
(1977) 01 RAJ CK 0009

In the Rajasthan High Court

Case No : Civil Miscellaneous Writ Petition No's. 17 and 82 of 1976

Parekh Automobiles and Others

APPELLANT

Vs

Municipal Council and Another

RESPONDENT

Date of Decision : 28-01-1977

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1977) WLN 137

Hon'ble Judges : M.L. Joshi, J

Bench : Single Bench

Judgement

M.L. Joshi, J.—These two writ petitions challenge the validity of the levy as the octroi on the petroleum products by the Municipal Council Jodhpur sell from depot of the Indian Oil Corporation at Jodhpur, hereinafter called the respondent No. 2 to its retail outlets viz Dangiavas and Mogda. The petitions are based on almost identical facts and involve common questions of law and so they are being disposed of by a single judgment.

2. As the facts and points involved in both the writ petitioner are almost similar it will be sufficient to narrate facts from writ petition NO. 17/76 Parekh Automobiles v. Municipal Council Jodhpur and Anr. as the decision in this case will govern the decision in the another writ petition also.

3. The petitioner Parekh Automobiles Co., has a retail outlet for the sale of petroleum products at Dangiavas. The petitioner has been allotted retail outle by the respondent No. 2 for sale of petroleum products such as diesel oil, mobile oil etc. at Dingiavas which is admittedly outside the limits of Jodhpur Municipal Council. According to the petitioner, respondent No. 2 has got its depot near Raikabag Station at Jodhpur where it stores petroleum products. The respondent No. 2 from its depot at Jodhpur supplies the petroleum products to various pump stations situated within the limits of Jodhpur Municipal Council as well &s situated outside the limits of jodhpur Municipal Council in several districts such as Districts of Jodhpur; Pali. Barmer, Jalore, Nagaur etc. including the retail outlet of

the petitioner at Dargia as According to the petitioner the respondent No. 2 being a public (sic) taking, it is being provided current account facilities u/s 133 of the Rajasthan Municipalities Act, hereinafter called the Act, and so the respondent No. 2 has not to pay octroi tax on such consignment at the time of entry of goods within the limits of Municipal Council. It is alleged that under Rule 13 of the Rajasthan Municipalities (Octroi) Rules 1962, herein after to be referred to as the Rules, the respondent No. 2 is supplied printed books for entry passes in duplicate in form No. 7 appended to the said Rules. Under Rule 13 if the goods which are imported within the Municipal Limits are not used, consumed or sold within the Municipal Limits and are exported out of Municipal limits for supply at various other retail outlets no octroi duty is charged on those goods for the reason that under Rule 13(4) octroi tax payable shall be based on the total amount of octroi tax as shown by the entry passes less the octroi tax the total amount of goods transported outside the Municipal limit. It has been further alleged that the Municipal Council Jodhpur has been following this procedure till 14th of July, 1975, but all of a sudden on 25th of July, 1975 the Municipal Council suspended the transport passes facilities to the respondent No 2 and took the stand that octroi tax would be charged from the respondent No. 2 on the goods brought within the Municipal limits even though they are exported by it outside the Municipal limits if they are sold within the limits of Municipal Council although such goods were meant for use and consumption of the consumers outside the Municipal limits. The respondent No 1 therefore cancelled the transport passes supplied to the respondent No. 2 from 25-7-75. As a consequence of this action of the respondent No. 1, the Municipal Council, the petitioner is being charged octroi tax on supplies made to the petitioner at Dangiawas by the respondent No 2 since 25th of July 1975 by adding the amount of octroi tax in the bills for the supplies made to the petitioner's retail out Jet at Dangiawas. It is further alleged that the respondent No. 2 challenged the right of the Municipal Council to charge the octroi on such goods and approached the State Government. Upon that, the State Government by its letter Ex.2 wrote to the Municipal Council that it having granted current account facilities u/s 133 of the Act to the respondent No. 2 should charge octroi or, the basis of petroleum products imported by respondent No. 2 minus the goods exported by it to its other distributing centres in Rajasthan. The petitioner also made representation to the Municipal Council challenging its right to realise octroi on the petroleum products which are received at the depot of the respondent No. 2 at Jodhpur but are transported by it to its retail outlets but of no avail.

4. The case of the petitioner is that the goods are not sold at Jodhpur but actually the sale takes place at Dangiawas the retail outlet of the petitioner. Secondly even if the sale is held to have taken place at Jodhpur merely on that account octroi cannot be levied unless the goods sold are meant for the use or consumption of the consumers within limits. The petitioner has therefore prayed for an order or direction or writ that the respondent be restrained from realising the octroi on diesel, petroleum products etc, which are supplied to the petitioner

at its outlet station by the respondents No. 2. It has been further prayed that the respondent be ordered to refund the octroi-tax as mentioned in the schedule A which has been illegally realised from the petitioners.

