

(1956) 07 KL CK 0008

In the High Court Of Kerala

Case No : A.S. No's. 94 to 96 of 1952 and Second Appeals No's. 155 to 161 of 1952

Municipal Council

APPELLANT

Vs

Pioneer Motors Ltd.

RESPONDENT

Date of Decision : 13-07-1956

Acts Referred:

Limitation Act, 1963 — Article 62

Travancore District Municipalities Act, 1116 — Section 13, 16, 2, 3(10), 354

Citation : (1956) 07 KL CK 0008

Hon'ble Judges : Sankaram, J;M.S. Menon, J;Kumara Pillai, J

Bench : Full Bench

Advocate : T.N. Subramonia Iyer, S. Subramonia Iyer and A. Krishna Iyer, for the Appellant; T.S. Krishnamurthy Iyer and R. Krishna Iyer, in Appeal Nos. 94, 95 and 96 of 52, S. Padmanabha Iyer in Appeal No. 155 of 52, R.N. Krishnaswami Iyer in Appeal No. 156 of 52, P. Sankaranarayana Kukiliya and S.N. Potti, in Appeal No. 157 of 52 and K.S. Neelakanta Iyer and S. Rajamony, in Appeal No. 160 of 52, for the Respondent

Judgement

M.S. Menon and Sankaran, JJ.—The Appellant in all these cases is the Municipal Council, Nagercoil, represented by its Commissioner and the only question that arises for determination is whether the conclusion of the Court below that the Council was not entitled to collect profession in pursuance of Ext. XX on the ground that the proceedings that led up to that notification were not in conformity with the requirements of Section 78 of Travancore District Municipalities Act, 1116, is sustainable or not.

If it is not sustainable the direction of the lower Court that the amounts collected by way of profession tax during the three years immediately prior to suits should be returned with interest to the assesses concerned will also have to be vacated.

2. Section 77 of the Travancore District Municipalities Act, 1116, allows Municipal Councils to levy, a profession tax and Sections 78 and 79 details the procedure that should be followed. Section 78 (omitting the last provisos which are not

material) provides: "Any resolution of a municipal council determining to levy a tax or toll shall specify the rate at which any such tax or toll shall be levied and the date from which it shall be levied:

Provided that before passing a resolution imposing a tax or toll for the first time or increasing the rate of an existing tax or toll, the council shall publish a notice in Our Government Gazette and at least in one Malayalam or Tamil newspaper having circulation in the municipality of its intention, fix a reasonable period not being less than one month for submission of objections and consider the objections, if any, received within the period specified."" and Section 79:

When a municipal council shall have determined subject to the provisions of Section 78 to levy any tax or toll for the first time or at a new rate, (he executive authority shall forthwith publish a notification in Our Government Gazette and by beat of drum specifying the rate at which, the date from which, and the period of levy, if any, for which such tax or toll shall be levied.

3. Ext. LVI (24-1-1119) is the resolution of the Municipal Council embodying its determination to levy a profession tax and specifying the rates at which the tax should be levied. It reads:

The report of the standing Taxation Committee was read. The Council resolved to levy Profession Tax at the rates specified in the schedule appended to the Taxation Committee.

(4) Ext. LVI was followed by Ext. XIX dated 11-2-1119, a notification published in the Travancore Government Gazette dated 9th Thulam 1119:

Municipal Council, Nagercoil Notification:

Under Section 78 of the District Municipalities Act XXIII of 1116, it is hereby notified for general information that at a meeting of the Council held on 24th Chingam 1119 the Council have proposed to levy the under mentioned taxes u/s 77 (b), (c) and (d) of the District Municipalities Act XXIII of 1116 at the rates specified hereunder with effect from 1st Kumbhom 1119.

Any inhabitant of the local Municipal town objecting to the proposal may submit his objection in writing to this office within 30 days of the date of publication of this notification in the Government Gazette.

Municipal Office, S. Kochukrishna Pillai, Nagercoil, 11th Kanni, 1119. Commissioner and by Ext. LV: a resolution of the Municipal Council dated 28-5-1119 "Resolved to levy Profession Tax and Vehicle Tax at the rates already published from the second half of 1119 and to publish the necessary notification u/s 79 of the D.M.A."

5. The last step in the proceedings was Ext. XX, a notification dated 4-6-1119 published in the Travancore Government Gazette dated the 12th Ma-karom 1119. That notification (omitting the rates specified) is in the following terms:

Municipal Council, Nagercoil Notice.

Under Section 79 of the District Municipalities Act XXIII of 1116, the public are hereby informed that this Council, as per its Resolution No. 1 dated 28th Miami 1119, has determined to levy (i) Profession Tax under Clause (b), (2) Tax on carriages and animals under cl (c) and (3) Tax on carts under Clause (d) of Section 77 of the Act at the rates mentioned below from the (April) 1957 Tra.-Co D.F./72nd half of 1119 that is from the 1st Kumbhom, 1119 M.E.

Municipal Office, Nagercoil, 4th Makarom 1119, S. Kochukrishna Pillai, 17th January, 1944. Commissioner.

6. According to the lower Court Ext. XIX is bad for non-compliance with the provisions of section 78, in that,

(a) it was not published by the Municipal Council but by the Municipal Commissioner;

(b) the newspaper in which the publication was made was not chosen by the Municipal Council;

(c) the time allowed for the submission of objections was not fixed by the Municipal Council; and

(d) the time allowed for the submission of objections was less than what is provided by the section; and as a result Ext. XX should be considered as of no effect.

7. As to objection (a) the fact that the notification Ext. XIX, appeared above the signature of the Municipal Commissioner may not make it any the less a notification published by the Municipal Council u/s 3 (10) of the Travancore District Municipalities Act, 1116, when a Commissioner is appointed for a Municipality he is the executive authority of that Municipality and u/s 16 of that Act one of the functions of the executive authority is to "carry into effect the resolutions of the Council."

It is true that while Section 78 speaks of a notification of the Municipal Council Section 79 provides for a notification by the executive authority. The distinction, however, seems to emphasize the source from which the notification should originate rather than the person above whose signature the notification should appear in print.

8. As to the objections (b) and (c) the lower Court proceeded on the basis of certain admissions. The admissions were denied before us and as a result we called for specific findings as to whether the Municipal Council had authorized the publication of the notification in the "Abhimani" (Ext. XXXVIII) and the Gazette (Ext. XIX) and whether the Council had fixed the period "within one month" specified in the notifications concerned.

The lower Court after taking evidence has found that the Defendant has not

proved that the Municipal Council has by any resolution or record authorized the publication of the notification in the "Abhimani" and the "Gazette" and that the period "within one month" was not fixed by any resolution of the Council.

