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(1976) 07 GUJ CK 0013

In the Gujarat High Court

Navinchandra A. Shah and Another — APPELLANT

Vs

The Modasa Nagar Panchayat and Another — RESPONDENT

Date of Decision : 01-07-1976

Acts Referred:
Bombay Municipal Boroughs Act, 1925 — Section 73
Gujarat Gram and Nagar Panchayats (Taxes and Fees) Rules, 1964 — Rule 32

Citation : (1977) 18 GLR 762

Hon'ble Judges : J.B. Mehta, Acting C.J.;P.D. Desai, J

Bench : Division Bench

Judgement

P.D. Desai, J.—The petitioners carry on business as wholesale merchants within the limits of Modasa Town. The first respondent is the Modasa Nagar Panchayat and the second respondent is the State of Gujarat. The petitioners challenge in this petition the levy of octroi duty by the first respondents Panchayat under Resolution dated December 20, 1975. In order to determine the merits of the challenge, it would be necessary to set out a few facts.

2. The case of the petitioners is that in the course of their business as wholesale merchants they import various goods from large commercial towns into Modasa. Modasa being the premier town of Sabarkantha District, it is the center for purchase of goods so far as the surrounding villages are concerned. Hardly ten to fifteen percent of the goods brought within the limits of Modasa, according to the petitioners, are meant for, sale, consumption or use by the ultimate consumer within the town and nearly 85 to 90 percent of the goods are re exported to different village in the surrounding areas.

3. A meeting of the respondent Panchayat was called on November 10, 1975 for transacting business as set out in the agenda fixed for the said meeting. A copy of the said agenda is annexed to the petition at Exhibit A. In all 13 items of business were set out in the agenda. Item No. 8 of the said agenda was in the following terms:

To seriously and actively consider and decide about the measures to be taken for

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increasing the revenue of the Panchayat." Item No. 13 on the agenda was to the following effect:

Such other business as may be brought up by the Presiding Officer.

The meeting of the respondent Panchayat, whose membership consists of 21 members, was accordingly held on the day in question. The Chairman of the Panchayat was absent since he was indisposed and in his absence the meeting was presided over by the Vice-Chairman, Punjabhai Bhikhabhai Suthar. At the meeting, it was pointed out that the income of the Panchayat was very small and that it was not possible to meet the day to day expenses of the administration out of the said income. No development projects could also be undertaken for want of funds and the Government auditor had indicated that the income of the Panchayat should be augmented by levying octroi. Thereupon, one Ratilal Bhogilal Shah (member) proposed a resolution which was seconded by one Mahmad Husein N. Manva (another member) and under the said resolution octroi was selected as one of the taxes and statutory rules relating to the levy of octroi were also placed before the house. At that stage, one of the members, one Navnitlal Mathurdas Gandhi, took an objection to the transaction of the said business on the ground that the meeting was called merely for considering the proposal to increase the revenue of the Pauchayat and that there was no specific item on the agenda for selecting any of the taxes which could be levied under the Gujarat Panchayats Act, 1961 (hereinafter referred to as ''the Act''). The said objection was overruled by the presiding authority and the resolution was passed by 17 against 3 members of the Panchayat. A copy of the said resolution is annexed at Exhibit B. Under the said resolution, the Chairman was authorised to take necessary legal steps to enforce the tax.

4. In due course, objections were invited by the Panchayat in respect of the levy of octroi and necessary formalities were complied with. It is the case of the Panchayat that out of the several objections received by it, only one representation signed by about 40 merchants had totally opposed the levy of octroi. Thereafter another meeting of the Panchayat was summoned on December 20, 1975 whereat all the objections were duly considered. The objectors including the petitioners and other representatives of the business community were requested to remain present and they were heard in person. There is sore dispute between the parties as to what transpired at the said meeting between the objectors and the members of the Panchayat. However, it is not necessary to set out particulars relating to the said dispute ''since ultimately, at the hearing of the petition, no point was raised bearing on the said dispute. A resolution was finally passed at the said meeting levying the octroi on various items at specified rates. The levy was brought into effect from February 1,1976 after following the necessary procedure. The petitioners in the meantime filed the present petition on January 30, 1976. Rule was issued on the petition on January 31, 1976.

