

(1961) 10 BOM CK 0009
In the Bombay High Court
Case No : Second Appeal No. 997 of 1956

Municipal Committee

APPELLANT

Vs

The Savatram Ramprasad Mills Co., Ltd.

RESPONDENT

Date of Decision : 24-10-1961

Acts Referred:

Constitution of India, 1950 — Article 14, 19

Citation : (1962) 64 BOMLR 287

Hon'ble Judges : Abhyankar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Abhyankar, J.—This appeal is filed by the Municipal Committee, Akola. The appellant was originally the defendant in the two suits separately brought by each of the respondents. Respondent No. 1, the Sawatram Ramprasad Mills is a textile mill at Akola. It had filed civil suit No. 29B of 1955 and the relief claimed was for refund of a sum of Rs. 1,440-13-0 paid by the mill to the appellant-committee by way of licence fee for the year 1952-53. The mill also claimed a declaration that the byelaws framed by the municipal committee u/s 179(1)(1) of the C.P. and Berar Municipalities Act charging a fee at the rate of 0-3-0 per one thousand gallons of water from the Morna river taken by the mill through its pipe line were ultra vires of the committee. The plaintiff succeeded and the committee filed civil appeal No. 12B of 1956 in the District Court against the decision of the trial Court.

2. Respondent No. 2, the Oudh Sugar Mills, Bombay, are the owners of the hydrogenating plant going by the name of the Berar Oil Industries at Akola. Respondent No. 2 filed civil suit No. 30-B of 1955 against the municipal committee. Respondent No. 2 had paid a sum of Rs. 2,930-11-0 by way of water charges for the year 1952-53 under protest. They filed a suit for the refund of that amount on the ground that they were not liable for any such water charge and also for a declaration that the byelaws made by the municipal committee u/s

179(1)(1) were ultra vires of the committee. This suit was also decreed and against that judgment and decree the appellant-committee filed civil appeal No. 13B of 1956.

3. Both these appeals in the District Court, namely, civil appeals Nos. 12-B of 1956 and 13-B of 1956, were consolidated by the District Judge and he heard and disposed them of by a common judgment which was delivered on July 26, 1956, in Transfer Civil Appeal No. 12-B of 1956. By this judgment, the learned District Judge confirmed the decrees of the trial Court in both the suits. Against this judgment the municipal committee, Akola, has filed this appeal against both the original plaintiffs in their respective suits. As there is only one appeal this judgment will finally dispose of the litigation against the appellant commenced by both the respondents.

4. A municipal committee was established for the town of Akola by a notification as far back as February 10, 1887. The municipal committee was established under the provisions of what was then known as the Berar Municipal Law of 1886. The municipal committee was governed by the provisions of the Berar Municipal Law till the G.P. and Berar Municipalities Act, 1922, was made applicable to the municipalities in Berar from February 15, 1924, by a notification dated February 2, 1924. From this date, the C.P. and Berar Municipalities Act, 1922, governed the municipalities in Berar and also the appellant-committee at Akola.

5. Under the Berar Municipal Law of 1886, a municipal committee in Berar was empowered to make rules u/s 116(1)(h)

for supervision and regulation of public wells, tanks, springs or other sources from which, water is or may be made available for public use.

The municipal committee, Akola, exercised this power and had framed rules for this purpose. There is a river called Morna river which flows through the boundaries of the municipal committee of Akola. Rules u/s 116(1)(h) were made and they came into force after having been duly sanctioned u/s 150 of the Berar Municipal Law of 1886, on or about November 19, 1909. A copy of these rules finds place in the Paper Book as exh. D-I at pages 4243. Under these rules, Rule 1 provided that every person intending to utilise the Morna river water by laying out pipes or by means of moats within the municipal limits shall take permission in writing from the committee for doing so. Rule 3 provided that a person intending to utilise water in the above manner will be charged for the same at the rate of anna one and pies six for one thousand gallons per year. The quantity of water which is likely to be taken per year shall be determined by the committee possibly in advance for every year. There were subsequent amendments to these rules in 1912. By the amended rules, Rule 3 required a licence to be issued on payment of a fee to be fixed by the committee and this licence fee was to be calculated at the rate of one anna six pies for every thousand gallons of water which according to the committee's estimate was

likely to be used by the applicant.

6. After the Central Provinces and Berar Municipalities Act, 1922, was made applicable to the municipal town of Akola, the municipal committee in supersession of the rules sanctioned in 1912 framed byelaws purporting to exercise their power u/s 179(1)(i) of the C.P. and Berar Municipalities Act. Now, Section 179 (1)(1) of the Act provides as follows:

179. (1) In addition to any power specially conferred by this Act, the committee may make byelaws...

(1) for the supervision, regulation and protection from pollution of public cisterns, water-standards, wells, tanks, springs and other sources from which water is or may be made available; and, where water is supplied from a public source to any private premises, for regulating and controlling such supply...

A municipal committee is empowered to make bye-laws u/s 178 of the Municipalities Act; hereafter reference to the Municipalities Act will mean reference to the C.P. and Berar Municipalities Act, 1922. The bye-laws are subject to confirmation by the Provincial Government and subject to the previous publication in the manner prescribed by the rules. The committee made bye-laws which were sanctioned by the Provincial Government and were notified as having come into force from April 1, 1945. Exhibit D-3 at pages 45 to 47 of the Paper Book contain all these bye-laws made in 1944.

7. The bye-laws which are necessary for the purpose of this appeal are as follows:

(1)(i) No person shall use the Morna river water by laying out pipes within the municipal limits of Akola, without obtaining a licence from the Municipal committee (hereafter referred to as "the committee").

(ii) The Secretary of the municipal committee may on the application of any person grant to him a licence or renew a licence granted to him. A licence fee shall be charged for the grant of or renewal of licence on the basis of the actual quantity of water consumed.

(iii) A licence granted or renewed under byelaw 1 shall expire on the 31st March following the date of its grant or renewal.

(2) Notwithstanding anything contained in bye-law 1, the committee may revoke or cancel the licence granted or renewed under that bye-law Without assigning any reason therefor.

(3) The licence fee referred to in bye-law 1 shall be calculated at the rate of three annas per thousand gallons of water consumed.