9. What Section 78 provides is for a period of "not less than one month" for the submission of objections and what the notification directed was that they should be made "within 30 days" of the publication of the notification. Objection (d) is that the time allowed was less than what is provided by the section and hence insufficient. There can be no doubt that "within 30 days" denotes a period of time less than "one month". As stated by Stone, C. J.,-in Commissioner of Income Tax Vs. Ekbal and Co.,

With in 30 days" and "not less than 30 clays" are two quite different things." Within 30 days" is within two points of time, one at which the period begins and the other at which it expires. On the other hand, "not less than 30 days" is outside these two points of lime. There must be an interval of not less than 30 days and that means 30 days clear: sec In re Railway. Sleepers Supply Co., (1885) 29 Ch D 204 (B). The period must continue beyond the expiration of the stated time. Whereas "within" the stated period must mean what it says, something less than the moment of expiration.

10. It is evident from the above discussion that there has not been a strict compliance with the provisions" of Section 78 of the Travancore District Municipalities Act, 1116, and the main question for consideration is:

What is the result of such non-compliance? The answer will depend naturally on whether the provisions are imperative or only directory in character. As pointed out in Woodward v. Sarsons, (1875) 10 CP 733 (C), a famous case in Election Law, and approved in (1940) 8 ITR 635 (Privy Council) The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

If the provisions concerned are only directory in character there can be no doubt that there has been substantial compliance with those provisions and drat these appeals should be allowed.

11. We did not understand counsel for the Respondents as contending that there has been a lack of substantial compliance in this case. The argument was, not that there has been no substantial compliance but that the provisions are imperative, strict compliance is essential and in the absence of such Compliance, the judgment of the lower Court should be affirmed.

12. The consequences of not obeying the provisions are not prescribed in the Act and in such a case the question as to whether the provisions are imperative or directory (or in other words, whether the breach thereof involves invalidity of the action taken (or not) has to be judicially determined. In Howard v. Bodington, (1877) 2 PD 203 (E), Lord Penzance said:

I believe as far as any rule is concerned, you cannot safely go further than that

in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.

Many decisions in which Courts have held particular provisions to be mandatory or directory were cited before us but we are afraid it will not be safe to go beyond the rule laid down in *Howard v. Bodington* (E) or by Campbell, Lord Chancellor, in *Liverpool Borough Bank v. Turner*, (1860) 30 LJ Chh 379 (F), when he said that no universal rule can be laid down in the matter and that "it is the duty of Courts of justice to try to get at the real intention of the Legislature, by carefully attending to the whole scope of the statute to be construed.

13. To the same effect lire the observations of the Supreme Court in *Thakur Pratap Singh Vs. Shri Krishna Gupta and Others*, . Their Lordships said:

We do not think that is right and we deprecate this tendency towards technicality; it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter; they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with t he rules read as a whole and provided no prejudice ensues; and when the Legislature does not itself state which is which. Judges must determine the matter and, exercising a nice discrimination, sort out one class from the other along broad based, commonsense lines.

14. We have carefully considered the provisions of Section 78 in the light of the other provisions of the Act and the principles mentioned above and have come to the conclusion that they are only directory in character that substantial compliance with those provisions will be adequate and that such compliance exists in this case.

15. Sub-sections (1) and (2) of Section 371 provide as follows:

(1) No suit for damages or compensation shall, be instituted against the Municipal Council, any Municipal authority, officer or servant, or any person. acting under the direction of the same, in respect of any act done in pursuance of execution or intended execution of this Act or any rule, bye-law, regulation or order made under it or in respect of any alleged neglect or default in the execution of this Act, or any rule, bye-law, regulation or order made under it until the expiration of one month after a notice has been delivered or left at the Municipal Office or at the" place of abode of such officer, servant or person, stating the cause of action, the relief sought and the name and the place of abode of the intending Plaintiff; and the plaint shall contain a statement that such notice has been so delivered or left.

(2) Every such suit shall be commenced with in six months after the date on

which the cause of action arose or in case of continuing injury or damage during such continuance or within six months after the ceasing thereof.

and according to the learned Counsel- for the Appellants the suits are bad for lack of the notice contemplated by Sub-section (1) and are barred by limitation as they were filed beyond the period allowed by Sub-section (2). It is conceded that if Section 371 is applicable to the suits both the contentions have to be accepted and the suits dismissed.

16. Section 371 applies only to suits, for "damages or compensation" and it will be difficult to consider the present suits as coming within that description. In *The Municipal Council Vs. The Bombay Company, Ltd.*, the Madras High Court had to deal with the application of Section 350 of the Madras District Municipalities Act, 1920, wherein the same words occur and it was held that a suit for recovery of the money wrongfully collected by the Defendant Municipality in that case cannot be described as a suit for damages or compensation, that such a suit is essentially an equitable action for money had and, received and that therefore it cannot be considered as affected by the provisions of the said section.

17. Section 378 of the Travancore District Municipalities Act, 1116, reads as follows:

(1) No assessment or demand made, and no: charge imposed, under the authority of this Act shall" be impeached, or affected by reason of any clerical error or by reason of any mistake (a) in respect of name, residence, place of business or occupation of any person, or (b) in the description of any property or thing, or (c) in respect of the amount assessed, mended or charged provided that the provisions of this Act have been, in substance and effect, complied with. And no proceedings under this Act shall merely for defect in form, be quashed or set aside by any Court of Justice.

(2) No suit shall be brought in any Court to recover any sum of money collected under the authority of this Act or to recover damages on account of any assessment, or collection of money made under the said authority; provided that the provisions of this Act have been, in effect, complied with.

(3) No distraint or sale under this Act shall be deemed unlawful, nor shall any person making the same be deemed as trespasser, on account of any error, defect or want of form in the bill, notice, schedule, form, summons, notice of demand, warrant of distraint, inventory or other proceedings there to if the provisions of this Act, the rules and bye-laws have in substance and effect been complied with:

Provided that every person aggrieved by any irregularity may recover satisfaction for any special damages sustained by him.

This section also according to the Respondents cannot have any application to cases where the validity of the provision under which the tax was made is itself impeached and we did not understand the learned Counsel for the Appellants as

contending otherwise. Section 354 of the Madras District Municipalities Act, 1920, corresponds to Section 378 (2) of the Travancore District Municipalities Act, II16, and in *Bombay Co. Ltd. Vs. Municipal Council Dindigul*, (the judgment from which the appeal " dealt with in *The Municipal Council Vs. The Bombay Company, Ltd.*, arose), Beasley, J., held that:

If a Municipality levies a tax upon a person or corporation not liable to pay that tax, it cannot be argued that what has been done has been done in compliance either in substance or in effect with the provisions of the Act.

18. In view of the conclusion we have expressed in para.14, viz., that Section 78 of the Travancore District Municipalities Act. 1116, is only directory in character and that there has been substantial compliance with the provisions of that section in the imposition of the tax concerned, these appeals - A.S. Nos. 94, 95 and 96 of 1952 and S. A. Nos. 155, 156, 157, 158, 159, 160 and 161 of 1952 - have to be allowed and it is unnecessary for us to express an opinion on the arguments based on Sections 371 and 378 of that enactment.

