
(1972) 04 GUJ CK 0004
In the Gujarat High Court

Okha Gram Panchayat

APPELLANT

Vs

Esso Standard Eastern Corporation and Another

RESPONDENT

Date of Decision : 24-04-1972

Acts Referred:

Coal Production Fund Ordinance, 1944 — Section 2, 5
Gujarat Gram and Nagar Panchayats (Taxes and Fees) Rules, 1964 — Rule 27 , 34
Gujarat Panchayats Act, 1961 — Section 305

Citation : (1973) 14 GLR 261

Hon'ble Judges : S.H. Sheth, J;J.B. Mehta, J

Bench : Division Bench

Judgement

S.H. Sheth, J.—Esso Standard Eastern Corporation, a incorporated in U.S.A., has its main office at Bombay and has a at Ahmedabad. 1 is hereinafter referred to for the Esso. It has been dealing in petrolium products in a Terminals at different ports in India where it has storage faculties A Okha has storage tanks for storing petroleum products such as petrol diesel oil and furnace oil. Okha had prior to 1st January 1970 is Gram Panchayat which since 1st January 1970 has been converted into a Nagar Panchayat constituted under the Gujarat Panchayats Act, 1961 there in a referred to as "the Act" for the sake of brevity). The Okha Gram Panchayat will be hereinafter referred to as the Panchayat for the sake of brevity It had been importing petroleum products at Okha from Bombay and storing them in its tanks there. It had a bonded ware-house at ash and another at Okha maintained under the Central Excises and Salt Act, 1944. Removal of these goods from one bonded ware house to It entailed no payment of excise duty. It became payable only when goods were removed from a bonded warehouse for the purpose of sale or for being marketed. About 5% of the quantity stored by Esso at Okha was released by it for consumption, use or sale within the territorial limits of the Panchayat.

2. The Gujarat Panchayats Act, 1961 was made applicable to with effect from 1st April 1965. Since then Esso has been pay of duly to the Panchayat on the goods consumed, used or sold within the territorial limits of the Panchayat the

Panchayat had granted to Esso current account facility by virtue of which no octroi duty was paid at the Octroi Naka at the time of the entry of the goods in Okha but it was paid at the end of the month or when accounts were made.

3. By about July 1966 a dispute arose between Esso and the Panchayat. It was two-fold. The Panchayat claimed octroi duty on all goods imported into Okha irrespective of whether the entire quantity or only a part thereof was consumed, used or sold in Okha. Secondly, the Panchayat claimed octroi duty on the value of the goods arrived at after including therein the excise duty paid or payable thereon. Esso contested the claim.

4. On 4th November 1967 the Panchayat in pursuance of its claim in the aforesaid terms served upon Esso a notice of demand for Rs. 92,840.44 in respect of goods imported in Okha between 1st April 1965 and 23rd November 1966 and between 28th February 1967 and 29th July 1967. Esso did not pay the amount to the Panchayat. Therefore, the Panchayat issued a writ of demand to Esso and added a sum of Rs. 4642.05 to its original demand as fee for issuing the writ. Esso paid under protest Rs. 97,482.49 to the Panchayat.

5. Thereupon Esso filed a Revision Application u/s 305 of the Act before the State Government against the demands made by the Panchayat and the writs issued by it. In that Revision Application it raised the following contentions : (1) Excise duty was neither payable nor paid on the goods in question. Therefore, it could not be included in the value of goods. Therefore, no octroi duty was payable under Rule 27 of the Gujarat Gram and Nagar Panchayats Taxes and Fees Rules, 1964 (hereinafter referred to as "the Octroi Rules" for the sake of brevity) on the excise duty component of the value of goods : (2) Under Rule 32 of the Octroi Rules no octroi was payable on goods exported out of Okha and sold elsewhere even if they were exported after two months of their import into Okha. In any case, Esso was entitled to the refund thereof if octroi was paid; (3) The Octroi Rules are ultra vires Section 2(20) and sec 178 of the Act and entry 52 in List II of the Seventh Schedule to the Constitution.

6. Esso filed another Revision Application u/s 305 of the Act claiming refund from the Panchayat of the octroi duty paid by the former to the latter.

7. On 14th August 1969 the Development Commissioner, Gujarat State, as the delegate of the State Government heard the two Revision Applications and by his order dated 13th November 1969 he decided them. He did not decide the vires of the Octroi Rules because it was, according to him, beyond his jurisdiction to do so. But he held against the panchayat that Esso was entitled to the refund of the octroi duty paid by it to the Panchayat. He, however, held against Esso that octroi duty was payable on the price of the goods in question which included the excise duty. In pursuance of the aforesaid order of the Development Commissioner Esso demanded from the Panchayat refund of Rs. 2,68,117.59 as detailed in its letter dated 29th November 1969. The said order of the Development Commissioner is hereinafter referred to as "the impugned order" for the sake of brevity.

8. Against the said order in so far as it adversely affects the Panchayat the Panchayat has filed Special Civil Application No. 1650 of 1969. It prays for a Writ of Certiorari to quash the impugned order in so far as it records the decision that Esso is eligible and the Panchayat is liable for the refund of octroi duty paid by Esso to the Panchayat.

