

to their value, though by that of import excise duty was not paid. ESSO A
contested both the claims of the Panchayat and filed two revision applica-
tions before the Development Commissioner which were disposed of by
him. Aggrieved, the Panchayat as also ESSO filed writ petitions in the High
Court.

The High Court negated the challenge to the validity of Rule 32 B
and at the same time directed the Panchayat to entertain the appellant's
claim for refund of octroi duty after giving it a reasonable opportunity of
being heard in the matter. So far as the valuation for the purpose of levy
of octroi duty was concerned, the High Court upheld the Gram
Panchayat's claim. It also held that the failure to follow Rule 34 did not C
extinguish appellant's right to refund if it was entitled to it in law. Hence
these appeals by Hindustan Petroleum Corporation.

Disposing of the appeals, this Court

HELD :1. Even if the goods are sold within the local area, it must be D
for the purpose of consumption or use within that local area to be a sale
for the purpose of Entry 52 of List II of Seventh Schedule to the Constitu-
tion. If the goods are not consumed, used or sold within the local area, no
tax can be imposed under the said Entry. [509-D-E]

Tata Engineering & Locomotive Company v. Municipal Council, E
Thane, A.I.R. (1992) S.C. 645, referred to.

2.1. The Explanation to Rule 32 of the Gujarat Gram Panchayat
Taxes and Fees Rules, makes it clear beyond any doubt that the presump-
tion created by it is a rebuttable presumption. The main limb of the Rule F
provides that an importer of goods on which octroi had been paid shall be
entitled to refund of the amount so paid on export of such goods from the
octroi limits if the goods have not been consumed, used or sold within the
limits. The Explanation then provides that in three situations mentioned
therein, it would be deemed, unless the contrary is proved, that the goods G
have been used, consumed or sold within the octroi limits and refund
would be allowed in those cases. The three situations contemplated by the
explanation are (i) where the goods have broken bulk; (ii) where the goods
are not exported within two months after their import and (iii) where the
goods have changed its form by any process whatsoever. A reading of the
Explanation clearly shows that the presumption created by the Explana- H

A tion applies to all the three situations. [510-D-F]

2.2. The essential nature of the tax/duty contemplated by Entry 52 of List II of the Seventh Schedule to the Constitution should be kept in mind while construing Rule 32 inasmuch as the Gujarat Panchayat Act, 1961 and the Rules are referable to that Entry and that Entry alone. The Explanation creates a rebuttable presumption and not an irrebuttable presumption. The object behind prescribing the period of two months in clause (ii) of Rule 32 was merely to emphasise that after the expiry of two months the burden cast upon the person becomes heavier, viz., the burden to establish that the goods which have been imported into the octroi limits and whereon octroi has been paid have been exported without being used, consumed or sold within the said limits. [511-F-H]

Tata Engineering & Locomotive Company v. Municipal Council, Thane, A.I.R. (1992) S.C. 645 and *Burmah Shell v. Belgaum Municipality*, [1963] 2 Supp. S.C.R. 216, distinguished.

3. Rule 34(B) provides for maintenance of an 'account current' wherein the particulars of imports and exports and particulars of deposit of octroi duty and other specified particulars are entered. This Rule is procedural in nature. It is meant for those persons who regularly import and export goods. It only provides for a facility - convenient to both the person concerned and the Panchayat. Such a procedural rule cannot override the provisions of Rule 32 which is of a substantive nature. Both Rules 32 and 34(B) could be operated simultaneously. Rule 34(B) does not say that accounts cannot be settled at an interval less than three months. It only prescribes the outer limit viz., that the account should be settled "at intervals not exceeding three months" Even while settling the account, whenever it may be, the Panchayat authorities are entitled to apply Rule 32. [512-C-F]

4. The Panchayat authorities should look into the relevant facts and circumstances relating to the period concerned viz., from April 1, 1965 to June 10, 1969 and decide whether and, if so, what amount is liable to be refunded to the appellant. Before taking a decision on the said question, the Panchayat authorities should allow the appellant to place such material as it thinks appropriate before it and consider the same alone with other relevant material. The appellant is permitted to file a written representation with necessary material before the Panchayat authorities,

if not already filed. The amount found refundable to the appellant should be refunded within three months from the date of such decision.

[512-G-H, 513-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 29-31 and 317-18 of 1973.