(4)(i) In case of Mill or factory using water for other purposes than for generating power, or gas engines or similar other machines, a meter shall be fixed at the cost of the committee and the person on whose pipe a meter has been fixed by the committee shall in addition to rate otherwise payable for the

use of water, pay the rate for the cost of providing and maintaining meter, as provided for in rule (4) of the rules regarding the levy of general and special water rates (including meter rate) published under Local Self Government Department Notification No. 5711-1915-M-VHI, No. 5711-1915-M-VUI, dated 12th Oct. 1931.

(ii) In case of a Mill using water for generating power the owner of the Mill may fix a meter at his own cost for measuring the quantity of water consumed. Where no meter is fixed, the committee shall arrive at the quantity of water consumed on the following basis:

No. of Lbs of C.P. Coal consumed : ----- =
No. of gallons of water consumed. 10

(iii) In case of a press or a Gin worked by steam engine, the owners of the press or Gin, as the case may be, may fix a meter at his own cost for measuring the quantity of water consumed. Where no meter is fixed, the committee shall arrive at the quantity of water consumed on the following basis:

(a) 2400 gallons of water per Press per day of 12 Hrs.

(b) 10 gallons Of water per Gin per hour.

Under the bye-laws in force at the relevant time bye-law No. 3 provided that licence fee referred to in bye-law No. J. shall be calculated at the rate of three annas per thousand gallons of water consumed,

8. The scheme of these bye-laws thus was that no person was entitled to use the Morna river water by laying down pipes within the municipal limits without obtaining a licence. The person was required to apply for a licence by making an application to the committee and the Secretary was empowered to grant him a licence or renew the licence already granted. Then clause (ii) of bye-law (1) provides that the licence fee shall be charged for the grant of or renewal of licence on the basis of the actual quantity of water consumed. The meaning of this provision will come in for discussion later on. But, according to the counsel for the appellant-committee, no licence fee or fee was chargeable for mere grant of a licence to use the Morna river water by laying down pipes because no separate licence fee is provided for the licence. What is provided for is the charges on the basis of the actual quantity of water consumed though these charges are styled as licence fee.

9. The case of each of the plaintiff-respondents in the trial Court was as follows. The plaintiff-Mills used the Morna river water by means of laying down pipes within the Akola municipal limits for consumption on their premises for industrial and commercial purposes. The plaintiffs obtained a licence from the appellant-committee as required by the bye-laws of 1944 and have been paying charges or licence fee at the rate of three annas per thousand gallons-of water consumed. Respondent NQ. J Savatram Ramprasad Mills paid Rs. 1,440-13-0 for consumption of water during the year 1952-53 and respondent No. 2 the Oudh

Sugar Mills paid a sum of Rs. 2,930-11-0 for the water consumed by them during the year 1952-53. These payments were made as per bills submitted by the appellant-committee for recovery of the said amounts. According to the plaintiffs, Section 179 (1)(1) of the Municipalities Act does not empower the appellant committee to require a licence being taken. Therefore, according to the plaintiffs, the bye-laws requiring the persons who want to use the Morna river water by laying down pipes to take out licences are ultra vires of the power of the municipal committee. It is further stated that even assuming that the appellant-committee had power to require a licence being taken for the use of the Morna water in the manner indicated in the bye-laws in exercise of their power of regulation, the committee had no authority to impose pecuniary obligation or burden on the plaintiffs as a condition for the grant of such a licence or for the purpose of using the Morna water by laying down pipes. The appellant-committee could at the most recover from the plaintiffs and persons like the plaintiffs for the use of the Morna water by laying-down pipes such expenses as could be legitimately incurred by the committee for regulating and controlling the Water from the Morna river when it was to be used by the plaintiffs and persons like plaintiffs. The appellant-committee could not, however, levy any charge by way of water charge on the basis of the quantity of water consumed or used by the plaintiffs in exercise of the power of making bye-laws u/s 179(1)(1) of the Municipalities Act. When the suit was filed, the municipal committee contemplated raising the then existing water charges of 0-3-0 per one thousand gallons per year to 0-6-0 per thousand gallons per year. Notice of such intention was given and that seems to be the immediate cause which brought the plaintiffs to Court. After serving due notice on the committee, the plaintiff in each case brought their suit. As already stated, each of the plaintiffs claimed refund of the amount paid by them: as per bill received from the municipal committee in each case and also wanted a declaration that the bye-laws framed were ultra vires of the committee.

10. The appellant-committee denied the right of the plaintiffs to claim any such declaration. The committee contended that it had power to make bye-laws like the ones framed by it in 1944 and charge licence fee on the basis of actual consumption of water during the year. The appellant's further contention is that the river Morna is a public stream running through the Akola town, and that it vested in the municipal committee. As the river and its water are under the control of the committee the committee is entitled to hold it and apply that water for municipal purposes according to the Municipal law. Under the law the municipal committee is entitled to supply water from the river Morna to the public or any member of the public during the year. For this purpose, the municipal committee has erected embankments to the river for storing water at two places called the upper and lower anicuts. The committee incurs expenditure for maintaining these anicuts in proper state of repairs and has also to make suitable arrangements for the storage of water, for safeguarding the river banks and for prohibiting the river water from pollution. The responsibility for doing all

these acts rests on the committee. As the appellant-committee has to incur expenditure over these heads including expenditure for patrolling the river banks, the committee is required to impose a fee called a licence fee for the use of the water by persons laying down pipes. The water is being used by the plaintiffs who have their factories close to the river bank because they find it convenient to make use of water for non-domestic and commercial purpose. The committee having power to regulate the use of the said river water by the plaintiffs and prevent unlimited use of such water by factory owners to the prejudice of general public, the bye-laws have been made by the committee from before. First such bye laws were framed, as already stated, under the Berar Municipal Law, 1886, under which also a fee used to be charged by way of a licence but the fee really represented the charge for the water consumed by the licensee and it was not merely for the permission to draw water from the river by laying down pipes. These charges were levied for meeting the expenditure for maintaining the embankment, storage of water and protecting water from pollution and defilement. The charges are not utilised for the purpose of general revenue. The fee levied was found to be inadequate for covering the expenditure incurred for the above purposes and, therefore, the bye-laws were framed, for the first time under the provisions of Section 179(1)(1) of the Municipalities Act in 1944. There were subsequent amendments in 1945 and 1951. The appellant-committee's case is that the power to insist on the licence being taken for the use of the river water by means of laying down pipes from the river bed to the licensee's premises and to prescribe fee therefore as a charge for the quantity of water consumed is implicit in the power vested in the appellant-committee by law to regulate and control the supply of water.