5. Though the levy of octroi was challenged on various grounds in the petition, at

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the hearing of the petition the challenge was ultimately confined only to the following points:

I The levy of octroi is illegal and invalid since there was no proper selection of tax by following the prescribed procedure; the agenda of the meeting of November 10, 1975 did not specifically mention that the selection of the said tax was one of the items which would be considered at the said meet ing and as such the said meeting could not have validly transacted the said business and selected the said tax.

II The levy of octroi is made in colorable exercise of the power conferred upon the Panchayat at the instance of and with a view to benefiting the Vice-Chairman, who had his place of business outside the limits of Modasa town, by diverting to him the entire business carried on within the octroi limits by merchants resident in the town of Modasa.

III The levy of octroi and more particularly Rule 32 of the Octroi Rules adopted by the Panchayat is ultra virus the Act inasmuch as by the impugned levy, the Panchayat seeks to impose octroi on import of goods meant for export outside the limits of the Panchayat without any consumption or use therein.

We shall deal with these points seriatim.

Point No. I:

6. The contents of the agenda of the meeting which was held on November 10, 1975 have been set out earlier. The petitioners contend that it did not specifically mention that selection of taxes was one of the items of business which would be transacted at the said meeting and that such business could not have been transacted even under item No. 8 which has been set out verbatim in the earlier part of this judgment. The submission was that the proceedings of the said meeting relating to selection of tax were, therefore, invalid and the prescribed procedure having not been followed, the levy was ineffective. In this connection, our attention was invited to Section 178 of the Act, the material part of which reads as under:

178. (1) Subject to any general or special order which the State Government may make in this behalf, it shall be competent to a gram panchayat and to a nagar panchayat to levy all or any of the following taxes and fees at such rates as may be decided by it (but subject to the minimum and maximum rates which may be fixed by the State Government) and in such manner and subject to such exemptions as may be prescribed, namely:

(i) xxx xxx xxx

(ii) octroi on animals or goods or both brought within the gram or nagar for consumption, use or sale therein;

(iii) xxx xxx xxx

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It was urged that a tax there under could be levied only in such manner as may be prescribed and that, therefore, compliance with, relevant rules of procedure relating to the levy of tax was mandatory. Our attention was then invited to Rule 3 of the Gujarat Gram and Nagar Panchayat Taxes and Fees Rules, 1964, the relevant part of which reads as under:

3. Procedure for levying tax or fee: Before deciding to levy a tax or fee every Panchayat shall observe the following procedure,-- namely:

(a) It shall, by resolution passed at its meeting, select a tax or fee which it proposes to levy and in such resolution shall specify the rate at which it is to be levied.

xxx xxx xxx

It was submitted that according to Rule 3 it was incumbent upon the Panchayat to pass a resolution selecting the tax which it proposed to levy and to specify in such resolution the rate at which it was to be levied. Reference was next made to Rules 12 and 13 of the Gujarat and Nagar Panchayat (Procedure) Rules, 1963. Rule 12 deals with the order of business to be conducted at a meeting of the Panchayat, and, in our opinion, it has not much bearing on the controversy between the parties. Rule 13, however, is relevant and it may be set out in extension:

13. Ordinarily business to be transacted according to agenda.--Except with the permission of the presiding officer:

(a) no business, which is not entered in the agenda, shall be transacted at any meeting.,

(b) the business to be transacted at any meeting shall be taken up in the order in which it is entered in the agenda.

Provided that, in granting permission for priority for transacting any business, the presiding officer shall be guided by the majority of votes for or against the motion moved therefore.

The submission on behalf of the petitioners was that according to Rule 13, except with the permission of the presiding officer, no business which is not entered in the agenda could be transacted at any meeting and that, since in the present case the question of levy of octroi was not specifically entered in the agenda, the said matter could not have been taken up for consideration and no business relevant thereto could have been transacted at the meeting held on November 10, 1975. This, in substance was the contention urged on behalf of the petitioners.