9. There are two cross-petitions filed by Esso. In Special Civil Application No. 191 of 1970 it has prayed for a declaration that Rule 32 of the Octroi Rules is ultra vires the rule-making power of the State Government and that it otherwise offends Article 19(1)(g) of the Constitution. It also prays for a Writ of Mandamus directing the Panchayat to refund to it a sum of Rs. 67,982.44 and a further sum of Rs. 1,34,642.88 p. totalling at Rs. 2,02,625.32 p. In Special Civil Application No. 192 of 1970 it prays for the same declaration in regard to Rule 32 of the Octroi Rules and further prays for a Writ of Mandamus directing the Panchayat to refund to it a sum of Rs. 97,482.49 p. and a further sum of Rs. 37,998.54 p. In these petitions it also prays for a Writ of Certiorari to quash the impugned order in so far as it adversely affects it. In Special Civil Applications Nos. 191 and 192 of 1970 Mr. Kaji, appearing for Esso has expressly given up the contention that Rule 32 of the Octroi Rules is ultra vires Article 19(1)(g) of the Constitution and has raised only the following contentions:

(1) Esso is entitled, under Rule 32 of the Octroi Rules, to the refund of that part of the octroi duty which was paid on the excise duty component of the value of the goods in question. Even if the goods were exported out of Okha after two months, the right to obtain refund was not lost by Esso.

(2) Excise duty on the value of the goods in question was neither actually paid nor was any liability for its payment incurred. Therefore, it did not fall within the meaning of the expression "other incidental charges" used in Rule 27 of the Octroi Rules. Therefore, no octroi duty was leviable on the excise duty component of the value of the goods in question even though it might otherwise be forming a part of the value of the goods in question.

(3) If Rule 32 raises an irrebuttable presumption that the goods which were exported out of Okha within two months from the date of their import are deemed to have been consumed, used or sold within the territorial limits of Okha, it is ultra vires Section 178 read with Section 2(20) of the Act and entry 52 in List II of the Seventh Schedule to the Constitution.

(4) Procedure laid down by Rule 34 of the Octroi Rules was not applicable to Esso during the period of availability of current account facility with the Panchayat. Therefore, the Panchayat which collected the octroi from it was bound to refund it to it.

10. In order to appreciate the contentions raised by Mr. Kaji it is necessary to have a quick glance at some of the provisions of the Act and the Rules. Section 2 (20) defines "octroi" 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 empowers a gram or a nagar panchayat to levy octroi. Indeed, the exercise of that power by a panchayat is subject to any general or special order which the State Government may make in that behalf and is also subject to the minimum and maximum rates which may be fixed by the State Government. It is to be levied in the manner prescribed by the Rules made under the Act and subject to such exceptions as may also be prescribed by Rules made under the Act. Sub-section (6) of Section 178 confers upon a person who is aggrieved by assessment, levy or imposition of any tax or fee by a panchayat right to appeal to the District Panchayat within the prescribed period. Sub-section (7) provides that in deciding an appeal under Sub-section (6), the District Panchayat shall follow such procedure as may be prescribed. Section 305 confers upon the State Government power to call for and examine the record of proceedings of any panchayat or of any officer for the purpose of satisfying itself as to the legality or propriety of any order passed and may revise or modify the order as it shall deem just. The exception carved out in Section 305 has no application to the facts of the instant case. Section 321 empowers the State Government to authorise any officer of Government, by notification in the Official Gazette, to exercise any of the powers exercisable by the State Government under the Act. Section 323 confers upon the State Government the rule-making power. It can make rules under the Act for carrying out the purposes of the Act. Section 178 read with Section 2(20) makes it quite clear that a panchayat may levy a tax on such goods as enter into a gram or a nagar for consumption, use or sale in that area. The expression "therein" is a significant expression and connotes the area of consumption, use or sale of the goods. Section 178 also provides for the corrective machinery where a person is aggrieved by an order of assessment, levy or imposition of any tax or fee. u/s 305 an aggrieved person has a further remedy.

11. We now turn to the Octroi Rules. Part III thereof deals with octroi. 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 into the octroi limits of a panchayat. Proviso to Rule 25 is not material for the purpose of the present case because it relates to the Gujarat State Road Transport Corporation. Rule 27 lays down the manner of calculation of the cost price of goods when rate of octroi is leviable ad valorem. It provides as follows:

Where the rate of octroi is leviable ad valorem under Rule 25, the value of the goods shall be calculated by adding to the cost price of the goods the charges incurred till their arrival at the octroi naka for the carriage and other incidental charges, if any, such as shipping, insurance, customs and railway freight, as the case may be, in respect of such goods.

Rule 32 provides for refund of octroi where refund is admissible. It provides as follows:

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 these limits : 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 sold within the octroi limits and no refund shall be paid on such goods....

Provision to Rule 32 relates to the Gujarat State Road Transport Corporation and is not material for the purpose of the present case, Rule 33 provides for debiting the refund of octroi to gram fund or nagar fund, as the case may be. It is in the following terms:

Refunds of the octroi paid under these rules, shall be debited to the gram fund or nagar fund constituted u/s 99.