11. Alternatively, the appellant-committee also pleaded that apart from the bye-laws each of the plaintiffs had entered into an agreement with the committee under which they agreed to lay down pipes and use water from the river Morna on agreeing to pay for this facility the charges mentioned in the bye-laws. Thus, there was a contractual relationship between the appellant-committee on the one hand and each of the plaintiffs on the other. The payment made by the plaintiffs on account of water charges to the committee was for actual consumption of water of which each of the plaintiffs had taken benefit.. This payment was made in pursuance of the contract entered into between the parties. As such, the plaintiffs cannot claim refund of the amount which had been paid in pursuance of the contract and which payment is actually for the benefit enjoyed by each of the plaintiffs.

12. In addition, two more contentions regarding the styling of the appellant-committee as municipal committee, Akola, and not as municipal committee of the Akola Municipality and another objection regarding the limitation for the suit were also raised in the trial Court. These two latter contentions were negatived in the first Court and were given up in the lower appellate Court and do not survive for decision now.

13. On these pleadings of the parties several issues were framed in the trial Court. The trial Court found that the bye-laws framed by the appellant-committee empowering it to require a licence and charge licence fee u/s 179(1) (1) of the Municipalities Act were ultra vires of the powers of the committee. The trial Court also negated the contention of the appellant-committee that the amount of water charge was paid by the plaintiffs on the basis of the contractual relationship. Having found that the bye-laws were ultra vires and the payment was not made as a result of the contractual liability, the trial Court decreed the plaintiffs' claim but without interest.

14. An appeal was taken from these decisions to the District Court and the appellant-committee pressed the same contentions before the District Court. The learned District Judge in an elaborate and careful judgment upheld the finding of the trial Court that the bye-laws were ultra vires of the powers of the committee. The learned Judge also held that the appellant-committee had failed to prove any contract creating contractual liability for the payment of water charge. The learned Judge also held that assuming that there was such contract, it was hit by the provisions of Section 44 of the C.P. and Berar Municipalities Act and would be unenforceable under the provisions. But as regards the power to require a licence to be taken, the learned Judge was of the view that the power to require a licence to be taken for the activity is implicit in the power to regulate or control. On this view, the learned Judge held that it may be within the powers of the municipal committee to make a bye-law requiring a licence to be taken for the use of water. But the learned Judge held that there was no express or implied power in the municipal committee to charge licensing fee even though a licence may be required to be taken. According to the learned Judge, what was charged as licensing fee or water charge was really in the nature of a tax imposed by the municipal committee having direct relation to the quantity of water consumed. Such tax could be imposed, according to the learned Judge, by exercise of the powers and following the procedure laid down in Sections 66 and 67 of the Municipalities Act. The learned Judge also negated the contention raised before him based on Section 70 of the Municipalities Act. Under that section, a municipal committee is entitled to charge a fee for the licence granted by it under the Act or for permission given by the committee for making any temporary erection or for putting up any projection or for the temporary occupation of any public street, etc. According to the learned Judge, the provisions of Section 70 of the Act were inapplicable to this case as licence was not granted under the Act, which expression, according to him, has to be confined to the express provision of the Act which permits a licence being required for a particular activity, such as, a licence provided for in Section 179(1) (c), or Section 179(1),(c-1), or Section 179(1)(g), or Section 133(1), or Section 135 to indicate a few of the provisions of the Municipalities Act expressly requiring a licence being taken. The learned Judge also found that the bye-laws actually framed by the appellant-committee were also unconstitutional and ultra vires because they were hit by Article 14 of the Constitution. Even though it is

not necessary to consider this last aspect of the matter which is not pressed before me by the learned Counsel for the plaintiffs, I am indicating the grounds on which the learned Judge of the lower appellate Court declared the bye-laws ultra vires. The learned Judge took the view that the bye-laws provided for charging a licence fee to persons making use of the Morna water by laying down pipes for commercial and industrial purposes whereas no such fee was chargeable to persons making use of the water for other purposes or by other methods. According to the learned Judge such provision in the bye-law was discriminatory and, therefore, unconstitutional. Reference also was made to Article 19 of the Constitution though no such pleas were raised in the plaint. On these findings, the learned Judge affirmed the decrees of the trial Court in both the cases.

15. The municipal committee in this appeal has strenuously contended, that the view taken regarding the powers of the committee to make bye-laws in exercise of its powers u/s 179(1)(1) is too narrow. It is urged that even though the bye-laws use the word "licence", the meaning and the content of that word have to be understood in the context of the subject. According to the appellant, a licence, as is usually understood, means a regulatory provision for regulating an activity which is otherwise unrestricted. In fact, the appellant would say that the normal use of the word licence in the context of trading, commercial, professional or other activities, permission to do which is guaranteed will have one meaning in the context of such regulation but the use of the word licence when used in the context of regulating an activity for which the bye-laws are permissible u/s 179 of the Act has a different meaning and, according to the appellant, that meaning is that such licence is nothing but permission for doing an activity and without the permission a person doing that activity has no legal right. What is urged is that under the bye-laws a licence is required to be taken by any person who wants to use the river water by means of laying down pipes over the municipal area. According to the appellant, nobody has a right as a citizen of the town to make use of the water from the Morna river without permission of the municipal committee. The municipal committee has a vested right with respect to the Morna river which passes through the municipal limits. AH the municipal committee-the argument runs-has been vested with rights over the river Morna along with its water, whether stationary or flowing, it is the municipal committee alone which can regulate the use of that water. The municipal committee has been given a right to regulate the use of water by a citizen. According to the appellant, the right to use water vests exclusively in the committee. Nobody can use the water except with the permission of the committee. The committee has power to regulate the use of this water on extensive scale by having resort to laying down pipes for conveying" water from the source to the premises of the user. The committee has power to step in and control its use both by requiring a licence to be taken and also by charging for the use of water according to the quantity consumed.