19. Judgment accordingly. The said appeals and second appeals are hereby allowed though in the circumstances with the direction that the parties shall bear their respective costs throughout.

Kumara Pillai, J.

20. In the suits which have given rise to these appeals and second appeals the Plaintiffs therein impugned the validity of the levy of Profession Tax by the Municipal Council, Nagercoil, and claimed refund of the tax alleged to have been wrongly realised from them. Three of the suits namely, the suits which have given rise to A.S. Nos. 94, 95 and 96 of 1952, were brought in the District Court, Nagercoil, and the remaining seven, namely, the suits which have given rise to S. A. Nos. 155 to 161 of 1952, were brought in the District Munsiff's Court, Nagercoil.

The suits filed in the District Court were tried together and all the evidence for them was taken in O.S. No. 40 of 1125 from which A.S. No. 96 of 1952 has arisen. The suits filed in the District Munsiff's Court were also tried together and the main evidence for all those suits was taken in O.S. No. 463 of 1121 from which S.A. No. 108 of 1982 has arisen.

All references in this judgment to exhibits and witnesses are to the exhibits and witnesses in O.S. No. 40 of 1120 unless they are expressly stated to be otherwise. The learned District Judge who tried the suits filed in the District Court and also heard the appeals from the decree in the suits filed in the District Munsiff's Court held that the levy of the tax was illegal and without jurisdiction and that the Plaintiffs were entitled to get a refund of all amounts realised from them by way of Profession Tax within three years before the date of the suits.

The claims for refund of the amounts paid more than three years before the date of the suits were held to be barred by limitation under Article 62 of the Indian

Limitation Act. The Additional District Munsiff of Nagercoil, who had tiled die suits filed in the Munsiff's Court, was also of the view that the levy of the tax was illegal and without jurisdiction and had decided those suits in the Plaintiff's favour. Thesa appeals and second appeals have been brought by the Municipal Council, Nagercoil represented by the Commissioner of the Municipality, against die decisions of the learned District Judge.

21. It is common ground that the Municipal Council has the power of taxation only by virtue of the provisions of the Travancore District Municipalities Act, XXIII of 1116; referred to hereinafter as the Act. Section 4 of the Act provides for the creation or constitution of Municipalities by the Government, and Clause (1) of Section 6 provides that every Municipality shall have a Council. Clauses (2) and (3) of Section 6 enact:

(2) The Municipal authorities charged with carrying out the provisions of the Act are, (a) a Council, (b) a Chairman, and (c) an-Executive Authority."

(3) The Council shall by the name of the Municipality be a body corporate, shall have perpetual succession and a common seal....."" Section 13 empowers the Government to appoint a Commissioner for any Municipality, and Clause (10) to Section 2 defines "Executive Authority" as meaning in the ease of a Municipality for which a Commissioner is appointed u/s 13, the Commissioner. Section 77 confers upon the Municipality powers of taxation, and Sections 78 and 79 contain the rules as to how these powers are to be exercised. The relevant portions of these sections read as follows:

Section 77:

(a) A Property Tax, (c)

(b) A Profession Tax, (d)

Section 78:

Any resolution of a Municipal Council determining to levy a tax or toll shall specify the rate at which any such tax or toll shall be levied and the date from which it shall be levied:

Provided that before passing a resolution imposing a tax or toll for the first time or increasing the rate of an existing tax or toll, the Council shall publish a notice in our Government Gazette and at least in one Malaya-lam or Tamil newspaper haying circulation in the Municipality of its intention, fix a reasonable period not being less than one month for submission or objections and consider the objections, if any, received within the period specified.....

Section 79:

When a Municipal Council shall have determined subject to the provisions of Section 78 to levy any tax or toll for the first time or at a new rate, the Executive Authority shall forth with publish a notification in our Government Gazette and by

beat of drum specifying the rate at which, the date from which, and the period of levy, if any, for which such tax or toll shall be levied."

22. The resolution which sets out for the first time the intention or determination of the Municipal Council, Nagercoil, to levy Profession Tax was passed by the Council on 24-1-1119. Ext. LVI is that resolution and it is in the following terms:

The report of the standing Taxation Committee was read. The Council resolved to levy Profession Tax at the rates specified in the Schedule appended to the Taxation Committee.

23. Thereafter a notification Ext. XIX dated 11,-2-1119 was published by the Commissioner of the Nagercoil Municipality in the Travancore Government Gazette of 9-3-1119 in the following terms:

Municipal Council, Nagercoil Notification.

Under Section 78 of the District Municipalities Act XXIII of 1116, it is hereby notified for general information that at a meeting of the Council held on 24th Chingam 1119 the Council have proposed to levy the under mentioned taxes u/s 77 (b), (c) and (d) of the Municipalities Act XXIII of 1116 at the rates specified hereunder with effect from 1st Kumbhom 1119.

Any inhabitant of the local Municipal town objecting to the proposal may submit his objection in writing to this office within 30 days of the date of publication of this notification in the Government. Gazette.

Municipal Office, Nagercoil, S. Kochukrishna Pillai, 11th Kanni 1119.
Commissioner.

24. A similar notification is also said to have been published in the Tamil newspaper "Abhimani". No issue of that newspaper containing the notification has been produced in any of these cases. Ext. XXXVIII is said to be a typed copy of the notification. A similar typed copy has been produced as Ext. II in O.S. No. 463 of 1121. After the publication of these notifications the Municipal Council passed the resolution actually imposing or levying the profession Tax on 28-5-1119. That resolution is Ext. LV and reads as follows:

Resolved to levy Profession Tax and Vehicle Tax at the rates already published from the second half of 1119 and to publish the necessary notification u/s 79 of the D. M. A.

25. This was followed by another notification dated 4th Makaram 1119/17th January, 1944, published by the Commissioner in the Government Gazette of 12th Makaram, 1119. That notification is Ex. XX and it reads as follows:

Municipal Council, Nagercoil Notice.

Under Section 79 of the District Municipalities Act XXIII of 1116, the public are hereby informed that this Council, as per its Resolution No. 1 dated 28th Dhanu 1119, has determined to levy (1) Profession Tax under Clause (b), (2) tax on

carriages and animals under Clause (c) and (3) tax on carts under Clause (d) of Section 77 of the Act at the rates mentioned below from the 2nd half of 1119, that is from the 1st Kumbhom 1119 M. E. Municipal Office, Nagercoil, S. Kochukrishna Pillai, 4th Makaram, 1119/17th Commissioner. Jan. 1944.

26. In the lower Courts the Plaintiffs impugned the validity of the levy on numerous grounds. But in this Court they confined their attack to the four grounds found in their favour by the learned District Judge and did not press the other grounds. The four grounds found by the learned District Judge in the Plaintiffs' favour and urged by them in this Court are, according to the order mentioned in Paras.15, 18 and 17 of the judgment of the District Judge:

(i) The newspaper in which the notification referred to in the second paragraph of Section 78 was published was not chosen by the Municipal Council:

(ii) the time allowed for the submission of objections as per the provision in the second paragraph of Section 78 was not fixed by the Municipal Council:

(iii) the notification referred to above was not published by the Municipal Council but by the Commissioner; and (iv) the time allowed for submission of objection, was less than that prescribed by Section 78.

