined to hold that Mr.Setalvad is not right in making the unqualified contention that, while we are dealing with a grant made by an absolute monarch, it is irrelevant to enquire, whether the grant is the result of an executive action, or a legislative action. On Mr.Setalvad's contention, every act of the absolute monarch and every order passed by him would become law though the act or order may have relation exclusively to his personal matters and may have no impact on the public at large. That is why it is unsound to suggest that the juris prudential distinction between orders which are judicial, executive or Legislative or in relation to purely individual and personal matters should be treated as irrelevant in dealing with Acts or orders passed by an absolute monarch".

The test, therefore, is whether the act in question embodies the command of the sovereign prescribing a binding rule of conduct determining legal rights and obligations. Law is the emanation of the will of he sovereign which prescribes a binding rule of conduct for observance of future and affecting legal rights and obligations of persons subject to his power. This test for determining a legislative act is admirably set out in the following passage from the opinion of Holmes, J., in *Parent v. Atlantic Coast Line Co. Ltd.*, (1908) 21 U.S. 210 at pages 226-227, where the learned Judge distinguishing between a judicial act and a legislative act observed :

"A judicial inquiry investigates, declares, and enforces liabilities as they stand in present or past facts and under laws supposed already to exist. That is its

purpose and end. Legislation, on the other hand looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore, is an act legislative not judicial in kind"

"* * * * *

That question depends not upon the character of the body, but upon the characters of the proceedings".

A similar statement in regard to what is an essential and distinguishing characteristic of a legislative act is also to be found in *Australian Boot Trade Employees federation v. Whybrow &Co.* (1910) 10 C.L.R. 266at page 318,where Issacs J., thus laid down the test for determining what is a legislative act as distinguished from a judicial act :

"If the dispute is as to the relative rights of parties as they rest on past or present circumstances, the award is in the nature of a judgment, which might have been the decree of an ordinary judicial tribunal acting under the ordinary judicial power. There the law applicable to the case must be observed. If, however, the dispute is as to what shall in the future be the mutual rights and responsibilities of the parties - in other words, if no present rights are asserted or denied, thus creating new rights and obligations, with sanctions for non-conformity - then the determination that so prescribes, call it an award, or arbitration, determination, or decision or what you will, is essentially of a legislative character, and limited only by the law which authorises it"

It would be thus be seen that for the purpose of determining whether a particular act of an absolute Ruler is a legislative act or not, what we must consider is whether the act "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to": his power and determines "What shall in the future be the mutual rights and responsibilities of the parties" by prescribing a building rule of conduct creating new rights and obligations.

(10) If this test be applied to the present case it is clear that the Tharav was a legislative act and not an executive act. Clause 1 of the Tharav granted exemption to the Company for a period of twenty years from octroi duty in excess of Rs. 300/-. It is undoubtedly true that there was no statutory liability at the date when the Tharav was made, but the exemption granted was an exemption in present and not an agreement to exempt in future. It cannot be disputed that if Clause 1 had provided that if, by reason of the mill premises being brought within the Municipal limits, any octroi duty might in future be payable by the Company to the Municipality, the Baroda State would be under an obligation to grant exemption to the Company, this Clause would have been an executive act on the part of the Ruler. But what this clause does is not to prescribed a covenant on the part of the time when grant exemption to the Company at the time when octroi duty becomes payable by the Company but it