16. As a foundation for this claim the appellant committee relies on the

provisions of Section 38 of the Municipalities Act. Now, Section 38 of the Act is as follow:

38. (1) Subject to any special reservation, made or to any special conditions imposed by the State Government, all property of the nature hereinafter in this section specified and situated within the limits of the municipality shall vest in and be under the control of the committee, and with all other property which has already vested or may hereafter vest in the committee, shall be held and applied by it for the purposes of this Act, that is to say,-

(a) all public town-walls, gates, markets, slaughter-houses, manure and night-soil depots and public buildings of every description which have been constructed or are maintained out of the municipal fund;

(b) all public streams, springs and works for the supply, storage and distribution of water for public purposes, and all bridges, buildings, engines, materials and things connected therewith or appertaining thereto, and also any adjacent land (not being private property) appertaining to any public tank or well;

(c) all public sewers and drains, and all sewers, drains, culverts and water-courses in, alongside or under any street, and all works, materials and things appertaining thereto;

(d) all dust, dirt, dung, ashes, refuse, animal matter or filth, or rubbish of any kind, or dead bodies of animals, collected by the committee from the streets, houses, privies, sewers, cesspools or elsewhere, or deposited in places fixed by the committee u/s 118;

(e) all public lamps, lamp-posts and apparatus connected therewith or appertaining thereto;

(f) all land or other property transferred to the committee (by the Central Government or the State Government) or acquired by gift, purchase or otherwise for local public purposes; and

(g) all public streets, not being open spaces or lands owned by the Government, and the pavements, stones and other materials thereof, and also all trees, erections, materials, implements and things provided for such streets.

(2) The State Government may, by notification, direct that any property which has vested in the committee shall cease to be so vested, and thereupon the property specified in the notification shall cease to be so vested, and the State Government may pass such order as it thinks fit regarding the disposal and management of such property.

(3) Where any immovable property is transferred, otherwise than by sale, by the State Government to a committee, for public purposes, it shall be deemed to be a condition of such transfer, unless specially provided to the contrary, that, should the property be at any time resumed by the Government, the compensation payable therefore shall, notwithstanding anything to the contrary

in the Land Acquisition Act, 1894, in no case exceed the amount, if any, paid to the Government for the transfer, together with the cost or the present value, whichever shall be less, of any buildings erected or other works executed on the land by the committee.

17. According to the appellant-committee under Clause (b) of Sub-section (1) of Section 38, all public streams, springs and works for the supply, storage and distribution of water for public purposes vest in the municipal committee, Akola. The Morna river is a public stream and as a public stream, the river along with its water, also vests in the municipal committee, Akola. The effect of coming into force of Section 38 of the Municipalities Act, is that the municipal committee, Akola, becomes vested with title and ownership of the Morna river and its water. It has not merely control over the Morna river and its water but also the right of ownership over the river and its water. As the owner of this property the appellant committee is entitled to regulate and control its use. Under the second part of Section 79(1)(J) of the Municipalise Act, a municipal committee is entitled to make bye-laws for regulating and controlling the supply where the water is supplied from a public source to any private premises. As the plaintiffs want supply of water from a public source like the Morna river to their premises by laying down a pipe line the committee is entitled to regulate and control such supply. As the owner of the property, namely, the river and its water, the committee is entitled to charge for such supply. If it is found that the committee is the owner of the water and is entitled to charge for the supply by way of sale price there will be no difficulty in the way of the appellant establishing vices of its action.

18. Thus the question that falls for consideration is whether the appellant has established that by reference to Section 38 of the Municipalities Act, 1922, as soon as that section was applied to the municipal committee, Akola, the appellant became the owner of the Morna river and its water. There is no doubt that Sub-section (1) of Section 38 which speaks of vesting of certain kinds of properties uses the word "vest". What has to be determined is what is the meaning that has to be given to the word vest. According to the appellant, "vest" means vest in title, vest in ownership. On the other hand, according to the respondents, Vesting of property enumerated in Sub-section (1) does not contemplate vesting in title. At the most it contemplates vesting in management or vesting in possession. According to the respondents, the word vests is used with varied meanings in different context; in one context it may mean vesting in title or ownership, in another context it may mean vesting in possession and, yet in another context, it may only mean vesting in management. My attention was invited by both parties to a decision, of their Lordships of the Supreme Court reported in *Fruit and Vegetable Merchants Union Vs. Delhi Improvement Trust*, . In that case the question involved was as to the rights of the Improvement Trust of Delhi in whom certain lands belonging to the Government were alleged to have vested. If the lands were found to have vested in ownership in the Improvement Trust, then according to the appellant in that case, the provisions

of the Rent Control Act applied. On the other hand, according to the Trust authorities, the lands did not vest nor the structure in any right of ownership in the Trust and they all along continued in the ownership of the Government to whom the lands belonged and as the property belonged to the Government! the provisions of the Rent Control Act would not apply. Their Lordships noted various meanings given to the word "vest" and their interpretation in English decisions from which passages have been quoted at pages 352 and 353. In the context of the present case reference may usefully be made to the decision reported in *Coverdale v. Charlton* (1878) Q.B.D. 104, noticed in para. 16 of the appeal and the following observations from the same (p. 116) -.

...What then is the meaning of the word "vest" in this section? The legislature might have used the expression transferred or "conveyed", but they have used the word "vest". The meaning I should like to put upon it is, that the street vests in the local board qua street; not that any soil or any right to the soil or surface vests, but that it vests qua street.

After noticing several authorities, their Lordships observed as follows in para. 19:

That the word "vest" is a word of variable import is shown by provisions of Indian statutes also. For example, S. 56 of the provincial Insolvency Act (5 of 1920) empowers the court at the time of the making of the order of adjudication or thereafter to appoint a receiver for the property of the insolvent and further provides that "such property shall thereupon vest in such receiver". The property vests in the receiver for the purpose of administering the estate of the insolvent for the payment of his debts after realising this assets. The property of the insolvent vests in the receiver not for all purposes but only for the purpose of the Insolvency Act and the receiver has no interest of his own in the property. On the other hand, Sections 16 and 17 of the Land Acquisition Act (Act I of 1894), provide that the property so acquired, Upon the happening of certain events, shall "vest absolutely in the Government free from all encumbrances". In the cases contemplated by Sections 16 and 17 the property acquired becomes the property of Government without any conditions or limitations either as to title or possession. The legislature has made it clear that the vesting of the property is not for any limited purpose or limited duration. It would thus appear that the word "Vest" has not got a fixed connotation, meaning in all cases that the property is owned by the person or the authority in whom it vests. It may vest in title, or it may vest in possession, or it may vest in a limited sense, as indicated in the context in which it may have been used in a particular piece of legislation. The provisions of the Improvement Act, particularly Sections 45 to 49 and 54 and 54A when they speak of a certain building or street or square or other land vesting in a municipality or other local body or in a trust, do not necessarily mean that ownership has passed to any of them.