Rule 34 lays down procedure for claiming refund. It provides as follows:

(1) Unless there are reasons to believe that a claim for refund is not admissible, the Sarpanch or in the absence of the Sarpanch, the Upa-Sarpanch shall sanction refund if:

(1) an application in writing is made to the Sarpanch within three days from the date of the export and,

(ii) the claimant produces a receipt signed by the Naka Karkun which was given to him at the time the octroi was paid.

(2) Where a claim for refund is rejected under Sub-rule (1), the Sarpanch, or as the case may be the Upa-Sarpanch shall record his reasons in writing for rejecting the claim and on demand by the importer, furnish him with a copy of such reasons duly signed....

Proviso to Rule 34 relates to the Gujarat State Road Transport Corporation and is not material for the purpose of the present case. Rule 34B was inserted on 10th June 1969. It empowers the panchayat to keep an account current with a person, a firm or a public body in lieu of collecting octroi on the entry of goods. It provides as follows:

(1) A panchayat if it thinks fit, instead of requiring payment of octroi, due from any person, mercantile firm or public body, to be made at the time when the animals or goods in respect of which it is leviable enter the octroi limits of the panchayat, may at any time direct that an account current shall be kept on behalf of the panchayat of the octroi so due from any such person, firm or body as the panchayat may specify in this behalf. Such account shall be settled at intervals not exceeding three months, and such person, firm or body shall give such information or details and makes such deposit or furnish such security as

the panchayat or any officer authorised by it in this behalf shall consider sufficient to cover the amount which may at any time be due from such person, firm or body in respect of such dues....

The rest of Rule 34B deals with details of this current account facility. Admittedly Esso had been enjoying such current account facility with the Panchayat and, therefore, it had not been paying to the Panchayat octroi duty every time its goods entered the octroi limits of the Panchayat.

12. Having noted the relevant sections and Rules we now proceed to examine first the second point raised by Mr. Kaji. The question is whether excise duty paid or payable enters the value of the goods on which octroi is levied. The first material expression used in Rule 27 is "where the rate of octroi is leviable ad valorem under Rule 24, the value of the goods shall be calculated...". The expression "value", in our opinion, means market value of which the cost of production is a very important element. Cost of raw materials, cost of labour, cost of transport, return on investment and other out-goings determine the cost of production. Apart from the language of Rule 27 which is very explicit in this behalf, we think that the excise duty, paid or payable, always enters into the cost of production of a commodity because it is one of the out-goings without payment of which the commodity does not become marketable. Indeed, it applies where the excise duty has been levied on a commodity. It becomes an integral and inseverable part of the cost structure of a commodity and, therefore, a material factor operating as a factor determining its cost price. It must, therefore, necessarily affect the value of the commodity. However, in the instant case, the language of Rule 27, in our opinion, is quite explicit. In order to determine the value of the goods to the cost price two sets of charges are to be added. One set of charges has been described as "the charges incurred till their arrival at the octroi Naka for the carriage" and the second set of charges has been described by the expression "other incidental charges, if any, such as shipping, insurance, customs and railway freight, as the case may be, in respect of the goods liable to pay octroi duty". The first expression refers to certain pre-import charges and the second expression refers to all other incidental charges. Shipping charges, insurance charges, customs duty and railway freight which have been described as incidental charges in Rule 27 do not, in our opinion, furnish an exhaustive list of these "other incidental charges". They are purely illustrative. If there are other incidental charges, they can certainly be added to the cost price. Excise duty is a duty levied on the production or manufacture of goods. Customs duty is a duty levied on the import of goods from abroad. They are two species of the same genus. We are, therefore, of the opinion that the expression "other incidental charges" takes into its arms the excise duty. In other words, the excise duty levied on the production of goods is an incidental charge to be added to its cost price within the meaning of Rule 27. We take this view because, in our opinion, "incidental charges" are charges incidental to marketability or marketing of goods. They are incidental to rendering the goods available for consumption, use or sale. They are also incidental to carrying on

business in them. Therefore, the expression "incidental charges" takes into its sweep the excise duty.

13. In *R.C. Jall Vs. Union of India (UOI)*, a similar question arose in connection with the interpretation of Sections 2 and 5 of Coal Production Fund Ordinance, 1944 and Rule 3 of the Rules made thereunder. It has been laid down in that decision that excise duty is primarily a duty on the production or manufacture of goods produced or manufactured within the country. It is an indirect duty which the manufacturer or producer passes on to the ultimate consumer, that is, its ultimate incidence is always on the consumer.

14. In *Delhi Cloth and General Mills Co. Ltd., etc. Vs. The Commissioner of Sales Tax, Indore*, a similar question arose in regard to the M. P. General Sales Tax Act, 1958. The question which actually arose in that case was whether the sales-tax recovered from the purchasers formed a part of the sale price. The Supreme Court has observed in that behalf as under:

Unless the price of an article is controlled, it is always open to the buyer and the seller to agree upon the price to be payable. While doing so it is open to the dealer to include in the price the tax payable by him to the Government. If he does so, he cannot be said to be collecting the tax payable by him from his buyers. The levy and collection of tax is regulated by law and not by contract. So long as there is no law empowering the dealer to collect tax from his buyer or seller, there is no legal basis for saying that the dealer is entitled to collect the tax payable by him from his buyer or seller. Whatever collection that may be made by the dealer from his customers the same can only be considered as valuable consideration for the goods sold.