5. The respondent No. 2 in its return has substantially supported the case of the petitioner. According to the respondent No. 2 it is a public sector under taking and has got vast net work of retail outlets, i.e. distributing centers for the distribution of petroleum products, throughout India including Rajasthan. For the purpose of distribution it has got its depots at various important places where it stores its petroleum products for supply to its, various retail outlets, i.e. distributing centres. Likewise the respondent No. 2 has got its depot situated near Raikabagh Station Jodhpur where it stores its petroleum products for sale and supply to its numerous retail outlets situated within the districts of Jodhpur, Pali, Barmer, Jalore, Jaisalmer, Nagaur, Siiohi etc. It has been alleged by the respondent No. 2 that it stores petroleum products in its depot at Jodhpur for the purposes which may be classified as follows:

(1) For sale by itself to its consumer such as railways, police etc. and to its dealers of retail outlets situated within Municipal Limits of Jodhpur City who distribute or sell the petroleum products within the area covered by the Municipal limits of Jodhpur.

(b) For re-export by itself for supply to its dealers of various retail outlets situated outside the Municipal limits of Jodhpur city within the various districts specified above. Such retail outlets distribute or sell the petroleum products to ultimate consumers outside the limits of Jodhpur Municipal Council. According to the respondent No 2 it has allotted the retail outlets to various dealers under dealers agreement. A copy of model agreement has been placed on the record. Under the terms of the dealers agreement the respondent No 2 transports petroleum products out of its depot and supplies petroleum products to his dealers at the destination in its own truck tanker or the tankers of its contractors and obtains the signatures of the dealers of the retail outlet in token of the delivery of the goods and till the supplies are made at the destination the goods are at the risk of the respondent No. 2. It has been alleged by the respondent No. 2 that the pump tank and other outfits which are fitted at the retail outlets belong to it and they are its property. It has therefore, been alleged that the goods supplied at retail outlets situated outside the limits of Municipal Council Jodhpur are sold at the retail outlets where the deliveries are made and not at Jodhpur although the dealers are required to deposit the price of the petroleum products in the respondent No. 2's account in the bank unless they are allowed credit facilities but the sale takes place only when the respondent No. 2 delivers its products at the dealers retail outlets outside the Municipal limits as per the terms of the dealer agreement.

6. The respondent No. 1 Municipal Council has, however, seriously contested the petition. It has in its reply to the petition contested that whenever the sale is made by Jodhpur Depot at Jodhpur octroi is chargeable irrespective of the fact

where it is consumed or used It has further contended that whether a contract of sale has taken place at Jodhpur or retail outlet is a question of fact and unless the contracts (agreements) are placed on the record by the petitioner, this Court should not decide whether the sale by the respondent No. 2 has taken place at Jodhpur or at Dangiawas. It has further been contended that Rule 13(4) of the Rules shall be operative only in those cases where the goods have not been sold within the Municipal limits or if they have been exported out of such limits within a period of six months from the date of its import. The Municipal Council's further case is that the respondent No. 2 sells the goods at Jodhpur. At any rate the respondent No. 2 never submitted its declaration as required by Rule 9 of the Octroi Rules, therefore, the goods brought within the limits of Municipal are liable to octroi. It has further contended that the petitioner has no locus stand to move this petition as the Municipal Council is charging octroi on the supplies made to the petitioner at Dangiawas from the respondent No. 2 and there is no privity of obligation between the petitioner and the respondent No. 2. In the Alternative it has been contended that the petitioner has already realised the octroi from its consumers by adding the amount of octroi and is therefore not entitled to any relief. The rest of the contentions raised in the petition have also been seriously contested by the Municipal Council. The petitioner in his rejoinder has contested all the pleas taken by the Municipal Council.

7. Argument in these cases, were mainly addressed by Mr. Hastimal learned Counsel for the Parekh Automobiles which have been adopted by Mr. Singh the learned Counsel for Shri Sukhsampat Raj petitioner in another writ petition Mr. Hastimal has put forth the following contention (1) the Municipal Council is not entitled to levy the octroi on the petroleum products which were re-exported by the respondent No. 2 to the retail outlet of the petitioner at Dangiawas as the goods were neither brought for consumption or use in the limits of the Municipal Council of jodhpur nor sold in the Municipal area (2) Even if it is assumed that the petroleum products which have been exported to the petitioner's outlet at Dangiawas have been sold at Jodhpur then too the Municipal Council Jodhpur has no jurisdiction to levy the octroi and realise, the same as goods so sold were not meant for use of ultimate consumer in the Municipal area. The taxable event for the purposes of levy of octroi duty takes place only if the entry of the goods in the limits of Municipal Council is meant for the use of ultimate consumer or user. The petroleum products which have been exported to the petitioner's retail outlet at Dangiawas were meant for the use of ultimate consumer for use outside the limits of the Municipal Council so they are not chargeable to octroi.