27. It was urged that these were serious contraventions of the provisions of law under which alone the Municipal Council has the power of taxation and that therefore the levy of the tax was illegal and without jurisdiction.

28. These appeals came before us for hearing at first on 21-7-1955. On that occasion the Appellant's counsel represented that it was on the assumption that an admission to that effect had been made by the Defendant that the learned District Judge had found that the Municipal Council had not chosen the newspaper for publication or fixed the time mentioned in the notification for submission of objections and that as a matter of fact no such admission had been made by the Defendant.

The learned Counsel contended that the publication of the notification in the "Abhimani" and the Gazette was authorized by the Municipal Council, that such authorization would be tantamount to a selection of the newspaper by the Council itself and that the absence of a pointed plea by the Plaintiffs that the publication was defective had prejudiced the Defendant-Appellant.

After hearing both sides we considered it necessary that a specific issue should be raised in regard to this matter and finding called thereon from the District Judge after giving both parties an opportunity to adduce fresh evidence in regard to it. We accordingly framed an additional issue and remitted the cases to the District Court for a finding thereon by a short order the operative portion of which reads as follows:

After hearing both sides, we consider that for the satisfactory disposal of these appeals and second appeals we should have a finding of the District Judge on the

following issue, namely:

Has the Municipal Council authorised by any resolution or record the publication of the notification in the "Abhimani"(Ext. XXXVIII) and the Gazette (Ext. XIX); and Has the Council by any notification or record fixed the time of "within one month mentioned the Gazette notification?" This issue will be treated as a common issue arising in all the cases, and the finding thereon will be recorded by the District Judge after allowing the parties in all the cases to adduce evidence thereon and forwarded to this Court within six weeks from this date.

29. By the time records reached the District Court the learned District Judge who had tried and disposed of the suits was transferred from Nagercoil, and his successor-in-office therefore tried the new issue remitted. After taking fresh evidence produced at the new trial by the Defendant that learned Judge found both parts of this issue against the Defendant, saying ""that the Defendant has not proved that the Municipal Council has by any resolution or record authorised the publication of the notification in "Abhimani and the "Gazette" and that, the second part of the issue has "also to be answered in the negative". Against this finding also the Defendant-Appellant has filed a memorandum of objections.

30. The Plaintiffs' case is that the various conditions laid down in the proviso to Section 78 of the Act are necessary steps or preliminaries which a Municipal Council is obliged to take or follow before passing a resolution imposing a tax and that the proviso to Section 78 of the Act is therefore a mandatory provision and the violation of any of those conditions will make the levy of the tax illegal.

By proviso 1 to Section 78 of the Act the Municipal Council has been enjoined to do three things before passing the resolution imposing a tax for the first time or increasing the rate of an existing tax, and the executive authority (i.e., the Commissioner) has been enjoined by Section 79 to do another thing after the resolution imposing the tax is passed by the Council in accordance with the provisions of Section 78. The three things the Municipal Council has to do before passing the resolution imposing the tax are:

- (i) The Council has to publish a notice in the Gazette and at least in one Malayalam or Tamil newspaper having circulation in the Municipality of its intention to levy the tax;
- (ii) The Council has to fix a reasonable period not less than one month for submission of objections; and
- (iii) The Council has to consider the objections, if any, received within the period specified.

31. The Executive Authority has been enjoined by Section 79 to publish immediately after the passing of the resolution imposing the new tax a notification specifying the rate at which, the date from which, and the period of levy, if any, for which the tax is levied. The material portion of proviso 1 to Section 78 reads:

The Council shall publish" a notice in our Government Gazette and "at least" in one Malayalam or Tamil newspaper.....fix a reasonable period" not being less than one month for submission of objections" and consider the objections", if any, received within the period specified.

32. The material portion of Section 79 reads: "When a Municipal Council shall have determined subject to the provisions of Section 78 to levy any taxthe "Executive Authority shall forthwith publish a notification in our Government Gazette.....""

33. The Municipal Council and the Executive Authority are distinct and separate authorities (see Section 6(2) of the Act), and, the words underlined (here into """) by me in the extracts given above from Sections 78 and 79 would show that distinct and separate functions have been assigned by the Statute to be discharged by the Municipal Council and the Executive Authority and that there is a difference between the notice to be published, by the Municipal Council and the notification to be published by the executive Authority.

The functions enjoined by proviso 1 to Section 78 to be discharged by the Municipal Council cannot be said to be mere matters of routine but are very vital matters on the proper discharge of which depend the question of the levy of the tax itself and the rate thereof and also the just and legitimate interests of the citizens and ratepayers in the Municipality.

From the direction in the proviso that the Council shall "consider the objections, if any, received within the period specified" it is clear that the object of the publication of the notice enjoined by it is to invite objections, if any, to the proposed levy of the tax from the public who will be affected by the same.

The proviso gives the public and prospective taxpayers a valuable right to raise objections to the proposed levy and have the same considered by the Municipal Council before the tax is imposed, but this valuable right is circumscribed by the limitation that the objections should be received by the Council within the period specified in the notice. Therefore, it is essential that the notice should have adequate publicity in the Municipality and that the time specified in the notice for the submission of objections is reasonable enough for the public and the prospective tax-payers to get the notice, scrutinize the proposals and submit their objection to the Council.

Since circumstances are likely to vary from Municipality to Municipality according to size, area, population, the language of the people, literacy, etc., the Legislature has cast upon the Municipal Council the duty to decide how the functions assigned to it should be discharged, leaving it to the discretion of the Council to decide what would be adequate publicity and what would be reasonable time for the submissions of objections.

Certain minimum standards alone have been prescribed by the Statute in regard to these matters and the Statute requires that the Council should consider and

decide whether those minimum standards alone should be conformed to or more publicity and greater time should be allowed. In regard to the publication of the notice the provision is that the Council shall publish the notice at least in one Malayalam or Tamil newspaper having circulation in the Municipality.

The Council has therefore to decide whether the publication should be made in one newspaper or more and whether the publication should be made in a Malayalam newspaper or in a Tamil newspaper or in both Malayalam and Tamil newspapers. The decision in respect of this matter vitally affects the adequacy of the publicity. Likewise in regard to the time to be allowed for submission of objections the provision is that the Council shall fix a reasonable period not being less than one month. In that case also the Council has to decide whether one month would be a reasonable period for submission of objections and to fix a greater period if such greater period is considered to be reasonable and one month not sufficient in the circumstances of the particular case.

Having regard to the clear object of the proviso, namely, that the public and the prospective tax-payers should have adequate notice of the proposed levy and reasonable facilities should be given to them to submit their objections to the Municipal Council and the Municipal Council should impose the tax only after considering their objections, and having regard also to the fact that this valuable right of the public and the tax-payers to have their objections considered by the Municipal Council before the tax is imposed is circumscribed by the limitation that such objections should be raised within the periods specified in the notice the functions assigned by the proviso to be discharged by the Municipal Council appear to be of very great importance and such as cannot in their very nature be delegated by the Municipal Council to another authority.