7. Now, this point urged on behalf of the petitioners appears to us to be devoid of merit. In the first place, Rule 13 upon which heavy reliance has been placed on behalf of the petitioners is not as peremptory as the petitioners think it to be. The said rule in terms provides that no business, which is not entered in the

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agenda, shall be transacted in any meeting except with the permission of the presiding officer. The effect of this rule is that ordinarily any business, which does not find place in the agenda, cannot be transacted at a meeting. However, if the presiding officer permits, even such business can be taken up for consideration by the meeting. In the present case, the impugned resolution was duly moved and seconded'' by a member and when an objection was taken to the transaction of the said business, it was overruled by the presiding officer. The effect of the ruling of the presiding officer was to grant permission to the mover to introduce the resolution for the consideration of the house it cannot, therefore, be said that Rule 13 has been contravened. In the next place, the contention that the item with regard to selection of tax was not included in the agenda is itself misconceived. Item No. 8 of the agenda, which has been set out earlier, was wide enough to take in the proposal for selection and levy of octroi. It was implicit in the said item of agenda that if on a mature consideration the Panchayat felt that it should select and impose any tax, it would take appropriate decision in that behalf. In the last place, as earlier stated, the meeting was summoned inter alia for the purpose of considering the mode of increasing the revenue of the Panchayat. The said subject was specifically entered in the agenda of the meeting which was circulated amongst all the members. The only defect, if any, was that the item relating to the selection of tax was not specifically mentioned in the agenda. However, 20 out of 21 members of the Panchayat were present at the meeting and all of them had participated in the deliberations held at the meeting. The resolution selecting and levying the tax was passed by an overwhelming majority. Under the circumstances, even assuming that it was necessary to specifically mention in the agenda that the business relating to the selection of tax would be transacted at the meeting, the defect stood cured in as much as almost all the members of the Panchayat had attended the meeting and waived the irregularity. Reference may be made in this connection to the decision of the Supreme Court in Vice- The Vice-chancellor, Utkal University and Others Vs. S.K. Ghosh and Others, . In that case, a meeting of the syndicate of the Utkal University which consisted of 12 members, all but one of whom had attended the said meeting, considered a subject which was not on the agenda of the meeting. At a subsequent meeting also the same subject was taken up for reconsideration and at that time also, another member was absent. The decisions taken at both the meetings were challenged inter alia on the ground of want of notice. The challenge succeeded before the High Court inter alia on the ground that the want of notice in the two cases invalidated the resolution. On appeal, the Supreme Court reversed the decision of the High Court, It observed:

In the present case, there were not one but two meetings. Proper notices of both meetings were issued to all the members including the two absentees. The only defect is that the matter we are concerned with was not included in the agenda of either meeting. We need not decide here whether this must always be done...it is not necessary to go into that because in this case these members did

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in fact attend one or the other of the meetings and expressed their views, not individually, but as members of a meeting which was considering the matter; and there was unanimity on both occasions. Even on the stricter view taken in the cases relied on by counsel it is pointed out that want of due notice can be waived in given circumstances. Thus, if a person who was not noticed appears at the meeting and waives the irregularity, the defect is cured; so also when a person is too far away to be reached in time to enable him to communicate with the Committee before the meeting; the sending of a notice is then excused.... The substance is more important than the form and if there is substantial compliance with the spirit and substance of the law, we are not prepared to let an unessential defect in form defeat what is otherwise a proper and valid resolution.

It would appear from the decision aforesaid that the true principle is that want of notice is a mere irregularity and that it could be waived and if it is waived the defect would stand cured. In the ultimate analysis, what is important is the substance and not the form and if there is substantial compliance with the spirit and substance of the law, an unessential defect in form cannot defeat what is otherwise proper and valid. In the instant case, the only absentee member was the Chairman of the Panchayat although he was served with the notice. He has not taken any objection subsequently against consideration of the item in question by the meeting without its being specifically included in the agenda. The proceedings of the meeting cannot, under the circumstances, be challenged by a taxpayer on the ground of want of notice and the defect, if any, stood cured by the participation of all but one of the members of the Panchayat whose vote, even if he was present, would not have made any difference in the result. In our opinion, therefore, the first point urged on behalf of the petitioners must be rejected.