8. Before dealing with the above contentions on merits it will be proper to first deal with the preliminary objections raised on behalf of the Municipal Council Jodhpur.

9. The first preliminary objection raised on behalf of the Municipal Council is that the petitioner is a firm and is therefore not competent to bring the writ petition. It is submitted that the petitioner firm is neither a natural nor a juristic person

and the before it is wholly incompetent to move this Court by way of writ petition under Article 226 of the Constitution of India. The learned Counsel for the Municipal Council has not been able to substantiate his contention by any provision of law or an authority on the point. On the other hand, Mr. Hastimal the learned Counsel for the petitioner has invited my attention to a Supreme Court decision viz. *Andhra Industrial Works v. Chief Controller Imports* AIR 1974 SC 1939 to rebut the contentions raised on behalf of respondent Municipal Council. I have gone through the Supreme Court decision cited by Mr. Hastimal and I am satisfied that that decision squarely negatives the contention raised on behalf of respondent Municipal Council. In that decision it has been held that a registered partnership firm is competent to move the High Court under Article 226. This preliminary objection has therefore no merit in it.

10. The next preliminary objection of the respondent Municipal Council is that the petitioner has no locus stand to file this writ petition as it is neither an aggrieved person nor an adversely affected party. He has raised (sic) three fold objections in this behalf. The first objection in this behalf is that the petitioner is not an aggrieved party. I have given my anxious consideration to this aspect of the matter. It may be observed here that although the Municipality is realising the octroi from the respondent No. 2 the respondent No. 2 is adding the amount octroi in the bills of the goods supplied by it to the petitioner's retail outlet at Dangiawas. The amount of the octroi though in the first instance is paid by the respondent No. 2 to the respondent No 1 but the same is realised by it from the petitioner by adding the same in the bills of the goods supplied to the petitioner. It, therefore, cannot be said that the petitioner is not an aggrieved party. Secondly, it has been contended that the petitioner is not a party adversely affected. It has been submitted that the petitioner has not shown how it has been adversely affected in its business of sale of petroleum products at Dangiawas Suffice it to say that when the amount of octroi is charged in the first instance from the respondent No 2 but the same is realised by the respondent No. 2 from the petitioner when billing out for the supplies is made to the petitioner's outlet at Dangiawas The petitioner has to pay the amount of octroi while making payment of the bills of the petroleum products supplied by the respondent No. 2 when the petitioner is made to pay the octroi to the respondent No. 2 who in its turn adds the amount of octroi in the bills of the goods supplied to the petitioner's outlet station at Dangiawas, obviously it is an adversely affected party. It is not necessary to further show how the petitioner's business has been adversely affected by the addition of the amount of octroi by the respondent No 2. The objection of the learned Advocate General in this behalf is that there is no privity of obligation between the petitioners and the respondent Municipal Council as the octroi is directly realised from the respondent No. 2 and not from the petitioner and, therefore, the petitioner cannot raise grievance about the octroi directly realised from the respondent No 2 The contention although apparently plausible if scrutinised has no substance in it. It is true that the octroi is in the first instance charged from the respondent

No. 2 but it is equally true that the respondent No. 2 realises the same amount as octroi by adding it to the bills for the supplies of the goods made to the petitioner's retail outlet at Dangiawas. The respondent No. 2 has supported the petitioner's version on this point. It has stated in its reply that the octroi charged from it by the Municipal Council is realised from the petitioner by adding it in the bills for the supply of petroleum products to the petitioner's retail outlet at Dangiawas. In view of the foregoing discussions it is legitimate to hold that the petitioner is an aggrieved and adversely affected party or at any rate interested party. It is settled law that aggrieved or adversely affected party or even interested party is entitled to claim relief by way of Article 226. I am fortified in this view of mine by *Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others*, *Dr. Satyanarayana Sinha Vs. S. Lal and Company (P) Ltd.*, *In Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others*, it has been held that petitioner who seeks to file an application under Article 226 of the Constitution should "ordinarily" be one who has a personal or individual right in the subject matter of the petition. It has been further held that a person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no property or even fiduciary interest in the subject matter thereof.