34. Proviso 1 to Section 78 thus appears to have been enacted with a purpose and on grounds of high public policy and that purpose and policy are sure to be defeated if it is held to be not a mandatory provision and that Municipal Councils are not obliged to conform, to the same. When public policy requires the strict observance of a provision of law and the failure to observe it would prejudicially affect and infringe the rights of individuals who have no control over the person or authority enjoined by the Statute to observe the requirements of the provision, the provision in question has of necessity to be construed as mandatory and not merely directory. In the present case the language of the section also is mandatory. From the purpose and policy behind the provision and its context and language, the intention of the Legislature appears to have been that the provision was to be mandatory and not merely directory and that its requirements should be strictly observed. Regarding the test to be applied in construing similar provisions of law it is said in Halsbury's Laws of England (second edition, p. 530):

Broadly speaking, it may be said that powers conferring jurisdiction on a judicial body, provisions as to time in regard to procedure, and generally in public statutes, enacting words where the thing to be done is for the public benefit or in

advancement of public justice, must be taken to have a compulsory force. On the other hand, statutes conferring private rights, or prescribing that certain things are to be done within a certain time, time not being of the essence, or in a certain manner, or by those whose action the person invoking the aid of the Statute is unable to control, are usually directory only; and where the provisions of a Statute relate to the performance of a public duty, and the case is such that to hold null and void acts done in neglect of that duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, such provisions should be construed as being directory only and not imperative. The Courts lean against construing words as mandatory when the result would be that the common law rights of individuals would be infringed. Much will depend upon the subject matter, and it is in deciding whether a provision in a Statute is imperative or permissive that, the intention of Parliament has most strictly to be regarded.

35. To the same purport are the observations at order.376 of Maxwell's Interpretation of Statutes, tenth edition:

A strong line of distinction may be drawn between cases where the prescriptions of the Act affect the performance of a duty and where they relate to a privilege or power. Where powers, rights or immunities are granted with a direction that certain regulations, formalities or conditions shall be complied with, it seems neither unjust nor inconvenient to exact a rigorous observance of them" as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the Legislature. But when a public duty is imposed and the Statute requires that it shall be performed in a certain manner or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only in cases when injustice or inconvenience to others who have no control over those exercising the duty would result if such requirements were essential and imperative.

36. No injustice or inconvenience would be caused to any one and the rights of none would be infringed if proviso 1 to Section 78 of the Act is construed as mandatory and the requirements therein are held to be essential and imperative. On the other hand considerable injustice and inconvenience would be caused to the public and the rate-payers who have absolutely no control over the Municipal Council and their valuable rights will be infringed if the proviso is construed as directory only and the requirements are held to be not essential and imperative. In *H. N, Rishbud v. State of Delhi*, (S) AIR 1955 SC 106 (J), the Supreme Court has quoted with approval the following observations of Lord Campbell in (1861) 30 LJ Ch 379 (F):

There is no universal rule to aid in determining whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the Court to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be

construed.

(This aspect, namely, that the intention, of the Legislature should be the primary³⁷ consideration in ascertaining whether a provision of law is mandatory or only directory, has been emphasized by their Lordships in Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, and in (S) Thakur Pratap Singh Vs. Shri Krishna Gupta and Others, also In Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others, it has been said:

It is well-established that an enactment in form mandatory might in substance be directory, and that the use of the word ""shall" does not conclude the matter. The question was examined at length in *Julius v. Bishop of Oxford*, 5 (1880) ACC 214 (L), and various rules were laid down for determining when a Statute might be construed as mandatory and when as directory. They are well-known, and there is no need to repeat them. But they are all of them only aids for ascertaining the true intention of the Legislature which is the determining factor, and that must ultimately depend on the context.

And in (S) Thakur Pratap Singh Vs. Shri Krishna Gupta and Others, their Lordships have said:

it is the substance that counts and must take precedence over mere form. Some rules are vital and go to the root of the matter: they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance with the rules read as whole and provided no prejudice ensues; and when the Legislature does not itself state which is which Judges must determine the matter and, exercising nice discrimination, sort out one class from the other along broad based, common sense lines.

(38) Thus, all the authorities are agreed that in the ultimate analysis the construction must depend upon the true intention of the Legislature. The intention of the Legislature has to be ascertained from the posy and purpose behind the section and its context, "deferring particularly to Statutes conferring powers of taxation on local bodies and authorities it has been observed in *Amalner Municipality v. Pratap S. W. & Mfg. Co. Ltd.* AIR 1952 Bom 401 (M):

As Maxwell points out, "statutes which impose pecuniary burdens are subject to the rule of strict construction." Usually this rule of strict construction; is applied in cases where it is doubtful whether the taxing Act really touches the person or the subject taxed. But the same approach will have to be adopted if it is found that power is conferred iii on a local body to levy taxes on condition that the local body follows the procedure prescribed by the Act before levying such a tax. In other words, if the provisions of the Act in effect emphasise that compliance with the preliminary procedure amounts to a condition precedent before the levy of the tax, it would not be open to the local body to contend that the tax levied by it or the rule framed by it in that behalf should be benevolently construed and its failure to comply with the preliminary procedure should be condoned.

39. The same opinion has been expressed by the Patna and Madras High Courts also. In *Chairman, Dhanbad Municipality Vs. Janeswar Bhakat and Others*, it has been observed:

It is a well-settled principle of law that when the Legislature has empowered an authority to impose taxes after doing a certain act it cannot impose the taxes lest that act is done and the authority must show if challenged that the act was done. No doubt there is a presumption that the official acts were duly performed. But it is a rebuttable presumption." (40) The Madras High Court has said in *The Municipal Council Vs. The Madras and Southern Mahratta Railway Co., Ltd.*,

Taxing enactments should be strictly construed and the right to tax should be clearly established. Conditions precedent to the imposition of any tax should be strictly complied with.

41. Having regard to the above authorities and judicial observations and the considerations adverted to in paras. 6 and 7 above (here paras 30 to 40), I am of the opinion that proviso 1 to Section 78 of the Act is a mandatory provision and that to acquire, jurisdiction for imposing or levying Profession Tax the Municipal Council should strictly conform to all the requirements therein, namely, (i) the Council itself should decide in how many and which newspapers or newspaper the notice mentioned in the proviso should be published and publish such notice; (ii) the Council itself should fix the time for the submission of objections; and (iii) the time it fixes for submission of objections should not be less than one month.