In that decision a passage from the judgement of Lawrence J. in *Paprika Ltd. v. Board of Trade* 1944 1 All ER. 372 has been quoted with approval. It is in the following terms:

Whenever a sale attracts purchase tax, that tax presumably affects the price which the seller who is liable to pay the tax demands but it does not cease to be the price which the buyer has to pay even if the price is expressed as plus purchase tax.

Another passage from the decision of Goddard L. J. in *Love v. Norman Wright (Builders) Ltd.* 1944 1 All ER. 618 has been quoted with approval. It is in the following terms:

Where an article is taxed, whether by purchase tax, customs duty, or excise duty, the tax becomes part of the price which ordinarily the buyer will have to pay. The price of an ounce of tobacco is what it is because of the rate of tax, but on a sale there is only one consideration though made up of cost plus profit plus tax. So, if a seller offers goods for sale, it is for him to quote a price which includes the tax if he desires to pass it on to the buyer. If the buyer agrees to the price, it is not for him to consider how it is made up or whether the seller has included tax or

not.

References to the aforesaid decisions fortify our conclusion that the excise duty paid or payable forms a part of the "value" of the goods and is to be added to its cost price so far as Rule 27 of the Octroi Rules is concerned. Mr. Kaji has argued that on the production of the goods in question no excise duty was actually paid nor was it paid at the time when they entered the octroi limits of Okha. It appears that under the Central Excise and Salt Act, 1944 and the Rules made there under Esso was not paying to the Central Government excise duty immediately on the production of the goods. It only means that though it had incurred the liability to pay the excise duty, its payment was deferred or postponed to a future date. Postponement of payment of excise duty to a future date after having incurred liability to pay it on the production or manufacture of goods does not derogate from its payability. Therefore, the argument that the excise duty was not paid immediately on the production of the goods or at any time until they entered the octroi limits of Okha is not a material question for the purpose of determining the value of the goods in question within the meaning of Rule 27. The second contention raised by Mr. Kaji has, therefore, no substance and is rejected.

15. In view of our answer to his second contention our answer to his first contention becomes very easy. Since the excise duty enters the value of the goods and becomes an integral part thereof, octroi duty paid on the excise duty component of such value is not refundable merely on the ground that it does not form a part of the value of the goods. The question whether Esso was liable to pay octroi duty to the Panchayat on the goods exported out of the octroi limits of Okha after two months is a question which turns upon the Explanation to Rule 32 of the Octroi Rules. It raises a question of facts and proof thereof. It is not possible for us to determine that question in these Writ petitions. Since we are directing the Panchayat to adjudicate upon the claim for refund by Esso according to law and in light of the observations made in this judgment, this question shall have to be determined by it ultimately if any claim for refund has been made or is made by Esso. For the sake of clarity, we state that in respect of such goods on the value of which octroi duty has been paid if it becomes refundable, octroi duty paid on the excise duty component of the value of those goods shall also become refundable.

16. Turning now to the third contention raised by Mr. Kaji, on the bare reading of Rule 32, we are of the opinion that it does not raise an irrebuttable presumption. The expression "unless the contrary is proved" used in Explanation to Rule 32 clearly shows that if the person who claims the refund adduces necessary proof in support of his claim for refund, obviously the presumption which the Explanation raises shall stand rebutted. The Explanation lays down only a rule of evidence. It lays down nothing more. When read as a whole it casts upon a claimant the burden of proving the facts specified in the Explanation to Rule 32. In light of this view of ours, Mr. Kaji has not pressed his contention relating to

the vires of Rule 32. It need not be said that it is open to Esso to adduce all evidence to rebut the presumption which may initially arise under the Explanation to Rule 32 wherever that Explanation is applicable.

17. Turning to the fourth contention raised by Mr. Kaji, we must have a close look at Rules 32, 33, 34 and 34B. Rule 32 which we have quoted above in terms creates a right in favour of an importer to the refund of octroi duty paid by him to the Panchayat in those cases where on evidence the terms of Rule 32 have been satisfied. It is quite clear, therefore, that if within the meaning of Rule 32 an importer has become entitled to the refund of octroi duty paid by him, it creates a corresponding duty or liability for the Panchayat to refund it. It is the Panchayat which levies and collects octroi duty. Therefore, it is that body which is primarily liable to refund it in cases where refund has become admissible. Under Rule 33 refunds of octroi duty made to importers have got to be debited to the gram fund or to the nagar fund, as the case may be, constituted u/s 99. The very fact that refund of octroi duty has got to be debited to the gram fund or nagar fund, as the case may be, as laid down by Rule 34, fortifies our conclusion that the primary liability to refund the octroi duty wherever refund is admissible lies primarily upon the Panchayat. Rule 34 lays down a special procedure to be followed by a claimant. It creates an authority to whom an application for refund can be made. Sarpanch or in his absence Upa-Sarpanch is the statutory authority under of Rule 34. His power to grant refund where it is admissible on merits is circumscribed by two factors. One of them is that an application in writing must have been made to him within three "days from the date of the export. The second is that the claimant must have produced a receipt signed by the Naka Karkun and given to him at the time of payment of octroi. We have no doubt in our mind that wherever Rule 34 applies, the special procedure laid down by it must be followed by a claimant for claiming refund of octroi duty paid by him. However, in the instant case, for the reasons which follow, we are of the opinion that the special procedure laid down by Rule 34 did not apply. Before Rule 34B came into force, Esso had been enjoying for some time current account facility with the Panchayat under a mutual arrangement between the two. Since the said Rule came into force, Esso had enjoyed the current account facility with the Panchayat under the said Rule. In fact, Esso had enjoyed this current account facility from 1st April 1965 to 15th May 1968 and from December 1968 to February 1970. Obviously, therefore, it was not paying octroi duty every time it imported goods within the octroi limits of the Panchayat. It was making up the accounts at the end of the specified periods. Since, by virtue of the current account facility granted to it, it was not paying octroi duty every time it imported goods within the octroi limits of the Panchayat, it did not obtain any receipts for the octroi duty which became due and payable on the goods imported. They would have been given to it if the duty was paid on the spot. In course of a month or in course of a specified period it might import goods several times. So far as octroi duty was concerned, the entire amount would be paid by it at a time to the Panchayat under the current account facility. Under such circumstances, it