11. In *Dr. Satyanarayana Sinha Vs. S. Lal and Company (P) Ltd.*, it has been laid down that under Article 226 writ which is the foundation for exercising the jurisdiction under Article 226 is ordinarily the personal or individual right of the petitioner himself. It has been further laid down that even on an application made by the person aggrieved the court will intervene ex-debtor justitia in justice to the applicant and when it is made by a stranger the court considers whether the public interest demand its intervention. In this case the petitioner is being made to pay the octroi to the respondent No. 2 which in its turn is being charged by the Municipal Council Jodhpur which is being challenged as an unauthorised levy. In such circumstances it cannot be said that the petitioner is not an interested or aggrieved party. The petitioner has therefore "right to move an application, under Article 226 to challenge the validity of levy of octroi in the, public interest. In view of the above authorities I am disposed to hold that petitioner has locus stand to move an application under Article 226 to challenge the levy of octroi on the ground that it is an unauthorised one.

12. The next preliminary objection of the respondent Municipal Council is that the petitioner had an alternative remedy by way of appeal under Rule 40 of the Rajasthan Municipalities (Octroi) Rules 1962, hereinafter referred to as the Rules. The contention of the learned Advocate General is that the petitioner having failed to avail the alternative remedy by way of appeal provided by Rule 40, this Court should not invoke its extraordinary jurisdiction under Article 226. In this connection he has relied upon *Union of India (UOI) Vs. T.R. Varma*, *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another*, *Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes*, *The British India Steam Navigation Co. Ltd. Vs. Jasjit Singh, Addl.*

Collector of Customs, Calcutta and Others, , Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others, and Joharmal Murlidhar and Co. Vs. Agricultural Income Tax Officer, Assam and Others, . The cases relied upon by the learned Advocate General broadly lay down that the parties who apply for a writ, should before he approaches the court have exhausted other remedies available to him under the law, as the existence of the alternative remedy is ordinarily a bar to the entertainment of a petition under Article 226 of the Constitution. This wide proposition, however, is subject to two broad exceptions. If the officer or authority who takes the action impugned or where the order prejudicial to the petitioner has been passed in violation of the principles of natural justice then the existence of alternative remedy will not operate as a bar to the maintainability of a writ petition under Article 226. The above proposition has its support in a Supreme Court decision. In *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhvani and Another*, it has been held that if the impugned order or action of the authority suffers from patent lack of jurisdiction or if the impugned order has been passed in violation of principles of natural justice, the existence of alternative remedy will not operate as a bar against the maintainability of application under Article 226. In Bench decision of this Court reported as *Venu Ram v. State of Rajasthan* 1967 RLW 39 the Division Bench of this Court after elaborate discussion has held that although generally the High Court will not entertain writ petition where there is an alternative remedy yet in cases where the order suffers from patent lack of jurisdiction on the part of the officer or the authority the High Court is duty bound to give relief under Article 226 even if there is alternative remedy available to the petitioner. The preliminary objections, therefore, will be decided with reference to the question as to whether the levy of octroi by the Municipal Council Jodhpur is without jurisdiction or not.

13. Section 104 of the Rajasthan Municipalities Act provides as follows:

Every Board shall levy, at such rate or from such date as the State Government in such case direct by a notice in the official gazette and in such manner as is laid down in this Act and as may be provided in the Rules made by the State Government in this behalf, the following taxes, namely,

....

(2) An octroi on goods and animals brought within the limits of the Municipality for consumption, use or sale therein:

....

It is contended on behalf of the petitioners that the taxable event in respect of the goods supplied at its retail outlet at Dangiawas had not taken place within the limits of the Municipal Council. It has been submitted by Mr. Histimal that the goods brought by the respondent, No. 2 and exported to the petitioners retail outlet at Dangiawas were in the first place not sold at all within the Municipal limits. Secondly even if the sale of the goods so exported is held to have taken

place within the Municipal limits then too the taxable event has not taken place as such goods were not meant for sale or use or consumption of the ultimate consumer residing within the local limits "of the Municipal Council. The contention of the learned Counsel for the petitioner is that the word "sale" occurring u/s 104 of the Act cannot be read without reference to use or consumption. His argument is that the sale simpliciter by itself does not attract the levy of octroi unless the goods were meant for use or consumption of the ultimate consumer in the area of the Municipal Council Jodhpur. In this connection the learned Counsel (or the petitioner has placed reliance on *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, and *Hiralal Thakorlal Dalal Vs. Broach Municipality and Others*, Trie material facts in *Burmah Shell Oil Storage and Distributing Co. India Ltd. Vs. The Belgaum Borough Municipality*, were like this. The *Burmah Shell Storage "and Distribution Company India Ltd.* hereinafter referred to as the company was dealer in petrol and petroleum products which it manufactured in its refinery situated outside the octroi limits of Belgam Municipality It brought those products inside that area either for use or consumption by itself or for sale generally to its dealers and the licencees who in their turn sold them to others. According to the Company, the goods brought by it within the octroi limits could be divided into four separate categories as under:

- (1) Goods consumed by the Company.
- (2) Goods sold by the company through its dealers or by itself and consumed within the octroi limits by persons other than the company.
- (3) Goods sold by the Company through its dealers or by itself inside the octroi limits to other persons to be consumed by the out side the octroi limits.
- (4) Goods sent by the Company from its depot inside the octroi limits to extra Municipal points where they are bought and consumed by persons other than the Company.

In that case the Company objected to the levy of octroi on the goods which were sent b) it out of the octroi limits for the outside ultimate consumers and claimed refund of the amount charged as octroi. Clause (4) of Sub-section (1) of Section 73 of the Bombay Municipal Boroughs Act which was under consideration in that case was just analogous to Sub-section (2) of Section 104 of the Rajasthan Municipalities Act. The words "use or sale" were substituted for the words "for use" by the Bombay Act of 35 of 1954. The Supreme Court examined the scheme of the taxation under the Bombay Boroughs Act and the Rules and bye laws made by the Municipality for, the levy of octroi. After examining the history of octroi the Supreme Court held "Octrois were tax 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. "The Supreme Court further specifically clarified that the word sale was, included only in, 1964 in order to bring the description of the octroi in the Act in

line with the Constitution. While doing so the Supreme, Court further, observed that the expression consumption "and use" together, connote, the bringing in of the goods and animals not with a view to taking them out again but a view to their retention either for use without using them up or for consumption in manner which destroys, wastes or uses them up. The Supreme Court further held that the sale by it directly to consumer or dealers was merely the means for putting the goods in the way of use or consumption and that the words therein does not mean that all the acts of consumption must take place in the area of the Municipality. The Court further held as follows:

In other words a sale of the goods brought inside even though not expressly mentioned in the description of the octroi as it stood formerly was implicitly provided that 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 the Constitution did not make any addition to true concept of octroi as explained above. That concept included the bringing in of the goods in the local area so that the goods come to a repose there. When the Government of India Act 1935 was enacted, the word "octroi" was deliberately avoided and a description to forestall any dispute of the nature which has been raised in this case. In other words even without the description the tax was on goods brought for consumption, use or sale. The word "octroi" was also avoided because terminal taxes are also a kind of octroi and the two were to be allocated to different legislatures.

In our opinion even without the word "sale" in the Boroughs Act the position was the same provided the goods were sold in the local area to a consumer who brought them for the purposes of use or consumption or even for resale to others for the purposes of use or consumption by them in the area. It was only when the goods were re-exported out of the area that the tax could not legitimately be levied.

14. The above observations of the Supreme Court were cited with approval.

15. By the Bench consisting of five Judges in Hiralal Thakurlal's case (12) and the dictum laid down by the Supreme Court was reaffirmed in that case. From the dictum laid down by both the cases of the Supreme Court it appears to me that the mere sale simplicities will not attract the levy, of the octroi. There the word sale has to be read in reference to the use or consumption, If the goods are sold with the purpose of use or consumption then it will attract the levy of the octroi It is further evident that if the. goods which were brought within the Municipalities had been exported for the use of ultimate consumer outside the Municipal limits they will not attract the levy of octroi. The use of the word "sale" has been interpreted in a narrower sense in conformity with the concept of octroi which primarily, postulates the sale of goods meant for use of the ultimate consumer in the area It therefore, can safely be said that the basis for attracting the levy of octroi is bringing of the goods into the local area for consumer use or

