
(1960) 10 GUJ CK 0002
In the Gujarat High Court

Kadi Municipality

APPELLANT

Vs

The New Chhotalal Mills Co. Ltd.

RESPONDENT

Date of Decision : 06-10-1960

Acts Referred:

Bombay District Municipal Act, 1901 — Section 179, 59, 74A
Civil Procedure Code, 1908 (CPC) — Section 80, 80

Citation : (1961) 2 GLR 153

Hon'ble Judges : J.M. Shelat, J

Bench : Single Bench

Judgement

J.M. Shelat J.

[His lordship after narrating the facts proceeded to observe.]

1. The principal contention urged on behalf of the Municipality was that the order No. 91/62 which was an order passed u/s 43 of B Class Municipalities Act of Baroda being Act No. XXXII of S.Y. 1983. ceased to exist on the merger of the state of Baroda on August 1 1949 It was also contended that that order was repealed by the Baroda State (Application of Laws) Order 1949 which came into force on July 30 1949 whereby several Acts Central and Bombay were extended to the territories of the former Baroda State. Schedule I of the Baroda State (Application of laws) Order sets out a list of such Acts which were extended to these territories one of the Acts so extended being the Bombay District Municipal Act III of 1901. Since an elaborate argument was addressed to me on Section 5 of this order it would be necessary to recite here that section. That section deals with the repeal of certain enactments in force in the Baroda State and lays down that the enactments set out therein including the rules made thereunder were repealed by the order. These enactments which were so repealed were:

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

(b) Sections 1 2 and 36 to 45 (both inclusive) of the Government of Baroda Act

VI of 1940 and

(c) 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. The Act relevant for these appeals which was extended to the former territories of the State of Baroda was the Bombay District Municipal Act 1901 Under Clause (1) of Section 5 all enactments in force in the Baroda State were deemed to have been repealed wherever Acts corresponding to them were u/s 3 extended to the Baroda State. Sub-clause (ii) of Section 5 then provided that all orders notifications schemes by-laws and all rules by whatever name or description called under any enactment repealed by the provisions of Sub-clause (i) were also thereby repealed. Therefore if it were found that the order in question was an order made under any enactment repealed by Sub-clause (i) of the section then such an order also must be deemed to have been repealed.

2. The argument of Mr. Patel was that the order in question was made u/s 43 of the B Class Municipalities Act XXXII of S.Y. 1983 of Baroda and that an Act corresponding to that Act having been extended to the territory of Baroda not only the Baroda Act but also the order in question made thereunder must be treated as repealed by virtue of Sub-clause (ii) of Section 5. Sub-clause (iii) of Section 5 however provided that the repeal by this Order of any such enactment notification scheme rule by-law or order shall not affect the validity invalidity effect or consequence of anything already done or suffered or any right title obligation or liability already acquired or incurred or affect any principle or rule of law or established jurisdiction form or course or pleading practice or procedure or existing usage custom privilege restrictions exemptions notwithstanding that the same may have been in any manner affirmed recognised or derived by in or from any enactment hereby repealed. It would thus appear that under Sub-clause (ii) even if the Baroda Act XXXII of S.Y. 1983 was found to have been repealed under Sub-clause (i) of Section 5 if the order in question were to be construed as granting an exemption such an exemption cannot be said to have been repealed or done away with. Mr. Patel however relied upon Sub-clause (iv) of Section 5 which lays down that nothing in Sub-clause (i) shall be deemed to save or to continue in force any right title obligation liability any principle or rule of law jurisdiction exemption etc. if the same were in any way inconsistent with any of the enactments extended or continued in force u/s 3 of the order. In other words if there was any exemption and if such an exemption was in any way inconsistent with any of the enactments extended to the former State of Baroda e.g. the Bombay District Municipal Act the such exemption was not saved by Sub-clause (iii) of Section 5. Therefore in order to establish that such an exemption is not saved under Sub-clause (iii) of Section 5 it has to be established that that exemption was inconsistent with the Bombay District Municipal Act 1901 Mr. Patel contended that the Order No. 91/62 in question being u/s 43 of the B Class Municipalities Act of Baroda and the Bombay District Municipal Act 1901 having been extended to the former territories of Baroda State the Baroda Act stood repealed. It was also contended that the order in question was inconsistent with

the Bombay District Municipal Act in as much as the exemption in respect of the octroi duty granted thereunder was contrary to the provisions of the Bombay District Municipal Act conferring powers on the District Municipalities to levy and collect octroi duties. The order granting such exemption consequently was not saved under Sub-clause (iv) of Section 5 of the Baroda State (Application of Laws) Order 1949. Therefore it was argued that the order in question stood repealed as from July 30 1949 when the Baroda State (Application of Laws) Order 1949 was brought into force.