grants exemption in persenti to the Company. It is an immediate exemption and nothing further is required to be done by way of granting exemption at the time of levy of octroi duty on the mill premises coming within Municipal limits. Now this exemption which was granted with immediate effect was an exemption from levy of octroi duty under a legislative enactment, namely, B Class Municipalities Act. This legislative enactment together with the statutory rules made under it determined until then the rights and liabilities of the Municipality and persons bringing goods within Municipal limits. But these rights and liabilities created by legislative provisions were sought to be affected by the Tharav in that the Ruler declared as his sovereign will that from and after that date, no octroi duty in excess of Rs.300/- shall be leviable by the Municipality from the Company. The Tharav affected the operation of a legislative enactment and it must, therefore, necessarily be regarded as impressed with legislative character. The Tharav prescribed a binding rule of conduct which was to be enforced for a period of twenty years and which determined the rights and liabilities of the Municipality and the Company in regard to octroi duty for that period of twenty years. And this was done by the Ruler by a fiat of his sovereign will and not as a result of any contract between him and the Company. It is, therefore, clear that the essential attributes of a legislative act existed in the case of the Tharav so far as Clause 1 was concerned. Clause 2 and the first part of Clause 4 of the Tharav also for the same reasons which we need not repeat bore the same legislative character inasmuch as they prescribed the rate of Income Tax leviable from the Company for a period of ten years and also granted exemption to the Company from Mokhrana tax for a period of ten years. Some reliance was placed on behalf of the Municipality on Clause 3 and the second part of clause 4 of the Tharav in support of the contention that the Tharav was not a legislative act. But these clauses do not, in our opinion, militate in any way against the conclusion which we are inclined to reach on a consideration of the Tharav as a whole. It is no doubt true that these Clauses standing by themselves might appear to partake of the character of an executive act but they cannot be said to be inapposite in a legislative order. The Tharav must be read as a whole and if the main and dominant clauses of the Tharav are legislative in character, the legislative character must attach to the entire Tharav and merely because some clauses contain provisions which appear more often in contracts or executive orders, the Tharav would not shed its character as a legislative act.

(11) Mr.S.N.Patel on behalf of the Municipality laid considerable emphasis on the fact that the Tharav was made by the Cabinet and the Diwan and not by the Ruler himself and contended that the Tharav could not, therefore, be regarded as a legislative act. The argument was that the Cabinet and the Diwan could exercise only the executive power of the sovereign and not his legislative power and any act of the Cabinet or the Diwan must, therefore, of necessity be an executive act. This contention is in our opinion without force. It is an undoubted fact that the Tharav was made by the Cabinet and the Diwan and not by the Ruler but the Tharav was a valid Tharav having binding effect on the Municipality

and the Company and it must therefore be concluded that the Tharav was within the authority of the Cabinet and the Diwan. Now there was no constitutional prohibition which precluded the Ruler from conferring legislative power on the Cabinet and the Diwan and no inference can, therefore, be drawn from the mere fact that the Tharav must necessarily be an executive act. The true nature and character of the Tharav must be determined not by reference to the authority which made the Tharav but by reference to the character, content and purpose of the Tharav. As observed by Holmes J., in the passage to which we have just referred, the question "depends not upon the character of the body, but upon the character of the proceedings". This argument cannot, therefore, dissuade us from holding that the Tharav was a legislative act.

(12) Mr. S.N.Patel also made a faint attempt to argue that the Tharav was in the nature of an agreement between the Company and the Baroda State. But the attempt was futile. There is absolutely nothing to show that there was any agreement arrived at between the Company and the Baroda State. The Tharav on the face of it was not expressed to be an agreement between the Company and the Baroda State. There was no consideration which proceeded from the Company to the Baroda State. The Company has actually purchased the textile mill in June 1933 and started running it in June 1934 and it was after the working of the textile mill had been commenced by the Company that the Tharav was made by the Baroda State. The Tharav was expressed as a binding rule of conduct and it clearly rested for its sanction on the will of the Ruler and not on the consensus of mind between the Ruler and the Company. This being the position, the decisions of the Supreme Court in AIR 1964 S C 888 where the agreements between the Ruler and the petitioner were not considered to be law, cannot avail the Municipality.

(13) We are, therefore, of the view that the Tharav passed by the Baroda State at the date when the administration of Baroda State was handed over to the Government of India. If the Tharav was law in force at that time, then obviously it was continued by Paragraph 4 of the Administration of Baroda State Order in exercise of its power u/s 4 of the Extra-Provincial Jurisdiction Act, 1947, the Government of Bombay must be held to have recognized the Tharav and the exemption granted under it. But this recognition was by the express terms of Paragraph 4 subject to the reservation that the Tharav could be altered, repealed or amended by an order under the Extra-Provincial Jurisdiction Act, 1947. The question which we must, therefore, consider is whether it was so altered, repealed or amended. Now the only order under the Extra-Provincial Jurisdiction Act, 1947, on which reliance was placed on behalf of the Municipality was the Application of Laws Order. The argument was that by Paragraph 3 (I) of the Order the Bombay District Municipal Act, 1901, was extended to the Baroda State and by reason of the extension of that Act, the Tharav was replaced under paragraph 5 (I) (c) of the Order. In order to test the validity of this argument it is necessary to examine briefly the scheme of Paragraphs 3 and 5 of the Order. Under Paragraph 3(I) all enactments specified in Parts I and II of Schedule I