sale for the use, of the ultimate consumption in that area. The taxable event therefore takes place on the entry of the goods which were brought for the purpose of use or consumption and the sale has to be read with reference to use and, consumption as the sale is merely the means for putting the goods in the way of use and consumption. The learned Advocate General however, contended that the event takes place as soon as the goods have been brought within the Municipal limits and the words "use, consumption and sale" have to be read in disjunctive manner. In this connection he has referred me to the Octroi Rules. Rule 6 provides that no goods liable to payment of octroi shall except as otherwise provided in these rules be brought within the Municipal limits until the octroi duty leviable in respect of such goods has been paid at the octroi outpost situated on the route of the entry as notified by the Board from time to time. Rule 9 further provides that every person bringing within the Municipal limits goods liable to payment of octroi shall produce such goods at the octroi out post and shall declare whether the goods are intended (i) for consumption, use or sale within the Municipality or (ii) for immediate transport outside the Municipality or (iii) for temporary detention within Municipal limits and eventual transpiration outside the Municipal limits. It further provides that if no such declaration is made the goods shall be treated as having been brought within the Municipal limits for consumption, use or sale therein. On the basis of these Rules it has been contended that as soon as the goods enter within the octroi limits it gives rise to taxable event unless a declaration as contemplated under Rule 9 has been made by the person bringing such goods. It has been submitted that no such declaration has been made and therefore a conclusive presumption arises that the goods shall be treated as having been brought within the Municipal limits for consumption, use or sale therein. This argument ignores the import of Rule 13. Rule 13 dispenses with the requirements of Rules 6 and 9. It is a special Rule applicable to the persons, firms and individuals who have been allowed current facilities u/s 133 of the Act. Section 133 provides that the Board if it thinks fit instead of requiring payment of octroi due from any mercantile firm or public body it may at the time when articles in respect of which it is leviable are introduced within the octroi limits of the Municipality, may at any time direct that a current account shall be kept on behalf of the Board of the octroi so due from any such firm or body as the Board specifies in this behalf. It further provides that every such account shall be settled at the intervals not exceeding one month and such firm or public body shall make such deposit or furnish such security as the Board or any Committee or officer authorised by it in this behalf may consider it sufficient to cover the amount which may at any time be due to such firm or body in respect of such dues. Rule 13, therefore, dispenses with the requirement of Rule 6. It further dispenses with the requirement of Rule 9 in regard to declaration. If we advert to Sub-rule (3) of Rule 13 it makes provision that persons to whom special facilities have been given regarding current account, a printed book of transport passes shall be supplied in form No. 5 on payment of such a price as may be fixed by the Board. When such a person wishes to transport his goods from the Municipality he shall fill up transport pass

and send it with the goods at the octroi post of exit. On receipt of transport pass the Incharge of the Octroi post shall see that the person who has signed his name in the list and being satisfied he shall tear off the coupon and deliver it to the person who presents the transport pass. He shall send the transport passes to the octroi Superintendent where they shall be filed separately in the name of each such person. The intendment behind Sub-rule (3) of Rule 13 is that account shall be maintained by the Board of the goods transported outside its octroi limited by the person who has been afforded current account facilities u/s 133 Sub Rule (4) of Rule 13 lays down that in cases provided for in Sub-rule (3) amount of octroi duty payable shall be based on the total amount of the octroi as shown by the entry pass less the total amount of the goods transported outside the Municipality as shown by the transport passes. It will thus appear that the persons who will be called upon to pay octroi on the goods shown by the entry passes less the amount of goods transported outside the Municipal limits. This is a special provision in regard to persons who have been granted current account facilities and this Rule is not subject to either Rule 6 or Rule 9 but is an overriding Rule independent of Rules 6 and 9. The respondent No. 2 admittedly has been granted current account facilities and, therefore, the octroi duty shall be charged from it under Sub-rule (4) of Rule 13 on the goods brought by it in the Municipal area minus the goods transported by it out said the Municipal limits. The contention of the learned Advocate General based on Rules 6 and 9 is, therefore, of no avail.-

16. The learned Advocate General, however, relied upon proviso to Sub-rule (4) of Rule 13 and contended that if the sale of the goods has taken place within the Municipal limits the octroi shall be leviable. The rule has to be read in consonance with Section 104. Section 104 is analogous to Section 73 of the Bombay Borough Act which has been interpreted by the Supreme Court in its two decisions referred to above wherein it has been held that the sale in order to attract levy of octroi should be for the purpose of use or consumption of the ultimate consumer in the area. The meaning of the word "sale", has therefore has to be given as per the decisions of the Supreme Court and any other meaning of sale contained in the Rules shall not be justified as it will be repugnant to the Act, namely, Section 104. There is thus no substance in this contention of the learned Advocate General also.

17. Applying the principles enunciated above it will be clear that in the instant case indubitable the goods in question were re-exported by the Indian Oil Corporation from its depot to its retail out-let for the use or consumption of the ultimate consumer outside the Municipal limits. Therefore the Municipal Council is not entitled to levy octroi on goods so exported by the respondent No. 2 to its retail outlet for use and consumption by the ultimate consumer outside the local limits of the Municipal Council. I am, therefore, disposed to hold that the Municipal Council had no jurisdiction to levy octroi on the goods re-exported by the respondent No. 2, the Indian Oil Corporation to the retail outlets of its dealers located outside the Municipal limits, for the use of the ultimate consumer

out side the Municipal limits.