42. The next question is whether Profession Tax has been imposed by the Municipal Council of Nagercoil after conforming to these mandatory requirements. The findings of the Courts below are to the effect that the Municipal Council has conformed to- none of them. Regarding these requirements what the section says is that the Council shall publish notice in the Government Gazette and at least in one Malayalam or Tamil newspaper having circulation in the Municipality and fix a reasonable period not being less than one month for submission of objections. If the Council had as a matter of fact chosen one newspaper for the publication of the notice it may be possible to contend with some justification that the Council had applied its mind to the questions whether the notice should be published in one newspaper or more and whether it should be published in a Malayalam newspaper or a Tamil newspaper, or in both. If on the other hand the Council had not even chosen any newspaper for the publication of the notice and the paper was chosen by the Executive Authority or other person it cannot legitimately be contended that the Council had applied its mind to these questions and decided them. According to the Appellant the notice under proviso 1 to Section 78 about the Council's determination to levy Profession Tax was published in the "Abhimani" which is a Tamil newspaper. But there is absolutely no evidence to show that before the publication of the notice the Council had by resolution or otherwise chosen that newspaper for the publication of the notice or authorised the publication of the notice in it or the Gazette.

There is also no evidence to show that the Council had by resolution, circulation of papers, or other proceedings fixed the period for submission of objections. Two witnesses, D. Ws. land 2 were examined after the remand. Neither of them has said that the publication in the "Abhimani" was made in pursuance of any resolution or minutes passed by the Council choosing the "Abhimani" for the publication, and no document has also been produced to prove that there was any resolution, minutes or other proceedings of the Council choosing this newspaper or authorising the publication to be made in it and the Gazette.

43. It was contended by the Appellant's counsel that the evidence adduced by the Defendant after the remand would show that subsequent to the publication of the notice in the "Abhimani" the Council had sanctioned the payment of the charges for the publication and that this sanction would constitute approval of the publication and therefore amount to a ratification by the Council of the choice of the newspaper made by the Executive Authority. I am unable to accept this contention for two reasons. In the first place, as has been pointed out in para. 6 (here paras 30 to 33) above, the duty of selecting the newspaper or newspapers for publication is not one which] can be delegated by the Council to any other person. " For the decision of the Council required by the Statute in regard to the matters pertaining to the publication and fixation of time and the decision of the Executive Authority or any other person cannot be substituted. By allowing the Executive Authority to decide these matters the Council was abdicating its functions, which under law had to be performed by the Council and the Council alone, and allowing the Executive Authority to usurp these functions. When the law does not allow the Council to delegate its powers or functions no subsequent ratification of the usurpation of such powers and functions by another authority can render the usurpation valid.

In the second place, there is no reliable evidence in this case that the sanction of the Council for payment to the "Abhimani" was in respect of the publication of the notice regarding the Profession Tax. Ext XCI is said to be the minutes of the Council meeting which sanctioned payment to the "Abhimani". The meeting was held on 11th October, 1944, and Ext. XCI shows that a sum of Rs. 20-10-0 was sanctioned" as expenditure in respect of "notification regarding enhancement of taxes in the "Abhimani" (see item 71, p. 34). It is not possible to ascertain from this entry whether the notification in question related or not to the Profession Tax also.

The item referred to as "notification regarding enhancement of taxes" and nothing is said therein about the imposition, levy or enhancement of Profession Tax. Exts. LXXXVII to EC are the other records relied upon by the Appellant's counsel to prove the sanction for the payment of the publication of the notice. As pointed out by the District Judge in the order subsequent to the remand Exts. LXXXVII and XC do not relate to this matter at all. Ext. LXXXVII is a bill for Rs. 5 from Shri D. C. Joseph, M.L.A., Editor, "The Travancore Times", (D.W. I) to the Municipal Council, Nagercoil, for "publishing some charcoal supply notice in the

"Times" dated 2-10-1943 and Ext. XC is the receipt given by D. W. 1 for the Commissioner for S. Rs. 5-2-8 "being charges for publishing the charcoal supply notice".

Ex. LXXXVIII is a bill from Shri D. C. Joseph, M. L. A. Editor The "Travancore Abhimani" for B. Rs. 15 "to publishing some tax enhancement notice in the "Abhimani" dated 1-10-1943", and Ex. UCXXIX is the receipt given by him for S. Rs. 15/7/8 "being charges for publishing a notice in the Abhi--mani with regard to enhancement of taxes". From Exs: LXXXVIII, LXXXIX and XCI it does not appear that--the publication had anything to do with the profession tax. Ex. LXXXVIII shows that the bill was for the charges in respect of a publication made in the "Abhimani" of 1-10-1943.

No issue of the "Abhimani" of that date has been produced in the case to show that as a matter of fact the notification published in the issue of 1-10-1943 was in respect of profession tax also although there is no specific reference to profession tax in Exs. LXXXVIII, LXXXIX and XCI. Ex. XCI itself does not show that the sanction for payment was in respect of any notification published in the issue of " 1-10-1943. As may be seen from Exs. LXXXVIII and LXXXIX the charges for the notification in the issue of 1-10-1943 regarding enhancement of taxes: were only (S. Rs. 15-7-8), but what was sanctioned by Ex. XCI was S. Rs. 20/10 on account of "notification regarding enhancement, of taxes in Abhimani".

Ex. II in O.S. No. 463 of 1121 and Ex. XXXVIII which are said to be typed copies of the notice published in the "Abhimani" do not show the date of .the issue of the newspaper in which the notice was published. There is thus no evidence to show that the notification to which the payment evidenced by Exts. LXXXVIII, LXXXIX and XCI related were in respect of an imposition, levy or enhancement of profession tax also. If as a matter of fact the notification referred to in Exts. LXXXVIII, LXXXIX and XCI was a notice in respect of profession tax also the Municipal Council could have easily produced, at least after the remand, a copy of the issue of the newspaper of 1-10-1943 mentioned in Ext. UCXXVII1. That the council was doing things in a most slipshod manner, without any advertence to necessary matters and relevant records and papers, is clear from the fact that whereas the bill. Ext. LXXXVIII, was only for B. Rs. 15 "to publishing some tax enhancement notice in the "Abhimani" dated 1-10-1943" what was sanctioned by Ext. XVI was S. Rs. 20/10/- for "notification regarding enhancement of taxes in "Abhimani". If the amount under Ex. LXXXVII also is added on to the amount under Ext. LXXXVIII, the total amount would be S. Rs. 20/10/-, but in that case the sanction for payment of S. Rs. 20/10/- would not be for "notification regarding enhancement of taxes in "Abhimani"" alone as stated in Ext. XCI, and the entry in Ext XCI would be incorrect and misleading.

An affidavit filed by the present Municipal , Commissioner of Nagercoil, Shri P. M. Mohammad Sali, in this Court before the remand has also been" relied upon by the Appellant's counsel in support of the case that the publication in the "Abhimani" i was made under the authorisation of the Municipal Council. The

affidavit reads as follows:

1. It is respectfully submitted that the practice for many years in the Municipal Council, Nagercoil has been for the Commissioner to take all steps to implement resolutions passed by them. Expenses if any incurred in this connection and action taken were later sanctioned and approved by the council and are entered in the Minutes in the usual course. Publications of resolution passed are effected by the Commissioner. Specific sanction of the Council for publication is usually limited to statutory bye-laws. Ever since I became Commissioner I have acted only under instructions of the Council in such matters in keeping with the practice for many years.