Point No II:

8. This point is entirely devoid of merit. The allegation of the petitioners is that the Vice Chairman, Punjabhai Suthar, who presided over the meeting of the Panchayat which selected the tax, is the proprietor of a petrol pump which is situate outside the limits of the Panchayat. According to the petitioners, the Vice-Chairman played a very important role in the meeting of the Panchayat held on November 10, 1975 and December 20, 1975 and saw to it that octroi was levied on petrol thereby ensuring that business was diverted from the petrol pumps situate within the limits of the Panchayat to his own petrol pump outside such limits. Now, it has to be remembered that petrol is only one of the several items on which octroi was levied. It is difficult to believe that the Vice-Chairman would go so far as to have octroi levied on several items merely with the end in view of diverting business of one of the items from the town of Modasa to a place outside the same. That apart, the allegation in this behalf has been specifically controverter by the Secretary of the Panchayat in his affidavit dated February 6, 1976. In paragraph 22 of the said affidavit it has been stated that the Vice-Chairman carries on transport business within the limits of the Panchayat and

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that the levy of octroi was likely to affect him also. Besides, the member who proposed the levy of octroi also carried on business within the limits of the Panchayat and he .vas also going to be affected by the levy. It has been averred that the resolution levying octroi was passed after fully considering the pros and cons and after the members were satisfied that it was necessary to augment the revenue of the Panchayat. The Vice-Chairman has also filed an affidavit dated February 6, 1976 denying the allegations made against him. Taking an overall view of the matter, we are of the opinion that there is no substance in the challenge formulated under this head.

Point No. III.

9. This is the only contention which merits consideration. The submission on behalf of the petitioners under this head was that the effect of the impugned levy was to impose octroi on goods sold within the limits of the respondent Panchayat although the said goods were meant for export outside the limits of the Panchayat after such sale and they were not brought for consumption or use within the octroi limits. It was urged that Rule 32 of the Gujarat Gram and Nagar Panchayat Taxes and Fees Rules, 1964 framed by the Panchayat contemplates refund only in a limited class of cases and that on a true interpretation of the said Rule, even goods sold to persons who were not ultimate consumers but who purchased goods merely for exporting them and selling them outside the Panchayat area were brought within the net. Under the circumstances, according to the petitioners, the levy was ultra vires the Act. Reliance was placed in support of this submission on the decision of the Supreme Court in Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality, as explained in Hiralal Thakorlal Dalal Vs. Broach Municipality and Others, .

10. In order to appreciate the contention raised on behalf of the petitioners, it would be necessary to refer briefly to the provisions of the Act and the Octroi Rules framed by the State Government. Section 2(20) defines "octroi" or "octroi duty" in the following terms:

"Octroi" or "octroi duty" means a tax on the entry of goods into a gram or nagar, for consumption, use or sale therein;

Clause (ii) of Sub-section (1) of Section 178, which has been set out earlier, empowers a gram or nagar Panchayat to levy octroi at such rates as may be decided by it on animals or goods or both brought within the gram or nagar for consumption, use or sale therein in such manner and subject to such exemptions as may be prescribed. The relevant rules in this behalf are the Gujarat Gram and Nagar Panchayat Taxes and Fees Rules, 1964. Under Rule 3 thereof procedure for levying a tax or fee is laid down and there under the Panchayat has to pass a resolution at its meeting selecting a tax or fee which it proposes to levy and in such resolution it has to specify the rate at which it is to be levied. It has then to invite objections by giving notice in the manner prescribed and to take them into consideration. The Panchayat has thereafter to decide the rate at which it

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proposes to levy tax. Under Rule 4, where the Panchayat so decides to levy any tax the rules in that part of those rules which relate to such tax, together with a notice stating the tax to be levied and the rate thereof is required to be published. The tax shall be accordingly levied from the date which shall be specified in the notice. Rule 25 provides that the octroi shall be paid at the octroi naka at the time when the articles in respect of which it is livable are imported in the octroi limits of a Panchayat. Rule 32, which is material, provides for refund of octroi where refund is admissible. It reads as under:

32. Refund of octroi when allowed-An Importer of goods on which octroi has been paid shall be entitled to a refund of the amount so paid on export thereof from the octroi limits, if the goods have not been used, consumed or sold within

Provide that in case of goods which are for the first time since their import into Panchayat limits sold to a non-resident person having his place of business outside the Panchayat limits and are exported as a result of such sale, refund of octroi shall be allowed to the importer. Explanation - if

(i) the goods have broken bulk, or

(ii) the goods are not exported within two months after their import, or (iii) the goods have changed form by any process whatsoever,

they shall, unless the contrary is proved, be deemed to have been used, consumed or old within the octroi limits and no refund shall be paid on such goods.