18. The learned Counsel for the petitioners has further contended that even otherwise the taxable event has taken place at Dangiawas and not in the octroi limits of Jodhpur as the sale has not taken place in the octroi limits but has taken place at Dangiawas. In this connection learned Counsel for the petitioner has submitted that the goods are supplied by the respondent No. 2 in its tanker at Dangiawas & till the goods are supplied at the petitioner's retail outlet at Dangiawas the risk in the goods is with the respondent No. 2. He has pointed out that this fact has been admitted by the Corporation in its return where in it has been clearly admitted that till the goods are supplied to the petitioner's outlet station the risk is of the respondent No. 2 consequently it has been contended by Mr. Hastimal that till the goods are delivered at Dangiawas there is no contract of sale According to the learned Counsel for the petitioner the contract of sale really takes place at Dangiawas when the goods are delivered at the petitioner's retail outlet at Dangiawas and a receipt is obtained from the petitioner's retail outlet acknowledging the delivery of the goods at that place. In support of his contention the learned Counsel for the petitioners has relied upon para No. 25 of the model agreement Ex. B1 According to para 25 of the model agreement the quantity of petroleum and other allied products shall be delivered by the Corporation as measured by the Corporation's measuring device and a receipt signed by or on behalf of the dealer at the time of delivery by the Corporation will be conclusive evidence that the petroleum products mentioned therein were in fact delivered to the dealer. It is submitted that the delivery is made by the respondent No. 2's tankers at Dangiawas and the receipt is obtained there. It is, therefore, contended that till the delivery of the petrol sum is made at Dangiawas the risk is of the respondent No. 2 and therefore the sale takes place at Dangiawas.

19. On the other hand it has been contended by the learned Advocate general that the question as to where the sale takes place is a question of fact which involves the determination of the complicated questions of disputed facts and this Court should not and cannot determine such question in its exercise of jurisdiction under Article 226. It has been strenuously urged by the learned Advocate General that neither indents in regard to the transactions of sale have been produced nor there is any evidence as to the quantities to which the sale had taken place and in the absence of material documents it is not possible to determine the question as to where the sale had taken place. It has further been urged by the learned Advocate General that the "petitioner deposits the amount in advance against the supplies to be made to its-retail outlet at Jodhpur According to the learned Advocate General material and relevant evidence having not been produced on the record it will be hazardous to reach a definite conclusion as to where the contract of sale had taken place. He has urged that Exs. 2,3,4,7 and 8 produced by the petitioner in support of the contention that the sale had taken place at Jodhpur cannot form a basis for a reliable conclusion either way with regard to all the transactions of sale made to the petitioner. The

evidence produced by the petitioners" counsel is in bits and pieces of evidence which relate to particular quantity and not to all the transactions and, therefore, no firm conclusion could be made on the basis of such pieces of evidence which is of very precarious value. It has further been urged by the learned Advocate General that the admissions made by the respondent No. 2 in its return are merely self-serving statements and in absence of actual and contemporaneous documents it will not be legitimate to base reliable conclusions as to where actually the sale had taken place. Learned Advocate General went on to argue that each transaction is a distinct transaction of sale and unless particulars have been given in respect of each one of them and supported by documents it will be rather hazardous to give a firm finding as to where actually the sale had taken place. He has further argued that as soon as the goods are segregated at respondent No. 2's depot by putting them into a tanker to be sent to the petitioner's retail outlet, the sale takes place & as the segregation takes place at Jodhpur, the sale will be deemed to have taken place at Jodhpur. I have considered the respective contentions, raised on behalf of the parties and after giving my careful consideration over them I do feel that the matter as to where the sale takes place involves investigation into the complicated and disputed questions of fact which cannot be satisfactorily decided without taking evidence. Such disputed questions of fact cannot be gone into in a writ petition under Article 226 vide *Union of India v. T.R. Verma* AIR 1975 SC 882 and *H.S. Verma v. T.N. Singh* (14). However, in view of my decision that even if the sale takes place within the limits of the Jodhpur Municipal Council, but the goods are exported outside the octroi limits of Jodhpur Municipal Council for the use or consumption of the ultimate consumer outside the octroi limits of Jodhpur then the taxable event does not take place in the octroi limits of Jodhpur. The Municipal Council has therefore, no jurisdiction to levy octroi on the goods so exported. Consequently the existence of alternative remedy by way of appeal cannot operate as a bar to the maintainability of the writ petition in the facts and circumstances of this case. The Municipal Board has therefore to be restrained by way of writ mandamus not to levy octroi on the goods exported by the respondent No. 2 for the use of the ultimate user outside the octroi limits of Municipal Council even if the sale also takes place within the octroi limits of the Municipal Council Jodhpur.