would be impossible for Esso to produce the receipts signed by the Naka Karkun within the meaning of Sub-clause (ii) of Clause (1) of Rule 34. If it did not have any such receipts and could not produce them before the Sarpanch it would be well-nigh impossible for the Sarpanch to order any refund even if he was otherwise satisfied on merits as to the admissibility of the claim for refund of octroi duty. On account of the availability of the current account facility the special procedure laid down by Rule 34 could not be invoked by Esso to claim refund. If that special procedure and, therefore, the special forum were not available to it under Rule 34 what was the remedy for Esso to claim refund ? It has been contended by Mr. Mehta, appearing on behalf of the Panchayat, that the only remedy available to Esso was to file a civil suit for the purpose. Resort to a Civil Court is a residuary remedy which is available to every person who has a claim against another. Mr. Kaji, appearing on behalf of Esso however has contended that a public body which levies and collects octroi duty under a statute is under a statutory obligation and duty under Rule 32 to refund it in admissible cases. In his submission, it is a general remedy which is available to every claimant. A claimant can resort to it if he cannot take benefit of Rule 34. We find a good deal of substance in this submission of Mr. Ramji. Rule 32 Creates a statutory right to refund in favour of an importer. When it is read in light of Rule 33, it creates a statutory obligation and liability on the part of the public body collecting the octroi duty to refund it in admissible cases.

18. Levy of octroi is a creature of the statute (vide Section 178). This section itself provides that levy is subject to refund in admissible cases. Therefore, refund is also a creature of the statute. Rule 32 provides for cases where and lays down the circumstances under which octroi becomes refundable. Rule 34 provides for a special channel (Sarpanch as distinguished from the panchayat through which refund can be obtained. Therefore, levy, collection and refund are creatures of the Act. Nothing is de hors the Act. Now, if the special channel to obtain refund provided by Rule 34 fails or cannot be made use of on account of circumstances beyond the control of an importer the liability of the Panchayat to refund it and the right of an importer to obtain refund are not extinguished. It is necessary to note that failure of the special machinery to operate in cases of this type cannot be equated with extinguishment of the liability of the Panchayat to refund it and of the right of an importer to obtain it. In other words failure of the special machinery, provided by Rule 34, to function is clearly distinguishable from the liability of the Panchayat to refund the octroi in admissible cases. The former touches the realm of procedure. The latter touches the realm of substantive rights. Failure of the former cannot lead to the extinguishment of the latter. There is no rule or section which renders an importer disentitled to refund where Rule 34 fails to apply. The question, therefore, which arises for our consideration is this: Apart from the residuary remedy of having recourse to a Civil Court, does an importer, under such circumstances, have any other remedy ? Since the levy, collection and refund are the creatures of the statute and since the proof of the circumstances which entitle an importer to claim refund is also matter falling

under the statute, we think one who levies and collects the octroi has both a right and an obligation to refund it in admissible cases. In other words, an importer claiming refund has three remedies. One is the special remedy available to him under Rule 34. In cases where Rule 34 cannot be invoked or made use of for reasons beyond the control of an importer he has a general remedy under Rule 32 itself to apply to the taxing authority itself to grant refund to him. He has also the residuary remedy of filing a suit in a Civil Court for the purpose. The last remedy is de hors the Act. So far as the second remedy is concerned, we infer it from the proposition that one who levies and collects a tax has an implied power and therefore an obligation to refund it in admissible cases. Supposing Rule 34 was not made at all and the rule-making authority had stopped at Rule 33 while making the Rules, could it have been said that an importer could not have applied to Panchayat for refund and that his only remedy would have been to institute a suit in a Civil Court ? We cannot subscribe to any such proposition. The doctrine of implied power which we are applying to Octroi Rules has been resorted to in a number of cases.