2. In 1119 the only Tamil Daily in the area, was the "Abhimani". The Commissioner had the notification published in these circumstances. The bill for the same was sanctioned by the Council as per Resolution No. 3 (Item No. 71j" dated 20th Thulam 1119 (Vide pages 30-34 of the Minutes).

3. The steps taken by the Commissioner for publication are seen to have been confirmed at the later meeting of the Council vide Resolution No, dated 28-5-1119 page 67" of the Minutes Book.

4. The absence of a pointed plea by the Respondent Plaintiff that the publication was defective has prejudiced the council Appellant. It is submitted that proceedings are regular. The Minutes Books are submitted herewith.

44. The resolution referred to in paragraph 3 of the affidavit is Ext. LV which is the resolution finally imposing or levying the profession tax and which has been set out in paragraph 3 above. There is nothing in that resolution confirming the steps taken by the Commissioner for publication in the "Abhimani". It was on account of the complaint in paragraph 4 of this affidavit that we remanded the case framing the additional issue and calling for finding thereon. After the remand Shri Mohammad Sali kept away from the witness box and caused the bills and resolutions referred to in paragraph 2 of the affidavit to be proved by D. Ws. 1 & 2, D. W. 1 being Shri D.G. Joseph, and D.W. 2 the head clerk of the Municipality. Neither the evidence of these witnesses nor Exs. LXXXVIII, LXXXIX or XCI for which reference has already been made would prove that the notification for which payment was sanctioned by the resolution referred to in paragraph 2 of the affidavit was in respect of the profession tax also. In paragraph 1 of the affidavit Shri Mohammed Sali says that the practice during his period of office is for the Commissioner to effect the publication of the resolutions passed by the Council and that the Commissioner takes all steps to implement the resolutions passed by the Municipal Council. Shri Kochukrishna Pillai, who was the Commissioner at the time of the publication of the notification in the "Abhimani", has not been called as a witness, and no affidavit from him has also been filed to prove whether practice was during his term of office. Granting that this was the practice then also if the practice is not sanctioned by law the fact that it was being followed previously would not render it valid when its

validity is expressly challenged. Further, I do not understand how the publication in question could be made on the strength of this practice. If the Council had passed a resolution saying that the notice should be published in the "Abhimani" and fixing a time for submission of objections, I can understand the Municipal Commissioner publishing the notification ""on behalf of the Council"" or ""by order" in the newspaper in implementation of the resolution that would be in accordance with the practice mentioned in paragraph 1 of Sri Mohammed Sali's affidavit. When the Council had not passed any resolution at all selecting the newspaper or fixing the time I fail to understand how the Commissioner could choose the ""Abhimani" and publish the notice in it. In the view that I have taken that it is obligatory on the part of the Council itself to select the newspaper and fix the time for publication and that the Council is incompetent to delegate these functions to the executive authority or any other person, it is not necessary to pursue this matter any further.

45. It was also contended by the Appellant's counsel that since the ""Abhimani" is the only Tamil daily published from Nagercoil no prejudice could have been caused to the public and the prospective tax-payers by the failure of the Council to select the newspaper. The contention or suggestion was that the "Abhimani" was the only available Tamil daily and that as a matter of fact the notice has been published in it. The ""Abhimani" might have been the only Tamil daily published from Nagercoil, but the proviso does not say that the notice was to be published in a daily only or in Tamil only. The proviso contemplates publication in either Tamil or Malayalam newspapers. Although Nagercoil is in a predominantly Tamil-speaking area, it cannot be denied that there are people in that town whose mother-tongue is Malayalam. Some newspapers which are not dailies may have more circulation than obscure dailies. There is also no requirement in the proviso restricting the choice of the newspaper to those published from Nagercoil.

If any newspaper published from outside had more circulation in Nagercoil than the ""Abhimani" there was nothing to prevent the Council from choosing that newspaper for the publication. As there is no evidence on these matters I am unable to hold that if the council had applied its mind to the selection of the newspaper or newspapers it would have selected the "Abhimani" and the "Abhimani"" alone. The statute requires in the matter of the selection of the newspaper and the fixation of the period or time for submission of objections the exercise of the discretion of the Council and not the exercise of the discretion of the executive authority or other person.

The Council being constituted mainly of elected representatives of the public and the tax-payers, was considered to be the best authority for deciding the question relating to the adequacy and vehicle of the publication of the notice and the sufficiency or reasonableness of the time to be given for submission of the objections. There can be no denial of the fact that in this case the Municipal Council has not considered and decided these matters. This may be due to some mistake or oversight on the part of the Municipal Council, or honest

misunderstanding of the law by the Council and the executive authority. But as pointed out in 26 Trav LJ 177 (P), at page 187:

The tax-payer has every right to insist!

upon a strict compliance with the provisions of the law before he can be made liable to pay the tax. Considerations as to the possible loss that may be incurred by the Municipality on this account are foreign to our present purpose; and an honest but erroneous assumption by the Municipal Council or the Government that they were acting under a particular section of the Regulation could not legalise steps which are otherwise illegal.

46. For the reasons stated above I accept as correct the finding of the learned District Judge that the remand on both parts of the additional issue framed and remitted by this Court. I hold that the Municipal Council had not chosen the newspaper for publication of the notice mentioned in proviso 1 to Section 78 or fixed, the time for submission of objections and that the Council had also not considered and decided in how many newspapers the notice was to be published and whether the publication was to be made in a Malayalam or Tamil newspaper or what was to be the reasonable time to be fixed for submission of objections.

The failure of the Municipal Council to comply with the requirements of proviso 1 to Section 78 in regard to these matters are in my opinion serious contraventions of mandatory provisions of law and render the levy of the profession tax in this case without jurisdiction and illegal.

47. The learned District Judge has found also that the notice, Exs. XIX and XXVJ11, published under proviso 1 to Section 78 was itself not published by the Council, that the time allowed in that notice for submission of objections was less than the time that had to be allowed under the proviso, and that for these reasons also the levy of the profession tax is without jurisdiction and illegal. In my opinion these findings also are unobjectionable. The notice published has been set out in paragraph 3 above.

As it was published over the name of the person holding the office of the executive authority and his official designation (S. Kochukrishna Pillai, Commissioner) the Plaintiffs contend that this notice was published by the executive authority and not by the Municipal Council, and as it was published under the title "Municipal Council, Nagercoil", the Appellant contends that it was published by the Municipal Council, and that the Commissioner had only signed it on behalf of the Council.