20. That brings me to the question whether the petitioner is entitled to refund of the octroi realised from the respondent No. 2. It has been contended by the learned Counsel for the petitioner that although the octroi has been realised directly from the respondent No. 2 but in fact and in reality it is the petitioner who has been made to pay the octroi as the same has been realised by the respondent No. 2 by adding the octroi realised from it by the Municipal Council in its bills for the supply of the goods made to the petitioner.-

21. On the other hand it has been argued by the learned Advocate General that firstly there is no privity of obligation between the petitioner and the Municipal Council and therefore the petitioner has no right to ask for a refund of the octroi.

Secondly the petitioner himself has realised the amount of octroi while selling the petroleum products to the retail consumers by adding the same in the retail price charged from the consumers.

22. So far as the first point is concerned, I may say that there is no privity of obligation between the petitioner and the Municipal Council. The petitioner's firm was not the person from whom the Municipal Council has realised the octroi. It is rather a stranger in a way. There being no privity of obligation between the petitioner and the Municipal Council, the petitioner cannot ask for a refund of the money which it has not paid to the Municipal Council. The privity of obligation if any is between the respondent No. 2 and the Municipal Council and the respondent No. 2 could make a demand in accordance with law for refund. It is settled position of law that the person who is to apply for refund and who is entitled to such refund is the person who had paid the octroi tax. Even in common law only a person who had paid a tax can ask for its refund if he is statutorily entitled to it. I am supported in this view of mine by a decision of the Madras High Court viz. *M.A. Khadtr v. Deputy Commercial Taxes Officer* 1970 (25) STC 104. That case related to a sale tax matter. In that case the assessee was the person who made a claim for refund of the sales tax. The assessee was not however the person who had paid the sales tax. The claim of the assessee for refund was refused by the Tax Officer on the ground that he could not claim the refund as he did not pay the sales tax. Obviously in this case the petitioner did not pay the octroi directly to the Municipal Council. It was the respondent No. 2 who had paid the octroi. The petitioner therefore is not entitled to refund of the octroi not paid by him to the Municipal Council. There is no provision for refund in the Municipal Act or the Rules which enables the petitioner to claim refund even though he has not paid it to the Municipal Council.

23. Mr. Hastimal contended that although the respondent No. 2 had paid the octroi to the Municipal Council but the same has been realised by it and, therefore, he is entitled under law to get a refund from the Municipal Council. No authority has been cited in support of this proposition. It cannot be lost sight of that the petitioner himself has realised the octroi by adding it to the retail price. Mr. Hastimal, however, contended that the petitioner had charged the retail price at a lower rate in exclusion of the octroi duty. This itself is a question of fact and there is very precarious evidence to arrive at a firm decision. At any rate there being no privity of obligation between the petitioner and the respondent Municipal Council the petitioner cannot ask for a refund in the absence of any statutory rules authorising him to do so. *R. Abdul Quader and Co. Vs. Sales Tax Officer, Hyderabad, and Rallis India Ltd. v. Commercial Tax Officer* 1970 (26) STC 254. relied upon by learned Counsel for the petitioners have no relevance as they are based on entirely different facts and are wholly distinguishable. There the State wanted to realise the amounts unauthorisedly collected by the dealers from the purchaser. The Government had no authority to recover such amounts realised by the dealers.

24. It has been lastly contended by Mr. Hastimal that the Municipal Council is under an obligation to refund the octroi in view of the undertaking given by it on 3-2-76 before this Court on 3-2-76. The Municipal Council had given undertaking that the Municipal Council will refund the octroi charged from the petitioner on the diesel re-exported outside the Municipal limit of Jodhpur in case the writ petitions are allowed. The undertaking is not of any avail to the petitioner on two grounds First that the undertaking is confined to the refund of the amount charged from the petitioner by the Municipal Council and not from the respondent No 2 Second the petitioner has not succeeded in establishing his claim for refund of octroi charged from respondent No. 1. To that extent the writ petition has failed. The petitioners therefore cannot base the claim for refund on the basis of the undertaking.

25. In the result, I partly allow the writ petition and restrain the Municipal Council from charging or realising the octroi on the goods brought within the Municipal Council by the respondent No. 2 but re-exported by it outside the Municipal limits to its retail outlets for the use and consumption of the ultimate consumer outside the limits of the Municipal Council. I however, disallow the prayer for the refund of the octroi made by the petitioners in their writ petitions. In the facts and circumstances of the case the parties are left to bear their own costs.