3. The first question that would arise on these contentions would be whether Order No. 91/62 was issued u/s 43 of the B class Municipalities Act of Baroda. Section 43 of the Act is somewhat similar to Section 59 of the Bombay District Municipal Act 1901 and provides that the B Class Municipalities would have the right to levy amongst other taxes octroi duty subject to the sanction of the Huzur. Section 44 of the Act then lays down the procedure which the Municipalities would have to follow before imposing any of the taxes in respect of which power was conferred upon them u/s 43. Both the Courts below were of the view that the order in question was not one u/s 43 of the Baroda Act and I think they were right in that view. There is in fact inherent evidence in the Order itself which shows that it was not an order u/s 43 of the Baroda Act or any other provision of that Act. As I have pointed out it is a composite order granting exemption with regard to several matters not connected with the B Class Municipalities Act of Baroda viz. Income Tax Super-tax Mokharana tax acquisition of land on payment of certain compensation by the company etc. That being so the order No 91/62 cannot be said to have been repealed by virtue of the provisions of Section 5 of the Baroda State (Application of Laws) Order 1949.

4. But assuming that it was an order u/s 43 of the B Class Municipalities Act of Baroda the next question would be whether that order was saved under the provisions of Sub-clause (iii) of Section 5 of the Baroda State (Application of Laws) Order 1949. The point to be considered is whether that order which grants exemption from payment of octroi duty over and above Rs. 300/- can be said to be inconsistent with the provisions of the Bombay District Municipal Act. The mere fact that an exemption has been granted from payment of octroi duty in excess of Rs. 300/per year cannot by itself mean that the Order is inconsistent with the Bombay District Municipal Act as contemplated by the Baroda State (Application of Laws) Order 1949. Such an inconsistency as contemplated by Sub-clause (iv) of Section 5 of that Order can be said to exist if there is something in the Baroda Act or the Order said to have been made thereunder which is contrary to the provisions or the objects of the Bombay District Municipal Act 1901. Section 59 of the Bombay District Municipal Act confers as Section 43 of the Baroda Act does power upon the District Municipalities to levy octroi duty. That power is subject to the sanction of the State Government under both the Acts. In this view Sub-clause (iii) of Section 5 of the Baroda State (Application of Laws) Order 1949 would seem to save the exemption granted under the order in question notwithstanding the fact that the exemption was granted under an

enactment which would stand repealed by reason of section and Sub-clause (i) of Section 5 of the Baroda State (Application of Laws) Order 1949 If that were to be so then the exemption granted under the order in question cannot be taken away or repealed by a mere executive act on the part of the State Government.

5. By an order dated the 22nd of October 1952 passed in exercise of the powers conferred by Section 74A of the Bombay District Municipal Act 1901 as inserted in Schedule III of the Bombay Merged States (Laws) Act 1950 Bombay Act No. IV of 1950 by Bombay Act No. XII of 1952 and made applicable to the merged territories of the former Baroda State the Government of Bombay withdrew certain exemptions from or concessions in respect of the taxes specified in column 2 of the Schedule annexed thereto. This included the exemption granted under Order No. 91/62 in favour of the plaintiff-company. The point to be considered is whether the Government of Bombay was entitled or was competent to withdraw the exemption granted under the order in question. In this connection it would be necessary to discuss the nature of the order No. 91/62 passed by the former Baroda State. As I have already said that order cannot be said to be one u/s 43 of the B Class Municipalities Act of Baroda. Prior to the merger the Ruler of Baroda was an absolute Ruler and all powers legislative executive and judicial were vested in him. He could delegate such powers to several authorities under him but those authorities would exercise those powers in his name and on his behalf. Mr. Patel emphasised that the order in question was the cabinet order signed by three ministers and therefore it was not an order of the Huzur. In my view that contention has no substance. Although an order may have been passed by or under the signature of a minister or is a cabinet order under the signatures of several ministers such an order must be considered as an order passed with the sanction of the Ruler and in his name or on his behalf. All the prerogatives compendiously termed as crown prerogatives were vested and remained in the Ruler. Therefore the order though passed by the Council of ministers must be deemed to have been the order passed on behalf of the Ruler and in exercise of his prerogatives.