together with all subordinate legislation made under those enactments were extended to the Baroda State. Paragraphs 5 (I) (a) repealed certain enactments specified in Sch. III which were in force in Baroda State immediately before the coming into force of the Order. Certain sections of the Government of Baroda State Act, 1940, were also repealed under para. 5 (I) (b). Paragraph 5 (I) (c) then repealed all enactments in force in Baroda State corresponding to the enactment extended to the Baroda State under para. 3 (I). The enactments in force in the Baroda State which were left unrepealed under para 5 (I) were dealt with in para. 3 (iii) which provided that the enactments specified in Sch. II and all other enactments not repealed under Para. 5 together with subordinate legislation made under such enactments shall continue in force in the territories of the Baroda State and shall have application until altered, repealed or amended by competent authority. The conjoint effect of paras. 3 and 5, therefore, was that out of enactments in force in the Baroda State prior to the coming into force of the Order all enactments which were not repealed under para.5 were expressly continued in force and it was declared that they shall continue in force until altered, amended or repealed by competent authority. It is, therefore, manifest that unless the Tharav which was an enactment in force in Baroda State prior to the coming into force of the Order was repealed under para.5 it would continue in force by reason of para.3 (iii). Now the only clause of para.5 (I) under which the Tharav could even remotely be attempted to be brought was clause (c). But cl.(c) could not apply unless it could be said that the Tharav was a law corresponding to some enactment extended to the Baroda State under Para. 3 (I) was an enactment in respect of which it could be said that the Tharav was corresponding enactment. But this contention is in our opinion one which is wholly unsound. The Tharav was in the nature of a special law relating to the Company. It granted exemption to the Company not only from octroi duty leviable by the Municipality but also from Income Tax, super-tax and Mokhrana tax. It was also not a law which could be regarded as forming part of the B Class Municipalities Act. It did not deal with the subject of Municipalities but made provisions in regard to the Company in relation to various matters such as octroi duty, Income Tax, super-tax and Mokhrana tax. It was sought to be argued before us that Tharav was nothing but an amendment to the B Class Municipalities Act and therefore formed part of the Act. but that contention cannot be accepted for the Tharav was a composite Tharav dealing with several matters in relation to the Company, octroi duty being only one of them and moreover, it had not independent existence and it was not as if its utility was exhausted when it operated to exempt the Company from levy of octroi under the B Class Municipalities Act. Tharav was not a Tharav which granted exemption with reference to the B Class Municipalities Act or with reference to any particular statute but it enacted an exemption from octroi duty leviable by the Municipality whatever be the law under which such levy might be made by the Municipality. The exemption granted by the Tharav was an exemption of a general nature in respect of any statute for the time being in force which might any empower the Municipality to levy octroi duty. The Tharav could not, therefore, be regarded as

in the nature of an amendment to the B Class Municipalities Act. It was really in the nature of a special law relating to the Company which by reason of the principles embodied in the maxim *generalia specialibus nonderogant* prevailed as against the general law contained in the B Class Municipalities Act and other statutes. It could not, therefore, be regarded as an enactment corresponding to the Bombay District Municipal Act, 1901. The enactments in Baroda State corresponding to the Municipal District Act, 1901, were the A Class Municipalities Act and B Class Municipalities Act and by reason of the extension of the Bombay District Municipal Act, 1901, these enactments were repealed and not the enactment contained in the Tharav which operated as a special law cutting into various enactments dealing with octroi duty, Income Tax, super-tax and Mokhrana tax. It must again be noted that corresponding, if any, must be mutual and the shortest answer to the contention urged on behalf of the Municipality on this point, is furnished. If we ask the question: Can it be said that the Bombay District Municipal Act, 1901, was an enactment corresponding to the Tharav? The answer is obviously no. We, therefore, reach the conclusion that the Tharav was not repealed under Para, 5 (I) of the Application of Laws Order and it must, therefore, be held to have been continued in force under Para 3 (iii) and since there is nothing to show that after the Application of Laws Order, any order was made under the Extra-Provincial Jurisdiction Act, 1947 or any law was made by a competent legislature abrogating the Tharav or the exemption granted under it, the exemption must be regarded as a valid enforceable exemption.