Provided that in the case of the Gujarat State Road Transport Corporation the provisions of this Explanation shall not apply.

Rule 34 lays down the procedure for claiming refund and it inter alia provides for an application in writing being made to the Sarpanch within three days from the date of export and the production of a receipt signed by the naka karkun which was given to claimant at the time when the octroi was paid. These are the relevant provisions which have to be borne in mind while considering the submissions under this head of argument.

11. Now there is no dispute that octroi is livable on articles which re brought within the limits of the Panchayat for consumption or use the rein The only dispute centers round the levy of octroi on goods which are brought into the limits of the Panchayat and which goods are sold within such limits but are exported thereafter outside the Panchayat limits. This dispute has been raised because, according to the petitioners, nearly 85 to 90 percent of the goods brought by various merchants within the limits of the respondent Panchayat are re exported to the various villages the surrounding area. In the submission of the petitioners, no octroi was livable on such goods even though their sale might have been effected in the octroi limits of the Panchayat to persons who are not ultimate consumers but who are merely merchants who purchase the goods and export them outside the limits of the Panchayat and sell them to the ultimate

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consumers outside such limits. It is the case of the petitioners that in respect of such goods no octroi would be livable and that since Rule 32 does not make provision for refund of octroi in such cases, it is ultra vires the Act.

12. The question as to what is the ambit of the taxing power of a local authority in relation to octroi is no longer open to doubt or debate. In Burmah Shell Company''s case (supra) this point was considered at length by the Supreme Court, The appellant Company in that case brought its petroleum products within the octroi limits of the respondent municipality. Broadly speaking, the goods so brought within the octroi limits were divided into four categories and the two categories which were in dispute were as follows: (1) goods sold by the Company through its dealers or by itself and consumed within the octroi limits by persons other than the Company; and (2) goods .sold by the Company through its dealers or by itself inside the octroi limits to other persons but consumed by them outside the octroi limits. The Supreme Court examined the scheme of taxation under the Bombay Municipal-Boroughs Act, 1925 as amended by Bombay Act 35 of 1954 under which octroi was levied in that case. It also made reference to the legislative lists in the Government of India Act, 1935 and the Constitution. After examining the history of octrois and terminal taxes, it held that "octrois were taxes on goods brought into the local area for consumption, use or sale" and that "they were leviable in respect of goods put to some use or other in the area but- only if they were meant for such user". It was specifically clarified that the word "sale" was included only in 1954 in order to bring the description of octroi in the Act in line with the Constitution and that the expressions "consumption" and "use" together "connote" the bringing in of goods and animals not with a view to taking them out again but with a view to their retention either for use without using them up or for consumption in a manner which destroys, wastes or uses them up". The Supreme Court thereafter proceeded to hold as follows:

So long as the goods are brought inside the area for sale within the area to an ultimate consumer, it makes no difference that the consumer does not consume them in the area but takes them out for consumption elsewhere The word "therein" does not mean that all the act of consumption must take place in the area of the municipality. It is sufficient if the goods are brought inside the area to be delivered to the ultimate consumer in that area because the taxable event is entry of goods which are meant to reach an ultimate user or consumer in the area The goods must be regarded as having been brought in for purposes of consumption when a person brings them either for his own use or consumption, or to put them in the way of others in the area, who are to use and consume. In this process the act of sale is merely the means for putting the goods in the way of use or consumption. It is an earlier stage, the ultimate destination of the goods being ''use or consumption.'' The earlier stage, namely, the sale by him, does not save the person who brought the goods into the local area from liability to the tax if the goods were brought inside for consumption or use. In other words, a sale of the goods brought inside, even though not expressly mentioned

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in the description of octroi as it stood formerly was implicit, provided the goods were not re-exported out of the area but were brought inside for use or consumption by buyers inside the area. In this sense The amplification of the description both in the Government of India Act 1935 and he Constitution did not make any addition to the true concept of octroi as above. That concept included the bringing in of goods in a local area so that the goods come to a repose there.... In our opinion, even without the word sale n the Boroughs Act the position was the same provided the goods were sold in the old area to a consumer who bought them for the purpose of use or consumption or even for resale to others for the purpose of use or consumption by them the area it was only when the goods were re-exported out of the area that the tax could not legitimately be levied....