6. The order thus passed by such a Ruler would be an expression of his sovereign will and would have the effect of any other law made or promulgated by him. That being the position the exemption granted under such an order would have the effect of even over-riding any other law for the time being in force and cannot be abolished or taken away by a mere executive act of the State Government. Mr. Patel however strenuously argued that the order in question was not a legislative act of the Ruler of the former State of Baroda but was at best an executive order which would cease to have any effect on and after the merger of the former State of Baroda with the State of Bombay. He relied upon the decision in Phaltan Sugar Works, Ltd. Vs. Commissioner of Income Tax, and argued that as in that case the exemption given by the Baroda Ruler was on the footing of an agreement between the plaintiff-company and the Ruler and that such an agreement would lapse with the merger of the State. In Phaltan Sugar Works Ltd. v. The Commissioner of Income tax the question was whether

an agreement between an assessee and the State of Phaltan as to exemption from Income Tax could be a defence against an order passed against the assessee company u/s 23A of the Income Tax Act 1922. There the assessee company was incorporated in 1933 in the State of Phaltan first as a private limited company but was subsequently converted into a public limited company on September 17 1942. At the time of its incorporation in 1933 an agreement was arrived at between the company and the Phaltan Darbar whereby the latter agreed not to levy Income Tax on the company for a period of ten years from the date on which the company started its work of manufacturing sugar and after the expiry of the period to levy the tax at a rate not exceeding one anna in a rupee on the net profits of the company. During the accounting year ending September 30 1938 the assessee company made a profit of Rs. 3 lakhs and odd but failed to distribute any portion of it by way of dividends to its shareholders. On March 15 1944 the Income Tax officer issued an order u/s 23 of the Indian Income Tax Act 1922 that the amount of profit should be deemed to have been distributed amongst the shareholders of the company and taxed accordingly. It was held that the company was assessable to Income Tax and super tax which it did not pay and that the provisions of the agreement did not exempt the income of the company from taxation u/s 4(3) of the Act because the agreement could only be regarded as an executive act of the Phaltan Darbar which could not override and supersede a statute of the country. At page 731 of the report the learned Chief Justice has observed that it might be that the Raja of Phaltan combined all the functions executive legislative and even judicial in him. But the question was what particular function was being discharged by him when he had entered into an agreement with the assessee company. He observed that it could not possibly be said that it was the legislative function which the Raja of Phaltan was discharging when he entered into this agreement with the assessee company and that it was clearly an executive act on his part and that such an executive act could not override and supersede a statute or a law of the country. Even though the Phaltan State might be supreme the Ruler could not by a mere executive fireman override the provisions of a statute which he himself had put into operation in his own State. It is clear from the facts in this case that the transaction in question was a totally different transaction from the one before me. The exemption which is the subject matter before me deals with the exemption of tax which the Ruler in his legislative capacity had empowered the Kadi Municipality and such other Municipalities to levy. The order in question also was not an agreement between the plaintiff-company and the Ruler of Baroda as was the case in Phaltan Sugar Works Ltd. The Ruler of Baroda could not possibly be said to have granted an exemption which he did by the order in question by means of a mere executive act having by an Act conferred the power on the Municipality to levy the octroi duty. The order in question cannot also be considered as an agreement between the plaintiff-company and the Ruler for the simple reason that the subject matter of the order viz. the exemption was not something between the Ruler and the plaintiff-company but an exemption which affected the right of the Kadi Municipality a third party altogether to levy the

duty. The case therefore of Phaltan Sugar Works v. Commissioner of Income Tax cannot assist Mr. Patel.