19. In my judgment, these precedents furnish a guide to determine what is the meaning that is to be attributed to the word "vest" as used in Section 38 of the Municipalities Act. The words used in Section 38 are "shall vest in and be under

the control of the committee... " There is considerable force in the argument urged on behalf of the respondents that if the word "vest" is meant to indicate vesting in ownership or title, no purpose is served by using the words "be under the control of the committee" in that section. Surely, if the authority "becomes an owner of the property it is needless to state again that it will also have control over the property. Vesting contemplated, therefore, in juxtaposition to the words which follow would seem to indicate that the property enumerated in the sub-clauses vests in possession or management. In this connection Clause (f) of Sub-section (I) of Section 38 is also relevant. This clause speaks of "all land or other property transferred to the committee... or acquired by gift, purchase or otherwise for local public purposes." This clause, therefore, expressly speaks of the property acquired by transfer and accepts the modes of transfer as gift, purchase or otherwise. This would indicate that vesting of a property contemplated in Sub-section (1) of Section 38 will not include transfers of properties. Section 42 of the Municipalities Act which provides for transfers of Municipal property also would seem to indicate that there cannot be a transfer of property which vests in a municipal committee. There is another aspect of this matter which may also be considered in determining the ambit of the word "vest" appearing in Section 38(1). The property which is enumerated is to be held and applied by the committee for the purposes of this Act and Sub-section (I)(c) of Section 38 shows that besides all public sewers and drains which vest in the committee, even private sewers, drains, culverts and watercourses in, alongside or under any street also vest in the committee. By virtue of the provision of vesting in Section 38(1) the municipal committee could not claim the right of ownership over such private sewers, drains, culverts, vesting in the committee as a result of this provision in the statute and it has been uniformly held that such vesting of private sewers, drains or culverts is for the purpose of the Act and does not vest in ownership or title. Reference need only be made to the decision in *Gunendra Mohan Ghosh v. Corporation of Calcutta* I.L.R (1916) 44 Cal. 689. That was a case of a private drain vesting in the municipal committee under identical provisions of the Calcutta Municipal Act.

20. The language used in the C.P. and Berar Municipalities Act in Section 38(1) may also be contrasted with the language used in the Bombay Municipal Boroughs-Act, 1925. Under that Act in Section 63(2) a -similar provision is made regarding vesting of property. But the words used in Sub-section (2) of Section 63 of the Act are as follows:

All property of the nature specified in the clauses to this section, not being specially reserved by the State Government, shall be vested in and belong to the municipality...

Thus, the words "belong to the municipality" have been expressly used to indicate in what right the municipality gets the property and it is these words which have been interpreted to indicate that the ownership in the property as a result of vesting becomes vested in the municipality. By comparing the words of

that sub-section with the words in Section 38(1) of the C.P. and Berar Municipalities Act, it will be seen that the phrase used in the instant Act merely says "shall vest in and be under the control of the committee." These words cannot be interpreted as words indicating transfer of title or ownership in the property from the Government to the municipal committee. In my view, therefore, it is not possible to accept the contention of the appellant-committee that as a result of vesting or application of Section 38 of the C.P. and Berar Municipalities Act to the municipal committee, Akola, the appellant-committee became the owner of the Morna river and its water whether standing or flowing. It would appear also that all public streams, springs and works for the supply, storage and distribution of water which become vested in a municipal committee under Sub-section 38(1)(6) become so vested only for the purposes of management: and control and it is so expressly stated by the words, "for the supply, storage and distribution of water for public purposes". It is not possible to accept the contention of the learned Counsel for the appellant that the words "for the supply, storage and distribution of water for public purposes" should only qualify "works" and should not be read along with the previously appearing words like public streams and springs. Public streams and "springs which are vested in the municipal committee are also vested for public purposes of storage of water or for distribution of water for the public. The claim of the municipal committee, therefore, that it has become the owner of the river and its water and as owner was entitled to sell water or control or prohibit its use on private premises except on terms and conditions imposed by the committee does not appear to be tenable in law. The municipal committee does not become the owner of the property which becomes vested under the provisions of the statute. Vesting is confined to the purposes indicated in the statute and the moment that purpose ceases to be effective vesting also ceases to be effective. It is not transfer of title or ownership in the property which is effected by the application of this section to the municipal town of Akola, and to its municipal authority.

21. The next contention, therefore, that is to be considered is whether the municipal committee will still have the right u/s 179(1)(J) of the Municipalities Act to make bye-laws providing for a licence being taken and charging fee for that licence.

22. Now, Section 179(1) in its Sub-clauses from (a) to (s)(cc) enumerates different topics for which bye-laws can be made by a municipal committee. Thus bye-laws have to be made for variety of activities which have been imposed on the municipal committee either as statutory duties or optional activities. Different functions of a municipal committee are enumerated, though not exhaustively in Sections 50 and 51. The functions which are enumerated in Section 50 are styled as duties of the committee and one of the duties of the committee is providing a supply of water proper and sufficient to prevent danger to the health of the inhabitants and their domestic cattle and having such water analysed periodically. There are several other duties which can be undertaken by the municipal committee, but that is left to its discretion.