(14) It is undoubtedly true that the State Government by its order dated 14th July 1953 purported to withdraw the exemption granted under the Tharav but we do not see how the State Government could by any such executive fiat withdraw an exemption available to the Company under a special law which continued to be in force. Such exemption could be withdrawn only by appropriate legislation by competent authority as provided in Para 3 (iii) of the Application of Laws Order and not by an executive fiat of the State Government. The learned Judge was, therefore, in our opinion right in taking the view that the exemption granted under the Tharav continued to be available to the Company against the Municipality even after merger for the period of twenty years provided in Tharav.

(15) That takes us to the next question, namely what is the point of time which the period of twenty years must be computed. The learned judge deciding the Second Appeals took the view that the period of twenty years was liable to be computed from 11th February 1937 being the date when the notification was issued bringing the mill premises within the Municipal limit. This view was challenged by Mr. S.N.Patel on behalf of the Municipality. We think that the challenge must succeed and our reason for so holding are as follows. In the first place it must be remembered that the exemption which is granted by Clause 1 of the Tharav is an immediate exemption and not an exemption to come into force from a future point of time. The original Tharav in Gujarati shows that the words denoting the period for which the exemption is granted immediately precede the operative words granting the exemption and the exemption being an exemption

with immediate effect it is clear on a plain and grammatical construction that the period of twenty years must be computed from the date when the exemption is granted. The words comprising the opening of the Clause immediately preceding the words granting the exemption for a period of twenty years are merely descriptive of the amount in respect of which exemption has been granted and do not indicate the point of time from which the period of twenty years must be counted. According to its plain and natural meaning all that the clause means is that the Company is exempted with immediate effect for a period of twenty years in respect of the amount of octroi duty in excess of Rs. 300/- per year payable by the Company in respect of goods brought within the mill premises when the mill premises come within the Municipal limits. If there is excess over Rs.300/- per year during the period of twenty years such excess is exempted. It is possible that in any particular year or years during the period of twenty years there be no excess over Rs.300/- per year either by reason of the fact that the octroi duty payable is less than Rs.300/- per year or by reason of the fact that no octroi duty is payable at all owing to the mill premises not being within the Municipal limits. In either case, there being no excess, there be nothing to exempt but that does not mean that the period of twenty years would not include the particular year or years or that in computing the period of twenty years the particular year or years should not be taken into account. The object of Clause 1 of Tharav also supports this construction. The industry which was stated by the Company was a nascent which was being an infant industry the Baroda State obviously wanted to encourage it by granting exemption respect of payment of octroi duty until reached the stage of maturity. The Baroda State, therefore, fixed a period of twenty years for which exemption from payment of octroi duty in excess of Rs. 300/- per year should be available to the Company. So far as Income Tax super-tax, and Moharana tax were concerned, the Baroda State fixed a period of ten years for granting total or partial exemption to the Company from payment of those taxes. The object clearly being to give protection to the infant industry, it would not be right to take the view, the language of Clause 1 clearly compels us so to hold, that the period of twenty years mentioned in the clause was intended to be computed from the date when octroi duty became payable by the Company on the mill premises being brought within Municipality limits. It might be that the mill premises might not be brought within Municipal limits for a period of twenty years or thirty years or an inordinately long period of time. Could it ever have been intended by the Baroda State that exemption from payment of octroi duty should be available to the Company for a period of twenty years computed from such date when the industry might already have reached full growth and maturity and might be in a prosperous condition. It is undoubtedly true that as a matter of fact the mill premises were brought within the Municipal limits within the year and a half of the date of the Tharav, but we cannot construe the language of the Clause by reference to subsequent events. We are, therefore, of the view that the period of twenty years for which exemption was granted under the Tharav was liable to be computed from the date of Tharav and not from the date when the mill premises were brought within Municipal limits. We will,

therefore, confine the declaration and injunction to the period of twenty years from 16th April 1935 i.e., up to 16th April 1955.