7. The powers of the Rulers of the States prior to 1947 come to be considered by the Supreme Court in Ameer-un-Nissa Begum and Others Vs. Mahboob Begum and Others, Nizam of Hyderabad constituted a Special commission to investigate and submit a report to him in a case of succession to a deceased Nawab which was transferred to the commission from the file of Darul Quaza Court. Thereafter another fireman dated June 26 1947 declared the report of the commission worthy of implementation and directed it to be implemented. The report was then transmitted to the Chief Justice of the Hyderabad High Court for execution with a direction that that report for distribution of matrooka property should be submitted for Nizams sanction before carrying it into effect. After the Police Action the previous order was withdrawn by yet another fireman of February 24 1949 and the decision of the Special Commission was set aside in respect of certain claimants. This fireman was again revoked by a fresh fireman dated September 7 1949 and the case was referred to another person for opinion and report. While considering the effects of those various fireman the Supreme Court held that though the report of the Special Commission could not per se operate as a decree it had that force after the sanction of the Nizam which was given to it by the fireman dated June 26 1947 and that therefore a decree capable of execution was brought into existence by that fireman. Dealing with the nature and effect of such fireman the Supreme Court observed that prior to the integration of the Hyderabad State with the Indian Union and the coming into force of the Indian Constitution the Nizam of Hyderabad enjoyed uncontrolled sovereign powers. He was the supreme legislature the supreme judiciary and the supreme head of the executive and there were no constitutional limitations upon his authority to act in any of these capacities. The fireman were the expressions of his sovereign will and they were binding in the same way as any other law nay they would override all other laws which were in conflict with them. Secondly so long as a particular fireman held the field that alone would govern or regulate the rights of the parties concerned though it could be annulled or modified by a later fireman at any time that the Nizam willed. Now it cannot be gainsaid that the Ruler of Baroda had a similar status and the same or similar powers enjoyed by the Nizam and the order in question therefore passed by him would have to be considered as having the same force of law as any other law promulgated by him and would indeed override any other law inconsistent with his order. Mr. Patel however pointed out to me the case of Ganpatrao Indalkar v. The State of Bombay 60 Bom. L.R. 888 where an order passed by the Ruler of Kolhapur State has been considered. In that case by an order of the Ruler passed in 1924 certain lands which were forfeited from a third party were granted to the plaintiffs. On February 7 1947 the Crown Representative in India vacated the order of forfeiture and recommended that compensation for loss of land be given to the plaintiffs. On August 12 1947 the plaintiffs appealed to the Secretary of State in Council but the paramount authority of the British Crown having lapsed

by the enactment of the Indian Independence Act the papers of the appeal were returned to the Ruler of Kolhapur with a request to deal with the appeal. On November 12 1947 the Ruler confirmed the order passed by the Crown Representative and as suggested by him awarded an amount as compensation to the plaintiffs. On March 1 1949 the Kolhapur State merged with the Bombay Province and on the same date the Government of India published the Kolhapur State (Application of Laws) Order 1949. The plaintiffs filed a suit against the State of Bombay claiming the amount of compensation on the ground that they were entitled to recover the amount from the State of Bombay the State of Bombay being the successor to the Ruler of Kolhapur. It was held that the order passed by the Ruler could not be regarded as an enactment within the meaning of Clause (5) of the Kolhapur State (Application of Laws) Order 1949 nor could it be regarded as a rule or an order passed under any enactment and that as Clause (5) had not the effect of repealing the order the proviso to Clause (5) did not apply and save the order passed by the Ruler of Kolhapur. Though the provisions of the Kolhapur State (Application of Laws) Order 1949 are similar to those of the Baroda State (Application of Laws) Order 1949 there was no question of the order there in question having been regarded as an enactment and as one having been repealed or as an order under a repealed enactment. In the very nature of things the order was obviously an executive order. The order was one passed by the Ruler which but for the Independence Act 1947 would have been dealt with and passed by the Secretary of State for India in Council. The paramount authority of the British Crown having come to an end the papers of the appeal were returned to the ruler with a request to deal with the appeal. The order of the Ruler which confirmed the order passed by the Crown Representative was thus clearly an executive and not even a judicial order much less an enactment as contemplated by Section 5 of the Application of Laws order. That being the case the plaintiffs in that case were not entitled to claim compensation from the State of Bombay as the order was not enforceable against either the Dominion of India or the State of Bombay under any rule of international law nor could it be enforceable by the Merger Agreement under which the Bombay State undertook obligations to discharge the liabilities relating to the governance of the Kolhapur State which devolved upon it; In my view neither the case Phaltan Sugar Works Ltd. nor the case in 60 Bom. L.R. 888 can possibly assist Mr. Patel the order in question in the one case being a mere agreement and in the other an act which was purely executive in nature.