19. Bidi, Bidi, Bidi Leaves" and Tobacco Merchants Association Vs. The State of Bombay, was a case under the Minimum Wages Act, 1948. While considering a notification issued under that Act by the State Government the question which incidentally arose for Their Lordships" consideration was this : If an employer discards in terms of the contract between the parties certain Bidis manufactured by his employees what should be its proportion and what procedure should be followed in regard to payment for such discarded Bidis ? This was a matter which had a bearing on the question of fixing minimum wages. The notification issued by the then Government of Bombay u/s 5 of the Minimum Wages Act 1948 had not authorised the setting up of the machinery for the purpose nor had it laid down the manner in which an employer should make payment for the discarded Bidis. It is in that connection that the question of implied power of the State Government, issuing the said notification, arose. A paragraph from Craies on Statute Law has been quoted by Their Lordships with approval. It is as follows:

One of the first principles of law with regard to the effect of an enabling Act is that if a Legislature enables something to be done, it gives power at the same time by necessary implication to do everything which is indispensable for the purpose of carrying out the purposes in view.

A passage from the decision of Pollock, C. B., in Fenton v. Hampton (1858) 117 RR 32 as reproduced in Maxwell on Interpretation of Statutes, 10th Edition, has also been cited by Their Lordships with approval. It is as follows.

It becomes therefore all important to consider the true import of this maxim, and the extent to which it has been applied. After the fullest research which I have been able to bestow, I take the matter to stand thus : Whenever anything is authorised, and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorised in express terms be also done, then that something will be supplied by necessary

intendment.

This doctrine can be invoked in cases "where an Act confers a power or imposes a duty. In such a case, it also confers by implication the power of doing all such acts, or employing such means, as are essentially necessary to its execution." After having considered the question this is what Their Lordships have laid down in that decision.

...the doctrine of implied power can be legitimately invoked when it is found that a duty has been imposed or a power conferred on an authority by a statute and it is further found that the duty cannot be discharged or the power cannot be exercised at all unless some auxiliary or incidental power is assumed to exist. In such a case, in the absence of an implied power the statute itself would become impossible of compliance. The impossibility in question must be of a general nature so that the performance of duty or the exercise of power is rendered impossible in all cases. It really means that the statutory provision would become a dead letter and cannot be enforced unless a subsidiary power is implied. This position in regard to the scope and effect of the doctrine of implied powers is not seriously in dispute before us.

20. Kirpal Singh Duggal Vs. Municipal Board, Ghaziabad, was a case under U. P. Municipalities Act, 1916 and Rules made thereunder. In that case, refund of tax which was levied and collected by the Municipality was claimed. Rules made in that behalf had laid down procedure for claiming refund. The question which arose before Their Lordships in that case was whether the procedure laid down by the Rules was a condition precedent to the exercise of the right to claim refund and whether recourse to the civil Court for the purpose was conditioned by strict compliance with the procedure prescribed. Their Lordships gave the following answer to the question.

The rules framed by the Government merely set up the procedure to be followed in preferring an application to the Municipality for obtaining refund of the tax paid. The Municipality is under a statutory obligation, once the procedure followed is fulfilled, to grant refund of the toll. The application for refund of the toll must be made within fifteen days from the date of the issue of the certificate and within six months from the date of payment of the toll. It has to be accompanied by the original receipts. If these procedural requirements are not fulfilled, the Municipality may decline to refund the toll and relegate the claimant to a suit. It would then be open to the party claiming a refund to seek the assistance of the Court, and to prove by evidence which is in law admissible that the goods transported by him fell within the order issued u/s 157(3) of the Act. The rules framed by the Government relating to the procedure to be followed in giving effect to the exemptions on April 15, 1939, do not purport to bar the jurisdiction of the civil Court if the procedure is not followed. In our judgment, the civil judge and the High Court exalted what were merely matters of procedure, which the Municipality was entitled to require compliance with in granting refund, into conditions precedent to the exercise of jurisdiction of the

civil Court.

The question in that case related to the power of the Municipality as distinguished from that of the civil Court. The proposition which emerges from that decision for the purpose of the present case is that a procedure laid down for a special statutory officer to do a certain thing fetters the power of that officer alone and none else.

21. Municipal Committee, Khurai v. Dhannalal Sethi and Ors. AIR 1968 SC 1458 was a case under the Central Provinces and Berar Municipalities Act, 1922. Under that Act, Rules were made by Khurai Municipal Committee for levy and collection of octroi duty. Rules 27 and 35 to 39 dealt with refund of octroi in admissible cases. The question which arose before their Lordships was this: If a claimant for refund did not follow the procedure, what would happen to his right to obtain refund ? Answering the question, this is what Their Lordships have observed in that decision,

...these rules do provide a procedure which an exporter wishing to claim refund has to follow. But the question is whether in a case where an exporter has not done so, is he disentitled from claiming the refund. The real difficulty in the way of the appellant Committee is that though the rules lay down a procedure which such an applicant has to follow, they do not provide at the same time that an applicant for refund who has failed to follow the procedure laid down in Rules 35 to 39 would be disentitled to claim the refund. In the absence of such a provision coupled with the categorical language of Rule 27 giving a right to an exporter of dutiable goods to claim 7/8th of the duty paid on such goods on their import, it becomes difficult to uphold the denial by the appellant Committee of the right of the respondents 1 and 2 to such a refund.

Therefore, failure to follow a special procedure to claim refund does not destroy or extinguish the substantive right unless the law makes an express provision to the contrary. In this case, failure of Rule 34 to apply to the facts of the instant case has not extinguished or destroyed Esso's substantive right to obtain refund.