The Supreme Court in terms held that the appellant Company was liable to my octroi on goods brought into the local area (a) to be consumed by itself or sold by it to consumers direct, and (b) for sale to dealers who on their turn sold the goods to consumers within the municipal area irrespective of whether such consumers brought them for use in the area or outside it. But it was "not liable to octroi in respect of goods which it brought into the local area and which were re-exported."

13. The ratio of this decision is that not with standing the use of the word "sale" in the relevant legislative entry and the taxing statute, it is not every sale within the local area which will attract the levy of octroi. The law of octroi will be attracted only in cases where the goods are brought inside the octroi limits for sale within that area to an ultimate consumer. Such goods only must be regarded as subject to the levy of octroi which are brought in for the purpose of consumption or use of the bringing them in or for the purpose of putting them the way of are in the area, who are to use and consume the same. In this process attract of sale is merely the means of putting the goods in the way of use or consumption. It is an earlier stage, the ultimate destination of the Thin ''use or consumption''. Therefore, in cases where goods are reel and out of the area, the levy of octroi would not be attracted. The goods cannot, in such a case, be said to have come to a repose in the local area in which they were brought

14. After the aforesaid decision was rendered by the Supreme Court, Div Hon. Bench of this Court had an occasion to consider the question of octroi on goods which were brought in and re-exported out it octroi its in Special Civil Applications Nos. 163 and 170 of 1972 which were decided on January 27/28/30, 1976, the question across meter three kinds of consignments, namely, through consignments in between the petitioners and the local authority was whether the goods imported within the octroi Imits of the municipality and on which octroi the municipal limits after their import but were subsequently re-exported. Two questions were canvassed for the consideration of the Court: first, what was the true extent of the taxable power conferred upon the municipality by Clause (iv) of Sub-section (1) of Section 73 of the Municipal Boroughs Act, 1925, that is,

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what was the connotation of the words "for sale" which were introduced for the time in the said Act by the Amending Act XXXV of 1954 and, secondly, as to whether on a true and correct interpretation of the relevant rules and by-laws of the local authority concerned, octroi duty was levied on through consignments and whether in the case of the other two kinds of consignments after payment of octroi duty there was an obligation on the part of the local authority to refund the duty paid to it provided conditions laid down in the rules and by-laws were satisfied. So far as the present case is concerned, the only relevant discussion in the said decision to which reference needs to be made is in regard to the first point. The contention on behalf of the petitioners in that case was that the interpretation of the words "for sale" was no longer a matter which was res Integra and that it was concluded by the decision of the Supreme Court in Burmah Shell Company''s case (supra) and that accordingly the said expression was used in a restricted sense, namely, that the sale within the octroi limits must be for consumption or use by the ultimate consumer therein. This contention advanced on behalf of the petitioners was negative by the Division Bench speaking through Miabhoy C.J. and it was held that the decision in Burmah Shell Company''s case (supra) not only did not support the contention advanced on behalf of the petitioners but that it also did not contain any obiter which might be regarded as binding as to the true interpretation of the words "for sale" as used in the amended Clause (iv). The question of interpretation of the said expression was treated as having been left at large. The Division Bench then proceeded to interpret the said expression and held that the words "for sale" could not be interpreted in a restricted sense as contended by the petitioners because, in the first place, the Constitution-makers could not have used that word over again in the restricted sense after having used the expression "consumption" and, secondly, that when the Government of India Act and the Constitution were enacted, the Sale of Goods Act had already been passed in 1930 and the term "sale" was defined in Section 4 of the said Act as a contract of sale where under property in the goods is transferred from the seller to the buyer. The Division Bench held principally on these two grounds that the words "for sale" in the relevant legislative entry and the relevant taxing provision was, therefore, used not in a restricted sense but in a larger sense, and that, therefore, it could not be contended that octroi was livable only in regard to transactions of sale made within the local area to the ultimate consumer alone. The relevant expression, according to the Division Bench, must be given its ordinary, natural and legal meaning, namely, that, it means, at least, transfer of goods from the seller to the buyer under a contract of sale and once such sale took place within the octroi limits, the levy of octroi was attracted.