8. But Mr. Patel argued that assuming that the order in question was a legislative act of the Ruler it was one to which Section 5(i)(c) of the Baroda State (Application of Laws) Order 1949 would apply and that being so not only the B Class Municipalities Act of Baroda but also an order made thereunder would have to be considered as repealed. Mr. Patel contended that Section 59 of the Bombay District Municipal Act 1901 is a section corresponding to Section 43 of the B Class Municipalities Act of Baroda. According to Mr. Patel the State Government has a power u/s 59 to grant exemptions in favour of either an individual or

institution and therefore it being a section corresponding to Section 43 of the Baroda Act Section 59 was extended to the former Baroda territories. That being so the order in question must be regarded as repealed by reason of Section 5(i)(c) of the Baroda State (Application of Laws) Order 1949. There is no doubt that Section 59 of the Bombay District Municipal Act is substantially similar to Section 43 of the B Class Municipalities Act of Baroda. Under both the sections the power to levy octroi duty conferred upon the Municipalities thereunder is made subject to the sanction of the State Government. But as I have already pointed out the order in question is an order giving exemption from a tax leviable u/s 43 of the Baroda Act. If at all there is a similarity it would be between Section 59 of the Bombay District Municipal Act and Section 43 of the B Class Municipalities Act of Baroda. Therefore it would be between Section 43 of the Baroda Act which would be a provision corresponding to Section 59 of the Bombay District Municipal Act and it would be that section that would stand repealed u/s 5(i)(c) of the Baroda State (Application of Laws) Order. In this connection Mr. Petal has relied upon certain other decisions. The first case that he referred to was the case of *The Municipality of Anand v. The State of Bombay* 57 Bom. L.R. 108. There the Municipality of Anand after obtaining the approval of the Government of Bombay to the rules and by-laws framed by it u/s 60 of the Bombay District Municipal Act imposed octroi duty of four annas per maund of milk brought for consumption use and sale within the municipal limits of Anand. A part of the milk brought within the municipal limits of Anand was brought by societies which supplied it to the Kaira District Milk Producers Union Anand. The Union processed it and then supplied it to the State Government for selling it in Bombay. The State of Bombay passed on April 4 1955 an order directing that no octroi shall be leviable on the milk imported within the limits of the Anand Municipality for consumption use and sale therein. The Municipality filed an application to the High Court under Articles 226 and 227 of the Constitution of India for a declaration that the order passed by the State was illegal and ultra vires the powers of the State. It was held that the order was valid and one which could be issued u/s 59. Reliance was placed in this decision on an earlier decision in *Vijapur Municipality v. State of Bombay* 56 Bom. L.R. 131 where it was held that the levying of a tax was a continuous process and that every time the tax was levied the State Government could say that it would withhold its sanction to the levying of the octroi in respect of either an individual or a class of persons or goods. The opening words of Section 59 of the Bombay District Municipal Act 1901 were considered in *Vijapur Municipality v. State of Bombay* 56 Bom. L.R. 131. A distinction was there made between the power to levy a tax and the power to collect it. It was there held that the State Government had no power to interfere with the collection of such a tax but as regards the power to impose or levy the tax the learned Judges who decided it observed that two constructions on the opening words of Section 59 were possible. One was that the general or special power must be one existing at the time when the power to impose a tax has been conferred upon the Municipality and therefore Government cannot pass a general or a special order once the power to impose the tax was conferred upon the Municipality. The High

Court however rejected that construction and preferred another construction and that was that the power to impose a tax conferred by Section 59 was capable of being displaced by any general or special order which the State Government may issue and as the power to impose is a continuing power that power may be taken away or controlled or limited by any general or special order. Therefore the power to control the imposing of a tax need not necessarily be exercised only at the time when the power is originally conferred upon the Municipality. It can be exercised so long as the power to impose the tax exists Relying upon this decision it was argued by Mr. Patel that Section 59 is a section corresponding to Section 43 of the Baroda B Class Municipalities At That Act having been extended to the former Baroda territories the B Class Municipalities Act of Baroda must be treated as having been repealed by virtue of the provisions of Section 5(i)(c) and (iii) of the Baroda State (Application of Laws) Order 1949.