22. In income Tax Officer, Cannanore v. M. K. Mohammed Kunhi AIR 1968 SC 430, a question arose under the Income Tax Act, 1961 whether the Appellate Tribunal, in absence of any express provisions in that behalf, has power to grant a stay order as incidental to the exercise of its appellate jurisdiction. Their Lordships have answered the question in the following terms.

Section 255(5) of the Act does empower the Appellate Tribunal to regulate its own procedure, but it is very doubtful if the power of stay can be spelt out from that provision. In our opinion the Appellate Tribunal must be held to have the power to grant stay as incidental or ancillary to its appellate jurisdiction. This is particularly so when Section 220(6) deals expressly with a situation when an appeal is pending before the Appellate Assistant Commissioner but the Act is silent in that behalf when an appeal is pending before the Appellate Tribunal. It could well be said that when Section 254 confers appellate jurisdiction, it

impliedly grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution and that the statutory power carries with it the duty in proper cases to make such orders for staying proceeding as will prevent the appeal if successful from being rendered nugatory.

23. Therefore, in our opinion, where the special procedure laid down by Rule 34 is rendered inapplicable on account of the facility granted to an importer under Rule 34 B or on account of any other circumstances beyond the control of an importer, -his right to obtain refund and the liability of the Panchayat to grant refund are not extinguished. In addition to the remedy of having recourse to the civil Court it is also open to him to approach the Panchayat itself (as distinguished from the Sarpanch) for the purpose because it is that body which has levied and collected the tax and out of whose funds it is to be refunded upon the proof of facts laid down in Rule 32. All these matters are creatures of the Act. If Esso approaches the Panchayat for refund, the latter is under a statutory obligation to consider it according to law.

24. Mr. Mehta, appearing for the Panchayat, has raised three preliminary objections to the maintainability of Special Civil Applications Nos. 191 and 192 of 1970. His first objection is that these two petitions involve disputed questions of fact and that, therefore, they cannot be entertained, more particularly so when Esso has an alternative and effective remedy to approach the civil Court. It is true that Esso had such an alternative remedy and that it did not avail itself of it. Instead, it approached the State Government u/s 305 of the Act. In our opinion, for the reasons which follow, it was a misconceived remedy. Now in 1972 civil suit is time-barred and is, therefore, not available to it. To dismiss these petitions on this technical ground and to leave Esso without any remedy whatsoever is to perpetuate injustice, to undermine public confidence in the administration of justice and to sacrifice substantive rights on the altar of procedural wrangles and highly technical considerations. We, therefore, reject this preliminary objection. The primary duty of a court of law is to do justice between the parties, and it must do so, if it can do so, without violating or infringing any law. By rejecting this preliminary objection we only try to further the ends of justice so as to enable an aggrieved party to vindicate his rights.

25. The second preliminary objection raised by Mr. Mehta is that these two petitions are barred by delay and laches. The following are the facts bearing on the question. Notices of demand were issued by the Panchayat to Esso on 14th November 1967 and 15th November 1967. Payments were made by Esso to the Panchayat shortly thereafter. Revision Application No. 81 of 1968 was filed thereafter by Esso before the State Government. It was heard on 14th August 1969. The Development Commissioner as the delegate of the State Government made the impugned order on 13th November 1969. Thereafter, there was some correspondence between Esso and the Sarpanch by which the former called upon the latter to refund to it the amounts in question. Thereafter, in February 1970 these two Writ Petitions were filed. Firstly these two Writ Petitions were filed

within three months from the date of the impugned order. Secondly, one of the prayers in these Writ Petitions is for issuing a writ of Mandamus directing the Panchayat to refund the amounts in question to Esso. The Writ Petitions were filed within three years from the dates of the notices of demand. Therefore, on the date on which these Writ Petitions were instituted, the claim was not barred by time. Thirdly, if these two petitions are now dismissed in limine on the ground of the bar of delay and laches, Esso will have no remedy whatsoever because action in a civil Court is now time-barred. For these reasons we reject the second preliminary objection raised by Mr. Mehta in answer to these two petitions.

26. The third preliminary objection raised by him is that the High Court cannot grant academic declarations in petitions under Article 226. This contention has no force because Esso in these two petitions not only prays for certain declarations but also prays for a writ of Mandamus directing the Panchayat to grant refund to it of the amounts in question. Such a prayer in certain cases can be entertained.

27. In *Bhopal Sugar Industries Ltd., Madhya Pradesh v. D.P. Dube*, Sales Tax Officer, Bhopal Region, Bhopal AIR 1967 SC 549 the question which arose was one relating to the refund of tax. Answering the question whether such a prayer can be made in a Writ Petition it has been observed by the Supreme Court in that decision as follows:

It is true that the jurisdiction of the High Court under Article 226 is extensive, but normally the High Court does not exercise that jurisdiction by entertaining petitions against the order of taxing authorities, when the statute under which tax is sought to be levied provides a remedy by way of an appeal or other proceeding to a party aggrieved and thereby by-pass the statutory machinery. That is not to say that the High Court will never entertain a petition against the order of the taxing Officer. The High Court has undoubtedly jurisdiction to decide whether a statute under which a tax is sought to be levied is within the legislative competence of the Legislature enacting it or whether the statute defies constitutional restrictions or infringes any fundamental rights, or whether the taxing authority has arrogated to himself power which he does not possess, or has committed a serious error of procedure which has affected the validity of his conclusion or even where the taxing authority threatens to recover tax on an interpretation of the statute which is erroneous. The High Court may also in appropriate cases determine the exigibility to tax of transactions the nature of which is admitted, but the High Court normally does not proceed to ascertain the nature of a transaction which is alleged to be taxable. The High Court leaves it to the tax payer to obtain an adjudication from the taxing authorities in the first instance.