23. It is urged by the appellant that it is one of the statutory duties of a municipal committee under Clause (Ic) of Sub-section (1) of Section 50 of the Act to provide for a supply of water proper and sufficient to prevent danger to the health of the inhabitants and their domestic cattle, and it is for this purpose that, the municipal committee is empowered to make bye-laws under the provisions of Section 179(1)(I) for the supervision, regulation and protection from pollution of public cisterns, water-standards, wells etc. Apart from these general powers there is a specific power in the latter part of that clause to make bye-laws for the supply of water from a public source when water is supplied to private premises by making a provision for regulating and controlling such supply. It is urged that the power of regulation implies power to require a licence to be taken for the activity which is regulated. Here the activity to be regulated is supply of water, and though the supply of water is to be made through pipes laid by the applicants such as the plaintiffs in this case, it will still amount to supply of water from a public source to private premises and what the municipal committee has done is to make bye-laws providing for such supply and the licence merely is a requirement of prior permission for taking the supply from a public source such as the Morna river. There is some force in this argument which was recognised by the learned Judge of the lower appellate Court. But on consideration of different heads of activities or duties for which the bye-laws are permitted to be made by the municipal committee, I have come to the conclusion that the municipal committee is not entitled in the guise of regulating or controlling supply of water from a public source or making bye-laws for supervision, regulation and protection from pollution of public cisterns, water standards, wells, tanks, etc. to require a licence to be taken by a citizen for making use of such tanks, water-standards or getting supply of water from a public source. It appears that wherever an activity normally permissible is to be restricted, for the purpose of regulating that activity a licence can be properly required to be taken. Instances of such activities are to be found in the provision for licensing in cls. (e), (c-7), (g), of Sub-section (1) of Section 179 or in the substantive provisions of the Act, namely Section 133 or Section 135 where licence is statutorily required to be taken for carrying one of the activities. I fail to see how any provision for a licence being required to be taken can with propriety be made while making bye-laws for supervision, regulation and protection from pollution of public cisterns, water-standards, wells, tanks, springs and other sources from which water is or may be made available. What can be regulated is the hours during which water will be made available from those sources or quantity of water that may be taken, but it is difficult to see the propriety of a licence being required to be taken for taking water from any such public source. As regards the second part, namely, for regulation and control of supply of water where water is supplied from a public source to any private premises, here again, the propriety of a licence being required for such purpose is also not apparent. Therefore, in my judgment, even though the municipal committee has been given power to regulate and control supply of water from a public source to private premises such regulatory power would not include power

to require a licence to be taken for that purpose. A licence is generally required to be taken for an activity which is not an activity carried on by every citizen, for instance a broker or a person who carries on noxious trade and if such a person carries on a particular trade then with propriety he may be asked to take a licence. But it is difficult to see how for the privilege of taking water from a public source to any private premises which may be required by all citizens a licence can be insisted upon by the municipal committee. In my view, therefore, the authority to make bye-laws for regulating and controlling which is given in Clause (1) of Sub-section (1) of Section 179 would not include authority to require a licence being taken.

24. Even assuming, however, that the appellant is right in their contention that the power to regulate itself implies power to require a licence to be taken, the next question is whether for such licence a fee can be imposed. Now, it may be noted that though at the opening of his argument the learned Counsel for the appellant did not rely on the provisions of Section 70 of the C.P. and Berar Municipalities Act which in terms permit a municipal committee to charge .a fee for the licence, if any licence is granted by the committee under the Act, such argument was advanced in the lower appellate Court and was repelled by that Court. That Court held that the committee was entitled to charge a fee for the licence if any such licence was granted under the provisions of the Act, which the learned Judge meant that a fee for a licence can only be charged if a licence can be required to be taken by the express provisions in the Act such as Section 179(1)(c) or (c-7) or (fir), or Section 133 or Section 135, to indicate a few of the sections which speak of licences. There is no express provision in the Act authorising bye-laws to be made requiring a licence to be taken for regulating and controlling supply of water from a public source to private premises. The words "under this Act" used in Section 70, therefore, would not cover cases of licence which are referable to the implied power which is claimed under the power of regulating and controlling an activity. That would seem to have reference only to the express power of licensing provided in the Act. As I have said reliance was not placed on this section in the main argument addressed by the learned Counsel for the appellant, learned Counsel for the respondents had no chance to reply to any such, submission. I have made reference to this fact because this argument was noticed in the judgment of the lower appellate Court. Mr. Chandurkar wanted to raise this question in reply and I had declined to allow him to do so at that stage as it would have been unfair to the respondents to permit any argument being addressed for the first time in reply. Moreover, in my opinion, no such claim could be validly made in this case inasmuch as, the licence for which a bye-law is made u/s 179(1)(?) is not a kind of licence which is indicated in Section 70 of the Act.

25. It is, however, contended for the appellant that there is general power of imposing a fee if there is power to require a licence to be taken. It is urged that what is imposed in the bye-laws of the municipal committee is merely a licence fee. There is a well-understood distinction between a fee and a tax, "though both

are pecuniary liabilities compulsorily leviable under the provisions of the statute, It is not necessary to refer to various decisions on this point and the law is well-settled in principle by their Lordships of the Supreme Court in the three decisions of that Court namely, *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, , *Mahant Sri Jagannath Ramanuj Das and Another Vs. The State of Orissa and Another*, and *Ratilal Panachand Gandhi Vs. The State of Bombay and Others*, . In order that an impost may legitimately be claimed as a fee and not a tax, it must be shown that the "burden imposed is not unduly high considering the expenses incurred by the committee or the authority for making the arrangement for the facility or service which occasioned the impost. In the instant case, it is claimed by the municipal committee that they had to incur expenses for maintenance and repairs of the two dams called anicuts so that sufficient quantity of water may be available and also to take steps by way of protecting the water from pollution and also to watch the water supply throughout the year. For this purpose they had to incur certain expenditure and it is precisely for meeting this expenditure which has been increasing in recent years that the committee contemplated increasing the amount of impost which is called water charge from 0-3-0 per one thousand gallons per year to 0-6-0 per one thousand gallons per year. Now, the municipal committee was asked particulars about these expenses and they furnished these particulars of expenses in the form of a statement which is to be found at page 33 of the Paper Book. That statement gives year-wise income from water charges and expenditure on maintenance of ani-cuts. A bare glance would show that the expenditure is far less than income. "Thus in the year in dispute, namely, 1952-53, the income from water charges was Rs. 6,640-6-0 whereas the expenditure was Rs. 1,300-1-6. Next year, the income was Rs. 6,986 and the expenditure was Rs. 902-11-3. In the year 1949-50, .year which is apparently most favourable to the appellant, the income was Rs. 4,852-4-0 and the expenditure was Rs. 1,002-6-9. It could hardly be contended with reasonable assurance that the income realised from water charges at the rate fixed by the bye-laws has any bearing or proportion to the expenditure incurred as shown by the municipal committee. When this was pointed out it was urged by the learned Counsel for the appellant that besides the figures of expenditure actually disclosed the committee has also stated that they are required to incur expenditure for supervising the doors of the anicuts at the points for safeguarding pollution of water and for this purpose expenditure is Trade from general fund. Unfortunately for the appellant they have not indicated what amount is expended on these items. The committee were the best authority which could have placed this information before the Court to enable the Court to judge whether there is any reasonable proportion maintained within the expenditure incurred and the income realised for this service. In the absence of any such material, there is no option but to go on the figures which are actually supplied and these figures which are found at page 33 of the Paper Book cannot justify the conclusion that the fee which is realised at the rate of 0-3-0 per one thousand gallons per year bears a reasonable proportion to the expenditure