9. That may be correct but the difficulty in accepting the contention of Mr. Patel is that it is not possible to hold that the order in question is one u/s 43 of the B Class Municipalities Act of Baroda. In the first place it is an order passed in 1935 long before the lands on which the plaintiff Mills are situate were brought within the limits of the Kadi Municipality In other words the order was not made at the time when the power to levy Octroi duty on goods brought into this land was conferred. Section 59 of the Bombay District Municipal Act and Section 43 of the B Class Municipalities Act of Baroda apply only to an order general or special of the State Government when it is passed either at the time of the conferment of that power upon the Municipality or at a date subsequent to the date of that conferment but not prior to such conferment. In the second place the order in question cannot be said to be one u/s 43 of the Baroda Act nor can it be one which can possibly be passed by the State of Bombay u/s 59 of the Bombay Act because it is one which does not deal with octroi only but with several other things such as Income Tax Super-tax land acquisition etc. The order by no means is a severable order from which the exemption as to octroi can be separated and brought within the purview of Section 43 of the Baroda Act. The order in question was therefore not an order u/s 43 of the Baroda Act. Even if therefore the B Class Municipalities Act of Baroda was to be considered as repealed the order in question not being under that Act cannot be said to have been repealed. The decisions relied upon by Mr. Patel in this view are not applicable. At the most it may be said that on the reasoning in these cases Section 43 may be said to have been repealed but that would not and cannot mean that the order in question was repealed or must be deemed to have been repealed. As stated by the Supreme Court in *Ameer-un-Nissa Begum and Others Vs. Mahboob Begum and Others*, the order was the sovereign will of the Ruler and had the effect of law as any other law in his territories. Unless therefore the order in question was repealed by an enactment it would still exist and hold good.

10. The question then is whether the exemption granted under the order has been properly withdrawn or repealed. The order dated the 22nd of October 1952 was clearly passed u/s 74-A of the Bombay District Municipal Act as inserted in

Schedule III of the Bombay Merged State (Laws) Act 1950 by Bombay Act No. XII of 1952. If one looks at Section 74-A of that Act it is clear that that section deals with the A Class Municipalities Act of Baroda an Act quite different from the B Class Municipalities Act of Baroda. There were prior to 1947 two classes of Municipalities in Baroda called Class A and Class B Municipalities and in respect of each of them there was a separate statute enacted by the Ruler If at all an exemption could be taken away under or by virtue of Section 74-A it could be the one granted under or in respect of the A Class Municipalities Act of Baroda and not the B Class Municipalities Act. At all material times Kadi Municipality was a B Class Municipality and was governed by the B Class Municipalities Act of Baroda and an order passed in exercise of the powers conferred by Section 74-A of the Bombay District Municipal Act 1901 cannot thus take away or withdraw the concession or exemption granted under the B Class Municipalities Act even assuming that the order was u/s 43 of that Act. It is obvious that even the order Exhibit 26 dated the 22nd of October 1952 was passed no one took the trouble of ascertaining whether Section 74-A would apply to the Kadi Municipality which as 1 have said was a B Class Municipality governed by the B Class Municipalities Act of Baroda. Bombay Act No. XII of 1952 deals with a concession granted under the A Class Municipalities Act of Baroda only. The order Exhibit 26 which purported to withdraw the exemption in question was clearly beyond the scope of Section 74-A of the Bombay District Municipal Act.

11. Realising that it had made an error in issuing the order Exhibit 26 the State Government passed another order Exhibit 29 dated July 14 1953 The order does not set out under what enactment or statute it is passed or under what power it is passed. In other words it does not mention under what provisions the Government derived its authority to pass such an order. Now there is and can be no doubt that the plaintiff-company was enjoying the exemption or concession given to it under lawful authority. That is not in dispute. It is clear that such an exemption cannot be taken away or abolished or withdrawn by a mere executive act. If it is to be withdrawn or taken away the State Government can do so only in pursuance of power given to it by some legislative provision. The fact that the Legislature had to bring into the Statute Book Section 74-A by means of Bombay Act No. XII of 1952 shows that it was clear to the mind of the State Government that in order to abolish the exemption granted under the A Class Municipalities Act of Baroda legislative provision was necessary conferring power to the State Government to withdraw such concession or exemption. If an exemption granted under the B Class Municipalities Act assuming that the order Exhibit 22 was under that Act was to be withdrawn it was necessary for the State Government to obtain such power under some legislation and to pass an order similar to Exhibit 29. That not having been done the order Exhibit 29 was bad and without jurisdiction. The order did not validly authorise the President of the Kadi Municipality to levy and collect octroi from the plaintiff-company. The plaintiff-company was therefore entitled to the enjoyment of the exemption or concession until it was validly withdrawn or abolished. That beings so the plaintiff-company

was entitled to an order of refund of the octroi which it had paid under protest.