(16) That leaves out the last question which relates to Letters of Appeal No. 10 of 1961. As pointed out above an additional point was raised in this case in regard to the maintainability of the suit against the Municipality. The argument on this point was that at the date when the suit was filed the Municipality had been superseded u/s 179 (1) of the Bombay District Municipal Act, 1901, and the effect of supersession was that there was no Municipality in existence against which the suit could be filed and the suit could, if at all, be filed only against the State Government in whom the property of the Municipality was vested u/s 179(3). This argument was negated by the learned Judge and in our opinion rightly. Section 179(1) empowers the State Government to supersede a Municipality in certain case. Section 179 (3) lays down the consequences of supersession and those consequences are: (1) all councillors of the Municipality vacate their offices as councillors from the date of the order of supersession; (2) during the period of supersession, all powers and duties of the Municipality are to be exercised and performed by such person or persons as the Commissioner may, from time to time, appoint in that behalf; and (3) all property of the Municipality vests in the State Government during the period of supersession. It is clear that none of these consequences provides for extinction of the Municipality or for the transfer of the liabilities of the Municipality to the State Government or to any other person or body. The Municipality is u/s 9 a body corporate having perpetual succession and a common seal and it can sue and be sued in its corporate name. Now the Municipality as a corporate body having its own independent existence cannot be annihilated except by a legislative provision and if there is no legislative provision which expressly or by necessary implication puts an end to the corporate existence of the Municipality, the Municipality must continue to exist as a corporate body. It may be that all Councillors of the Municipality vacate their offices as such Councillors; it may be that all powers and duties of the Municipality are exercised and performed by the Administrator during the period of supersession; it may even be that all the property of the Municipality is vested during the period of supersession in the State Government. But the Corporate existence of the Municipality does not come to an end. The liabilities of the Municipality continue to remain as such and as such can be enforced against the Municipality and we do not see why a suit cannot be filed for enforcing such liabilities against the Municipality during the period of supersession. Of course the Councillors having vacated their offices as Councillors, the Administrator would be the person entitled to exercise the power and perform the duties of the Municipality during the period of supersession but the powers which he would be exercising and the duties which he would be performing would be the powers and duties of the Municipality. One of the powers would be the power to defend suits and the Administrator would therefore, defend the suit but he would be defending it on behalf of the Municipality. It is, therefore, clear that a suit to enforce a liability of the

Municipality can filed against the Municipality even during the period of supersession. As a matter fact if the view were taken that the Municipality is extinguished as a result of the order of supersession a highly anomalous result arise. Since the liabilities of the Municipality are not transferred to the State Government like the property of the Municipality, the liabilities would come to an end along with the Municipality and the persons having corresponding rights would be left high and dry. The officers and employees of the Municipality would be no longer in existence. Difficulties would also arise when the Municipality is re-established. According to this submission the Municipality when re-established would be a new corporate entity and there being no provision for transfer of liabilities, the liabilities of the old Municipality would not enforceable against the new Municipality and the officers and employees would also have to be re-employed by the new Municipality. These considerations fortify us in the view which we are inclined to take on a plain grammatical construction of the words used by the Legislature, we, therefore, agree with the learned Judge that the suit was maintainable against the Municipality.

(17) In this view of the matter we dismiss all the three Letters of Patent and confirm the decrees passed by he learned Judge in all the three cases with this modification that the declaration and injunction granted under the decrees will be limited to the period up to 16th April 1955. The Municipality will pay the costs of all the three Letters of Patent Appeals to the Company.

(18) Appeals dismissed. Decrees partly modified.