Secondly, in the instant case, we not only grant the declaratory relief but also issue a writ of Mandamus for a lesser purpose directing the Panchayat to consider Esso's claim for refund of octroi duty according to law. Thirdly, so far as the proceedings before the Development Commissioner were concerned, both the parties were at issue on the question of livability and refund ability of the

octroi duty on the goods in questions.

28. Mr. Mehta has relied upon the decision of the Supreme Court in Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, . One of the principles laid down in that case in case of petitions under Article 32 is that extraordinary remedy should not take the place of ordinary remedy. We have not entertained these two Writ Petitions in lieu of the ordinary remedy available to Esso. We are in fact enforcing an ordinary remedy by directing the Panchayat to consider according to law its claim for refund. The principle laid down by the Supreme Court, therefore, in the aforesaid decision cannot be invoked to hit these two petitions. All the preliminary objections raised by Mr. Mehta fail and rejected.

Special Civil Application No. 1650 of 1969:

29. This petition is filed by the Panchayat against the impugned order. The only contention which has been raised on behalf of the Panchayat is that the impugned order is without jurisdiction. A few relevant facts in that behalf may be noted. Two Revision Applications, which were decided by the impugned order, were not filed against any original order made by the Panchayat or any appellate order made by the District Panchayat u/s 178. The Panchayat served notices and Writs of demands upon Esso. Esso made the payment under protest and raised a general dispute as to the live-ability of octroi and demanded its refund ability. The dispute between the parties was left unresolved. Therefore, Esso filed two Revision Applications before the Development Commissioner as if to seek declarations. The question, therefore, which arises for our consideration is whether a Revision Application of this type is maintainable u/s 305. Section 305 provides as follows.

The State Government may call for and examine the record of proceedings of any panchayat or of any officer (except any proceedings of the Nyaya Panchayat or of the District or the Sessions Court in judicial proceedings in revision or reference from the proceedings of a Nyaya Panchayat) for the purpose of satisfying itself as to the legality or propriety of any order passed and may revise or modify the order as it shall deem just.

We are not concerned in this case with the exception occurring in the brackets. The material expressions on which reliance has been placed on behalf of the Panchayat are "...may call for and examine the record of proceedings..." and "...any order passed...." These expressions clearly, in our opinion, contemplate a specific order in a specific case of which the record and proceedings can be called for. In the instant case, there was no such order. There was no such case also in which any such order could have been passed. In our opinion, therefore, Section 305 could not have been invoked by Esso for the purpose for which it did. The Development Commissioner as the delegate of the State Government had nothing before him to revise. He had no jurisdiction to grant a general declaration. In our opinion, therefore, the impugned order made by him is without jurisdiction and must be quashed. It has been contended by Mr. Kaji on

behalf of Esso that the Panchayat had refused to refund the octroi because Esso had a current account facility with the Panchayat. Rule 34 could not be invoked by Esso under the circumstances stated in this judgment. Therefore, according to Mr. Kaji, the State Government had the controlling authority over the Panchayat and it could, therefore, be approached for seeking the declarations which Esso sought. We are unable to uphold the contention raised by Mr. Kaji because the language of Section 305 of the Act is unambiguous and unequivocal. It does not confer any such power on the State Government. Its scope is limited to the examination of the legality or propriety of any specific order made by Panchayat or any officer in a specific case. It is conceded by the parties to this petition that the impugned order has not been made u/s 328 of the Act and that in any case, since it has been made by the delegate of the State Government and not by the State Government itself, Section 328 has no application to the instant case.

30. In the result, for the reasons stated above, we allow Special Civil Application No. 1650 of 1969 and issue a writ of Certiorari quashing the impugned order made by the Development Commissioner, Gujarat State. Rule is made absolute with no order as to costs of this petition.

31. So far as Special Civil Applications Nos. 191 and 192 of 1970 are concerned, challenge to Rule 32 of the Gujarat Gram and Nagar Panchayats Taxes and Fees Rules, 1964 fails for the reasons stated in the foregoing parts of this judgment. So far as the claim for refund is concerned, we issue a writ of Mandamus directing Okha Gram Panchayat (now Okha Nagar Panchayat) to entertain the claim for refund of octroi duty made by Esso Standard Eastern Inc. and to decide it according to law and in light of the observations made in this judgment after permitting Esso to lead all evidence in support of its claim and after having given it the reasonable opportunity of being heard in the matter. If Esso has not made any formal application to the Panchayat in that behalf, the Panchayat shall permit it to be made.

33. Rule in both these petitions is made absolute only to the ""aforesaid extent. There shall be no order as to costs of these petitions.