12. Over and above the contentions raised by the Municipality in the other two appeals the Municipality raised two new contentions. One was that on account of supersession of the Municipality the funds belonging to the Municipality vested in the State Government and therefore the suit ought to have been filed against the State. It also contended that a notice u/s 80 of the Code of Civil Procedure was necessary and that not having been given the suit was not maintainable. It appears that the plaintiff-company applied for amendment of its plaint under Ex. 60 and on liberty having been given to it the plaint was amended describing the Kadi Municipality as superseded and represented by the administrator. The learned District Judge inter alia raised two issues viz. whether the State of Bombay was a necessary party to the suit and whether notice u/s 80 of the CPC was necessary and if so what would be the effect of the want of notice on the suit. He held that the State of Bombay was a necessary party and consequently a notice u/s 80 of the CPC was necessary and that notice not having been given he allowed the appeal and dismissed the plaintiff-company's suit. In paragraph 13 of his judgment the learned District Judge has observed; Since the Municipality was superseded it was not in existence and therefore the administrator could not represent a superseded Municipality. In effect therefore the suit is filed against the administrator of the Kadi Municipality. The question is whether such a suit against the administrator alone is maintainable and whether notice u/s 80 of the CPC is necessary. After considering Section 179 of the Bombay District Municipal Act he held that there would be no effective Municipality in existence that all the property of the Municipality would vest in the State; that the Government would be the owner of the property and as the plaintiff-company was seeking to recover the amount of its claim from the administrator it was in effect seeking a relief from the property owned by Government. He also held that the administrator was merely a Government officer pursuing certain duties on behalf of Government and since the owner of the Municipal property was Government and no one else it was the State of Bombay against whom the suit ought to have been filed. On this reasoning he also held that notice u/s 80 of the CPC was necessary and that the failure to give such a notice was fatal to the suit. Accordingly he dismissed the suit.

13. Section 179 of the Bombay District Municipal Act gives power to the State Government to supersede a Municipality in case of incompetence default or abuse of powers. The consequences that ensue upon such supersession are to be found in Sub-clause (3) of that section. These consequences are that all the councillors have to vacate their office from the date of the order and all powers and duties of the Municipality are to be exercised and performed by such person or persons as the commissioner from time to time appoints in that behalf and all property of the Municipality vests in the State Government. The question is what is the effect of supersession of a Municipality? u/s 9 of the Act a Municipality is a body corporate and has perpetual succession and common seal and can therefore sue and be sued in its corporate name. Section 10 provides that every such

Municipality shall consist of elected councillors and all these elected councillors unless the Municipality is superseded carry on the affairs of the Municipality. Since u/s 9 the Municipality is a body corporate having perpetual succession until such Municipality is abolished the only effect of the order of supersession would be that the Municipality would become dormant though it would still remain in existence and secondly that though under the Act its affairs have to be transacted by elected councillors they would be transacted by an administrator appointed by the Commissioner under Sub-clause (3) of Section 179. The effect of such supersession came to be considered in *Ahmedabad v. Mulchand* 47 Bom. L.R. 876. Though it was a case of supersession under Rule 38(2) of the Defence of India Rules 1939 the principle there applied would be equally applicable in the case of a District Municipality superseded u/s 179 of the District Municipal Act. Like Section 179 Rule 38(2) of the Defence of India Rules provided that when an order of supersession was made under Sub-rule (i) thereof all the members of the local authority shall as from the date of supersession vacate their offices as such members and all the powers and duties which may by or under any law for the time being in force be exercised or performed by or on behalf of the local authority.....be exercised and performed by such person or persons as the Provincial Government may direct. The rule also provided that all property vested in the local authority shall until the local authority is reconstituted vest in the Provincial Government. In that case the suit was filed by the Municipal Borough of Ahmedabad against its contractor Mulchand to recover certain damages for loss caused by his negligence. While that suit was pending the Government of Bombay in exercise of its powers under Rule 38(2) of the Defence of India Rules issued a notification superseding the Ahmedabad Municipality and appointed the Collector of Ahmedabad to exercise all powers and duties of the Municipality under Clause (b) of Sub-rule (2). Thereafter an administrator was appointed and he took over charge from the Collector. On his application he was added as plaintiff No. 2. But on an objection raised by the defendant the trial Court held that the Government of Bombay was a necessary party and declined to proceed with the suit until the Government of Bombay was added as a defendant. On appeal to the High Court it was held that the administrator appointed by the Provincial Government under Rule 38-B corresponding to Section 219 of the Bombay Municipal Boroughs Act 1925 was entitled to continue a civil suit filed by the Municipality and the Government of the Province was not a necessary party to such a suit. The learned Judges who decided the appeal observed that an administrator sufficiently represented the superseded Municipality and any liability arising out of proceedings to which he was a party would have to be met out of the Municipal funds. They also observed that even if the funds of the Municipality vested in the Government of Bombay the Government would be liable to pay expenses of any civil proceeding prosecuted or defended by the administrator although the Government was not a party to the proceeding. Similarly in *Administrator Lahore Municipality v. Daulatram Kapoor* AIR 1942 F.C. 14 it was held that an administrator appointed in the case of a Municipality which is superseded can sue in the name of the Municipality. The case was converse to