incurred for maintaining the dams or anicuts and for the activity of regulating and controlling the public source of water. So, one of the tests that has to be accepted for determining whether the impost bears a reasonable proportion to the expenditure incurred for the service rendered is not satisfied "in this case. Similarly, the municipal committee has admittedly appropriated this income to its general fund. It is not ear-marked for maintenance or extension of service and goes towards the general fund of the committee. Even though u/s 61 of the Municipalities Act income from whatever source is put in general fund, there is no prohibition in the committee in ear-marking its income from a particular activity which is fee on this head if it is to establish its claim that what is charged is only by way of a fee and not by way of a tax. I am, therefore, satisfied that the burden that is imposed on persons like the plaintiffs under the bye-laws is not in the nature of a fee but is really a tax. This is further established by the fact that the impost is calculated at the rate of 0-3-0 per one thousand gallons per year. In effect it means that the municipal committee is selling water to the plaintiffs at the rate of 0-3-0 per thousand gallons per year. If that is the character of the deal between the plaintiffs and the municipal committee, it is difficult to see how the rate at "which these charges are calculated can still be styled as a fee. Whatever expenses are required to be incurred by the municipal committee for maintaining the dams have to be incurred by them whether water is or is not taken for commercial purposes. It is not the case of the municipal committee that they had to incur any extra expenditure because water was taken by a mechanical process through a pipe system by the plaintiffs. Admittedly, water must be taken by other sources such as by hand carts or motes. Unless, therefore, expenditure is directly related to the income that is expected to be earned by the imposition it is difficult for the municipal committee to contend that the impost is in the nature of a fee.

26. It is also urged on behalf of the respondents that the only power that is given to the municipal committee to impose financial burden is deposited in Section 66 of the Municipalities Act. Apart from Section 70 of the Act, u/s 66(1)(k) a municipal committee is entitled to charge a water rate where water is supplied by the committee. It is urged that in this case according to the municipal committee itself, what it is doing- is merely supplying water to the plaintiffs. If water is being supplied to the plaintiffs and anything is to be charged for the supply to the plaintiffs then the only manner in which charge can be imposed is by imposing a tax by following the due procedure u/s 66(1)(fe), read with Section 67 of the Municipalities Act. The power to impose a water rate is deposited in Section 66(1)(k). It is not deposited in any other section. "When there is an express provision as to the manner in which a water rate can be imposed on citizens by a municipal committee it is not permissible for the committee to make a bye-law u/s 179 to impose a water rate and call it a licensing fee. I find considerable substance in this contention of the learned Counsel for the respondents. The taxing power of a municipal committee is a delegated power. The power is really of the Legislature. The Legislature has delegated that power

in a section of the Municipal law. If such power is to be read as having vested in the municipal committee it must be found in the express power which is given by the Act and in this case in Section 66 or Section 70, In my opinion, no municipal authority or any delegated authority has legal power to impose financial burden in carrying but its public duty except in the manner and to the extent permitted by the statute which creates that authority. This power should, therefore, be referable only to the provisions of Section 66 or Section 70 of the Act. Whether it is called a licence fee or a water rate, in effect, it amounts to a water rate for the supply of water. It is not possible to accept the contention of the learned Counsel for the appellant that the supply of water which is indicated in entry (k) of Section 66(1) is the supply to the general public and that what is provided for in Section 179(1)(I) is something different even though Section 179(1)(I) in the latter part speaks of regulating and controlling of supply from a public source to any private premises. It is still supply of water by the municipal committee. Therefore, I do not think that any charge can be levied for such supply except by imposing a water rate which is a tax according to the definition in Section 3(n) of the Act by recourse to the provisions of Sections 66 and 67 of the Act. In my judgment, therefore, there is no statutory power in the municipal committee to levy either a tax or a fee or any other impost which will create a financial burden on the citizens in the guise of making bye-laws u/s 179 of the Act, unless it is a fee for a licence expressly permitted u/s 70 of the Act.

27. The learned Counsel for the appellant relied on a decision of the Nagpur High Court reported in Nagpur Kshatriycc Khatik Samaj v. Corporation of City of Nagpur [1956] Nag. 102. The judgment was delivered by the learned Chief Justice Mr. Hidayatullah, as he then was, with whom was sitting Mr. Justice Kotval of this Court. It is not necessary to reproduce all the passages on which reliance is placed by the learned Counsel. At, page 111 of the Report, the decision of the Calcutta High Court in Netram v. Chairman, R. Municipality (1955) 59 C.W.N. 872 and several deductions that have been made indicating criteria to decide whether the impost is a tax or a fee are reproduced with approval, I can do no better than respectfully refer to that decision and also the decision of the Supreme Court already referred to above by me. Applying the test given in those decisions I have come to the conclusion that the so-called water charge or licence fee, that is imposed by the bye-laws made by the municipal committee is really a tax or a water rate for the supply of water and the municipal committee was not authorised to impose such a charge except by imposing a tax after following the procedure laid down in Sections 66 and 67 of the Act. That not having been done, there is no liability on the plaintiffs to pay anything because the bye-laws provide such payment for the supply of water.