According to the Appellant, the source of the notification is the Municipal Council and not the executive authority above whose signature and official designation the notification appears in print. Now it cannot be disputed that the legislature has drawn a clear distinction between the notice to be published under proviso 1 to Section 78 and the notice to be published u/s 79. In proviso 1 to Section 78 it is said that "before passing a resolution imposing a tax or toll for the first time

or increasing the rate of, an existing tax the council shall publish a notice". What is said in Section 79 is that "when the Municipal Council shall have determined subject to the provisions of Section 78 to levy any tax or toll for the first time or at a new rate, the executive authority shall forthwith publish a notification. If both notices were to be of the same pattern and no difference was intended between the notice to be published by the council and the notice to be published by the executive authority, the legislature need not have taken the trouble to say in one case that the notice was to be published by the council and in the other case by the executive authority.

On account of the policy and purpose behind proviso 1 to Section 78 the publication of the notice mentioned therein is of supreme importance, and therefore the legislature has cast the duty of publishing it on the Municipal Council which is mainly composed of elected representatives. As the notice u/s 79 is comparatively of less importance the legislature has left it to the executive authority to publish it. The notice published in the present case u/s 79 is Ex. XX.

That notice also has been set out in paragraph 3" above. It too begins with the title "Municipal Council, Nagercoil and ends with the words "S. Kochukrishna Pillai, Commissioner". I fail to see how; it can be said that out of the two notices published under the same title and over the name and designation of the same person, one can be said to be a notice published by the Municipal Council and the other a notice published by the executive authority over whose designation and signature in they appear print.

If Ext. XX was a notice published by the executive authority and not the Council Ext. XIX also must be as much a notice published by the executive authority and not the Council. There was a suggestion at the time of hearing that it is highly inconvenient for the Municipal Council to publish a notice over the names and designations of the numerous municipal councillors and chairman and that therefore a notification by the municipal council must appear necessarily, or ordinarily, over the signature of either the chairman or the commissioner.

It was contended that if the Plaintiffs' present objection is upheld it would be possible to urge in both the cases mentioned above that the notification was not a notification by the Municipal Council but of the executive authority or of the chairman and "that therefore in ascertaining whether a notification was by the Municipal Council or some other authority one should look to the source from which it originated and not to the name and designation of the person over which it was published.

While I agree that it is highly inconvenient to live in a notification the names and designations of all the numerous municipal councillors and the chairman, I am of the opinion that it is not impracticable or inconvenient to indicate in the notification the source from when it originated. If above the words "S. Kochukrishna Pillai,, Commissioner" in Ext. XIX the words "By order of the Council" or "Under directions of the Council" had been added, the council would

have been clearly and easily indicated in the notice itself as the source from which it originated. The title ""The Municipal Council, Nagercoil" is no indication of the source, for it has been used both in the case of Ext. XIX which ought to have been published by the Council and in the case of Ext. XX which ought to have been published by the executive authority alone. The learned District Judge has found after the remand that the publication of Exts. XXXVIII and XIX was not authorised by the Municipal Council by any resolution or other record.

I have also found that the Municipal Council has not selected the newspaper or authorised the publication of the notice in the newspaper and the Gazette. In the circumstances I am unable to ac- 3 kept the contention that the source from which Exts. XIX and XXXVIII originated was the Municipal Council. I hold that the notice, Exts. XIX and XXXVIII, was published by the executive authority and not by the Municipal Council and that in this of respect also there has been a contravention of one of the mandatory provisions in proviso 1 to Section 78.

48. Under proviso 1 to S. 78 the period to be fixed for submission of objections is ""a reasonable period not being, less than one month". From the language of the section it is clear that the intention of the legislature was that the period to be allowed j| for submission of objections should never be less than one calendar month and that the Municipal Council should also have the discretion to allow larger time in appropriate cases.

The direction in Exts. XIX and XXXVIII regarding the time allowed for submission of objections is "any inhabitant of the local municipal town objecting to the proposal may submit his objection writing to this office within thirty days of the date of the publication of this notification in the Gazette. The Plaintiffs contention is that the period "within thirty days"" is shorter than the period "not less than one month" which has to be allowed under \\ the proviso and that as the Council was incompetent to reduce the period mentioned in the proviso there has been a serious contravention in this respect also of the mandatory provision in the proviso. In Commissioner of Income Tax Vs. Ekbal and Co., Stone, C. J., has pointed out thus the difference between the expression ""within so many days" and "not less than so many days. "In my judgment expressions "within 30 days" and "not less than 30 days" are two quite different things. "Within 30 days" is within two points time, one at which the period begins and the other at which it expires. On the other hand, "not less than 30 days" is outside these two points of There must be an interval of not less than 30 days and that means 30 days clear: see (1885) 29 Ch D 204 (B). The period must continue beyond the expiration of the stated time. "Whereas "within" the stated period must mean what it says, something less than the moment of expiration."

49. Kaniya, J., who subsequently became the \\ Chief Justice of the Supreme Court, also has said ; in that case: "It seems to be clear that when a party is called upon to act within a stated number of days he necessarily cannot get the number of days as "Clear days". A reference to the calendar shows that the month of Thulam in 1119" in which the Gazette notification was published had

thirty days.

As one clear month had to be allowed on account of the use of the expression "not less than one month" in the proviso, the period allowed in Exts. XIX and XXXVIII "of within 30 days" was undoubtedly shorter than what was required by the statute. At least thirty clear days should have been allowed in this case for sufficient compliance with the provision that not less than one month should be allowed. So it has to be held that there has been a contravention of the proviso in this respect also.

In view of the purpose and policy behind the proviso referred to in paragraphs 6 and 7 above and the fact that the right given to the public and the tax-payers to raise objections to the proposed levy and have those objections considered by the council. before the imposition of the tax is circumscribed by the limitation that the objections .should be sent to the council within the lime specified in the notice, the provision that the period should not be less than one month has of necessity to be as a mandatory provision.

I therefore agree with the learned District Judge in holding that with respect to time allowed for laic submission of objections also there has been a serious contravention of a mandatory provision of law.

50. Thus, all the" four grounds on which the learned District Judge has found that there have been serious contraventions of mandatory provisions of law in this case and that the levy of the profession tax is without jurisdiction and illegal are, in my opinion, perfectly sound and have to be upheld.

51. It was contended by the Appellant's counsel that even if the imposition of the tax was found to be illegal and without jurisdiction the suit for recovery of tax realised was not maintainable, and he relied upon Sections 371 and 378 of the Act in support of this contention. These sections have been quoted in extenso in the judgment of my learned brother, M.S. Menon, J., and I agree entirely with what has been said therein about their scope and applicability in paragraphs 15, 16 and 17 of that judgment.

Besides the decisions referred to in that judgment, reference may also be made in this connection to the decisions in Appu L. Rm. Lakshmanan Chetti (died) and Another Vs. The Union Board of Devakottai, and The Panchayat Board Vs. The Western India Matches Company by Agent Henrik Hybbidnettee, which deal with a similar section in the Madras Local Boards Act of 1920. I hold that Sections 371 and 378 of the Act do not apply at all to the present cases.

52. For the reasons stated above I would eon-firm the decrees passed in these cases by the learned District Judge and dismiss all the three appeals and seven second appeals with costs.