the contention raised before me by Mr. Patel. It was there argued that though the Municipality was superseded and had become dormant thereby still it would be the Municipality alone who can sue or be sued. Their Lordships of the Federal Court negated that contention and held that during the period when the order of supersession was in force all the members of the Municipality vacated their seats and the powers and duties of the Committee were to be exercised and performed by the administrator. Consequently in case of supersession of a Municipal Committee by an administrator it was not necessary for the administrator to take proceedings in the name of the dormant corporation. The person competent to take proceedings was the administrator and he could do so himself. They also held that even if the true view were that he should take proceedings in the name of the committee the defect was one of a formal character which could be cured by amendment.

14. I am afraid that this decision of the Federal Court was not properly appreciated by the learned District Judge. As I have said that was a converse case to the one before me and where it was argued that it was the Municipal Committee alone and not the administrator who could file the suit. That contention was replied to by the observation that it was not the Municipal committee alone but also the administrator who could file such a suit. The proper frame in such a suit would be: X.Y.Z. Municipality by the Administrator A.B.C. The same point also was raised in Municipal Committee Vs. Ramkaran Ganeshilal, where it was held that the supersession of a Municipality and the vesting of its property in the State are only to tighten more closely the Governments control but they do not so transform it into a Government Department as to necessitate in a suit against it a notice to the Government u/s 80 of the Code of Civil Procedure. The learned District Judge seems to have been impressed with the fact that on such supersession the funds of the Municipality became vested in the State Government. He was however in error when he held that these funds vested absolutely in the State Government or that the State Government became the owner thereof. It is true that Section 179 of the Bombay District Municipal Act uses the word vest but that word has not a fixed connotation. It does not mean in all cases that the property is owned by a person in whom it vests. Such property may vest in title or it may vest in possession or it may vest in a limited sense depending upon the context in which such vesting takes place. The word vest is therefore a word of variable import. For instance u/s 56 of the Provincial Insolvency Act the property of an insolvent vests in his receiver for the purposes of administering his estate for the payment of his debts. In such a case the property of the insolvent vests in the receiver not for all purposes but only for the purposes of the Insolvency Act and the receiver has no interest of his own in the property. On an order of supersession having been passed against the Municipality when the funds of the Municipality vest in the Government holds these funds as a trustee of the Municipality and not as an owner. If therefore an order is passed to refund all overpaid taxes against the Municipality or the administrator the decretal amount has to be paid by the administrator as

representing the Municipality from the funds held by the Government during the period of supersession. The learned District Judge was therefore in error in holding that the State of Bombay was a necessary party by reason of the Municipal funds having vested in the State Government. Consequently he was also in error when he felt that a notice u/s 80 of the CPC was necessary and that the notice not having been given that failure was to the suit. In my view the order of dismissal passed by the learned District Judge is incorrect and must be set aside.

15. The cross objections filed by the Kadi Municipality are on the same lines as the contentions raised by Mr. Patel on behalf of the Municipality in the other two appeals. Since I have held that these contentions cannot be sustained it is not necessary again to deal with them. The cross objections are therefore dismissed. The appeal filed by the plaintiff company is allowed and order of dismissal of the suit passed by the learned trial Judge is set aside except that interest awarded by him on the amount to be refunded should be at 4% instead of 6%. The Municipality will pay the costs of this appeal also of the cross objections to the plaintiff company.