15. Had the matter rested merely at this stage, the question would have been required to be resolved in favour of the local authority so far as this Court is concerned by holding that octroi would be livable, if relevant provisions is made therefore in the relevant octroi rules and bylaws, on goods imported within the octroi limits once sale in the larger sense (as explained by the Division Bench)

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took place within the octroi limits. However, the aforesaid decision of the Division Bench was taken in appeal to the Supreme Court and the decision has been reversed in Hiralal Thakorlal''s case (supra) by a Bench of Five Judges of the Supreme Court. The view taken in Burmah Shell Company''s case (supra) was reaffirmed in the said decision in and the effect thereof is that octroi would be livable on goods brought in to the local area for consumption or use by the importer himself or for sale by him to consumers direct or to dealers who in their turn might sell such goods to the consumers within the local area irrespective of whether such consumers bought them for use in the area or outside the area. However, octroi would not be livable in respect of goods which are brought into local area but are re-exported.

16. It is thus clear that the expression "for sale" in the relevant constitutional entry and taxing statute must receive a restrictive interpretation as explained above. In other words, the position is now well-settled that octroi is livable on goods which are brought within the octroi limits for sale to persons who buy them for the purpose of use or consumption themselves Or for resale to others within the said limits for the purpose of use or consumption by them. However, when sale of the imported goods takes place to persons other then consumers and the goods are thereafter re-exported out of the octroi limits, the goods covered by such sale would not be subject to the levy of octroi.

17. The question then is whether the impugned levy by the respondent Panchayat is in accordance with the aforesaid interpretation of the relevant statutory provisions. In considering this question, regard must be had to the peculiar nature of this levy, the validity of which cannot be examined in its isolated stages. It has to be borne in mind that as observed in the Taxation Enquiry Commission''s report (Vol. Ill Ch, [V page 401) the requirement peculiar to octroi, namely, that the taxable goods must not only enter within the octroi limits but they must be for the purpose of consumption, use or sale thereof, is usually satisfied by (a) the ab initio exemption of the goods which merely pass through the area, whether the exit is immediate or after an interval, or (b) by the subsequent refund of the tax collected on such goods. Exemptions and refunds, therefore, are the distinguishing features of the octroi system. The aforesaid view of the Taxation Enquiry Commission was approvingly referred to by the Supreme Court in Burmah Shell Company''s case (supra). The question, therefore, whether the levy of octroi in a given case is valid and within the limits of the taxing powers of the local authority has to be examined in the light of the system of exemptions and refunds evolved by the local authority.

18. It is also worth remembering in this context that if on one construction a given provision becomes ultra vires the powers of the enacting authority, whereas on the other construction which may be open, the statute remains effective and operative, the Court will prefer the latter on the ground that the legislature is presumed not to have intended an excess of its jurisdiction. In compliance with this principle general words are sometimes read down and

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construed in a limited sense to avoid a statute becoming unconstitutional (see, for example R.L. Arora v. State of Uttar Pradesh AIR 1964 S.C. 1220 , New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar, Tilkayat Shri Govindlalji Maharaj Vs. The State of Rajasthan and Others, . Similarly a wider construction and sometimes even strained construction of statutes has been adopted in order to uphold the constitutionality of the enactment (see Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others, , and B. Banerjee Vs. Smt. Anita Pan, . In the present case, therefore, we would be completely justified in putting upon the expression "for sale" occurring in the relevant taxing rules of the respondent Panchayat a narrower meaning and to assign to that expression the connotation that it takes in only a sale of the nature as explained by the Supreme Court in Burmah shell Company''s case. Such a construction, which is open and permissible having regard to one of the natural and ordinary meanings of the word "sale" and which is even otherwise preferable having regard to the historical background, would be all the more preferable in order to save the rule or any part thereof from being exposed to challenge on the ground that it is ultra vires.