28. The appellant has an alternative defence to the case and that defence is that both the plaintiffs having entered into an agreement with the appellant-committee under which they asked for the supply of water had agreed to pay charges fixed by the bye-laws and having actually been supplied with water cannot now go back on that agreement and claim refund of the amount. In

support of this part, of the case, the appellant-committee filed documents only in the suit filed by the Oudh Sugar Mills. The committee did not file any documents from which the alleged contract could be spelt out in the suit filed by the Sawatram Ramprasad Mills. No evidence was led on either side and the case went to trial only on the documents filed by both the parties. Both the Courts below have come to the conclusion in respect of this contention with regard to the Oudh Sugar Mills suit that the appellant-committee has failed to establish the contract. The learned Judge of the lower appellate Court has also referred to the fact that no concluded agreement as such had been entered into between the parties and in the absence of such a document the appellant-committee cannot be said to have established its case of contractual liability. This finding is challenged before me by the learned Counsel for the appellant-committee on the ground that the agreement was arrived at as a result of the correspondence between the Oudh Sugar Mills and the appellant-committee. The correspondence has been placed on record and if it could be shown from the correspondence that there was an agreement between the parties then its contention based on the contractual liability should be accepted. It is further contended that the contract is of a kind which is not required to be in writing or after following the procedure as laid down in Section 44 of the Municipalities Act. According to the appellant-committee this is not an agreement with respect to immovable property at all. The contract is regarding the purchase of movable property, namely water. As the contract is with respect to a movable property it is not necessary that it should be in writing or that the procedure u/s 44 should be followed. It is also contended that the failure to follow the necessary procedure would not result in barring the municipal committee from pleading or proving the contract or resisting the suit on the basis of such a contract. The learned Counsel has referred to a decision of this Court, in *Vithal Narayan Musale v. Municipal Commissioner, City of Nagpur Corporation, Nagpur* (1961) Special Civil Application No. 54 of 1961, decided by Kotval and Chitale JJ., on March 18, 1961 (Unrep.). In that case, an agreement alleged to be entered into between the Nagpur Corporation and another person was the subject of consideration and it was held while interpreting Sub-section (2) of Section 44 of the Act that such a provision does not make an agreement or contract void or unenforceable but only creates a disability in one of the contracting parties in enforcing the contract against the committee. In my opinion, it is not necessary to decide this question as I have come to the conclusion that the contract is not with respect to the sale of a movable, I have already held that the bye-laws provided for permission to the licensee to take water. Under the bye-laws the only part or the activity that the municipal committee plays is of maintaining the anicuts or dams and preventing water being polluted. Beyond doing these duties the municipal committee does not take any overt steps to supply water in the sense that it stores water and makes it available to its users. In effect, therefore, what the municipal committee permits as a result of the bye-laws is to allow persons like the plaintiffs to take water from the Morna river and what is guaranteed on issue of a licence on payment of a fee is the right to take water. In my view, the right

to take water is not the right with respect to a movable property. It is the right with respect to immovable property and in that aspect of the case the agreement or contract entered into between the parties as alleged by the plaintiffs will not amount to an agreement with respect to sale or purchase of movable property. The learned Counsel for the appellant referred to two English decisions to show that water can be treated as an article or movable property. It is possible to take that view in the context of the provisions of some statutes but, in my opinion, on a proper construction of the bye-laws made by the municipal committee what the bye-laws provide for is the right to take water and not to supply of water from the depository. In fact, water is drawn from the river by a pumping arrangement and the machinery set up by the persons like the plaintiffs. It is they who set up pumping station, lay down. pipes and take water from the river to their premises. The municipal committee enters into picture at the initial stage when permission is sought to do these filings and also when it expects to be paid for the actual water taken by the consumers at a fixed rate. It, therefore, cannot be said that in the instant case the municipal committee supplied water as such. If the municipal committee were to supply water in the sense that it sold water, then we would expect the municipal committee to make its arrangements to pump water, store it and. then make it available through the deposit or the storage tank in fixed quantities. In fact, water is taken from running stream which is a river in this case. As I have already rejected the contention of the appellant-committee that running water or stationary water vests in the committee in the right of ownership, it also cannot, be said that the committee is selling that water from the river bed or stream.

29. The appellant has relied on three documents in this case which according to them establish the contract between the parties. These documents are exh. D-5, which is a letter from respondent No. 2 to the Secretary, Municipal Committee, Akola, seeking permission to take water from some point in the river and also to lay down a pipe line. The reply sent by the President under exh, D-6 to this letter contains a significant statement, it is stated that there will be no objection to the company taking water from the bed of the river where-ever water is available as per existing rules and on payment of usual charges. Then the correspondence ultimately ends up by a resolution passed first by the Nazul Sub Committee and later confirmed by the General Committee. This-resolution finds place in exh. D-14 and is at record page 63, Now, what is it that the plaintiff wanted to be done in this case as a result of this correspondence? In my opinion, the appellant-committee has failed to establish that either the quantity of water to be taken or the rate charged had been fixed as a result of the agreement. What has been agreed upon after negotiations is-the area over which the pipe line has to be laid and perhaps the size of the pipe. The Nazul authorities also enter into the picture because part of the area over which pipes had to be laid belonged to the Nazul authorities. Therefore, the only matter on which negotiations were entered into and finalised between the parties was regarding the permission to lay down pipes. There was no negotiation as regards the quantity of water or the rate at

which the supply was to" be charged. It, therefore, cannot be said that the liability of the plaintiffs has arisen as a result of a contract. Even though the agreement was entered into between the plaintiff and the municipal committee to fix the area over which the pipes had to be laid the subject-matter of the agreement was only that and not the rate or the charges which were to be paid by one party to the other, that being already fixed by the bye-laws. It is not suggested that the municipal committee could reduce the charges ignoring the bye-laws. Thus, there was little which the municipal committee could do in the matter of fixing of charges by way of negotiations in this agreement. In my judgment, therefore, even assuming that the agreement is established between the parties, the subject of the agreement was not the supply of water at a certain rate which was agreed between the parties. The subject-matter of the agreement was the fixing of the area over which the pipe line had to be laid to facilitate supply of water. Thus, in my opinion, it is not correct to say that the liability which was fixed" was fixed as a result of the contractual obligation and not as a result of the provisions of the bye-laws. In the view I take of the agreement, it is not necessary to decide, as urged by the learned Counsel for the respondents, whether in spite of the liability being contractual, the plaintiffs would still be entitled to claim refund if it is established that there was a mistake or coercion in making the payment. I hold that the appellant-committee has failed to establish that the liability for the payment of water charges arose as a result of contractual obligations.

30. No other contentions were raised in support of this appeal. Thus, the result is that the appeal fails and is dismissed with costs. There shall be separate costs for each of the respondents.