19. In the light of the aforesaid principles, let us examine the levy in the present case. Rule 25 provides that octroi shall be paid at the octroi naka at the time when the articles in respect of which it is livable are imported within the octroi limits of the Panchayat. The second proviso to She said Rule provides that if the importer at the entry of the goods , at octroi naka declares to the naka karkun that the goods are goods in transit, he shall deposit with the naka karkun an amount equal to the amount of octroi duty which would have been payable had the goods been not goods in transit and the naka karkun shall thereupon issue a transit pass to the importer in the form specified in Schedule 1-A. Rule 32 provides for the refund of octroi and it has been set out in extension in the earlier part of this judgment. In substance it provides that refund shall be allowed to an importer of goods on which octroi has been paid on export thereof from the octroi limits, if the goods have not been "used, consumed or sold within these limit." There is a proviso to this rule which deals with a specific instance of sale and the instance is of first sale to a non-resident person having his place of business outside the Panchayat limits who exports the goods after such sale. In such a case it has been provided that refund of octroi shall be allowed to the importer. There is an explanation which requires the importer to adduce necessary proof in support of his claim for refund. In cases where the goods have broken bulk or the goods are not exported within two months after their import or the goods have changed form by any process, unless such proof is adduced in support of the claim, there will be a presumption that the concerned goods have been consumed, used or sold within the octroi limits and no refund shall be paid on such goods. There is a proviso with regard to the Gujarat State Road Transport Corporation in Rule 32 with which we are not concerned. Then Rule 34-A provides for the return of deposit in the case of goods in transit at the octroi Naka from where the goods pass out of the octroi limits. Rule 36 and Rule 36-A

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provide for exemptions but there is nothing in those rules which needs to be specifically mentioned.

20. One thing which clearly emerges from the scheme of the rules is that so far as the goods in transit are concerned, having regard to the aforesaid scheme of refund, such goods are not subject to the levy of octroi. With regard to the goods brought within the octroi limits and sold within those limits after its import, specific provision has been made with regard to a particular sale and such sale has been exempted under the proviso to Rule 32. However, in our opinion, having regard to the limits of the taxing power of the local authority, the word "sale" in its grammatical variation used in Rule 32 will have to be read in a restricted sense, that is, as a sale to the consumer himself, whether such consumption takes place within the octroi limits or outside or as a sale to a dealer who in his turn might sell such goods to consumers within such limits for their use or consumption within or outside such limits. Therefore, under Rule 32, refund of octroi will be disallowed only in cases where sale in that restricted sense has taken place. If sale has taken place within the octroi limits not to the ultimate consumer but to a middle man who re-exports the goods, such sale would not be hit by the disqualifying clause in Rule 32. It requires to be noted in this context that proviso to Rule 32, which deals with a specific instance, is merely illustrative in character and that it is not exhaustive of the case in which refund can be earned on goods which subsequent to the sale are re-exported. So far as the explanation to Rule 32 is concerned, its scope and ambit has been examined in Okha Gram Panchayat v. Esso Corporation 14 G.L.R. 261 and it has been explained that it is merely a rule of evidence and that it is not ultra vires Section 178. In our opinion, on examining the entire scheme of the Rules in the light of the well-settled legal position, it becomes clear that the levy of octroi in the instant case is not ultra vires Section 178 since it does not operate to bring within its net goods which are brought into the local area and which are not sold to the ultimate consumer within that area but which are re-exported.

21. Having regard to the foregoing discussion, it would appear that the challenge leveled by the petitioners against the impugned levy and more particularly against Rules 32 is baseless and that it proceeds upon a misconception as to the true scope and ambit of the levy. We must make it clear, however, that as and when the question of refund arises in respect of goods brought within the local area which subsequent to their import are re-exported outside the octroi limits, the respondent Panchayat will consider the claim for refund on merits and dispose it of in the light of the observations made in this judgment.

22. No other contentions were advanced and since there is no merit in any of the aforesaid three contentions, the petition fails and is dismissed. Rule is accordingly discharged. There will be no order as to costs, however, in view of the fact that the legal position in this behalf has been finally settled only recently by the latest decision of the Supreme Court.

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