From the Judgment and Order dated 21/24-4-72 of the Gujarat High Court in S.C.A. No. 1650/69 and 191 & 192 of 1970.

R.F. Nariman, S. Sukumaran and S.B. Pathak for the appellant.

S.K. Dholakia, Narsimhan, Yashank Adhyaroo and Anip Sachthey for the respondents.

The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J. This appeal is preferred by the Hindustan Petroleum Corporation Limited, successor to the ESSO Standard Eastern Corporation against a common judgment of the Gujarat High Court in three writ petitions. Writ petition no. 1650 of 1969 was filed by the Gram Panchayat, Okha. The other two writ petitions Nos. 191 and 192 of 1970 were filed by the appellant. The dispute pertains to levy of octroi duty by the Gram Panchayat. The writ petitions were filed against the orders passed by the Development Commissioner who was approached by the appellant by way of two Revision Applications. The writ petition filed by the Gram Panchayat has been allowed. In writ petition (Special Civil Applications) Nos. 191 and 192 of 1970, the High Court negatived the challenge to the validity of Rule 32 of the Gujarat Gram and Nagar Panchayats Taxes and Fees Rules, 1964 (Rules). At the same time, the Gram Panchayat was directed to entertain the appellant's claim for refund of octroi duty and to decide it according to law and in the light of the observations made in the judgment, after permitting the appellant to lead evidence in support of its claim and after giving it a reasonable opportunity of being heard in the matter. It directed further that if the appellant had not made a formal application to the Panchayat in that behalf, the Panchayat shall permit it to do so.

ESSO, a company incorporated in U.S.A. had been dealing in petroleum products in India. It had oil terminals in different parts in India where it had storage facilities. One such storage facility was located within

- A the limits of Okha Gram Panchayat in the State of Gujarāt. Petrol, diesel oil and furnace oil were stored there. The ESSO was importing products at Okha from Bombay. It had bonded warehouses both at Bombay and Okha, maintained under the provisions of the Central Excise and Salt Act, 1944. When the goods were removed from the bonded warehouse at Okha
- B for the purpose of sale or for marketing, excise duty was payable and was paid. Of the total quantity stored at the storage facility within the Okha Gram panchayat, only about 5% was released for consumption, use or sale within the territorial limits of the Gram Panchayat. The rest was taken out to places outside the Gram Panchayat for distribution and sale.
- C The Gujarāt Gram Panchayat Act, 1961 was made applicable to Okha on and with effect from April 1, 1965. Since that date, ESSO has been paying octroi to the Panchayat on the goods consumed, used or sold within the limits of the Panchayat. ESSO was also maintaining a current account facility as contemplated by Rule 34(B) of the Rules. In July, 1966,
- D a dispute arose between the Panchayat and the ESSO. Panchayat claimed octroi duty on all goods imported into Okha Panchayat limits, irrespective of the fact whether they were consumed, used or sold within the limits of Panchayat or were taken out for being sold and distributed outside the Panchayat limits. Further while determining the value of the goods for the purpose of octroi duty, the Panchayat added the excise duty to their value,
- E even though by that date of import, excise duty had not yet been paid by the appellant. (This was for reason that transfer from the bonded warehouse and to the bonded warehouse at Okha did not call for payment of excise duty). ESSO contested both the claims of the Panchayat. When demand notices were served by the Panchayat on the above basis, ESSO
- F filed revisions before the Development Commissioner which were disposed of on November 13, 1969. It is against the said order that both the Panchayat and ESSO filed writ petitions in the Gujarat High Court.

- G ESSO did not press before the High Court its challenge to the validity of Rule 32 on the ground of violation of Article 19(1)(g) of the Constitution. It raised only the following three contentions before the High Court:

- H (1) Where the goods are exported from the Panchayat limits even after two months; it is entitled to refund of the octroi duty. Rule 32 does not create any irrebuttable presumption that goods not exported within two

months shall be deemed to have been consumed, used or sold within the Panchayat limits. If it is not so construed, Rule 32 falls foul of the provisions of the Act as well as Entry 52 in List II of the Seventh Schedule to the Constitution. A

(2) That the Panchayat has no power to include the excise duty while valuing the goods, for the purpose of levy of octroi duty, even though it was not paid by that date. No octroi is leviable on the excise duty component. B

(3) That Rules 32 and 34 had no application to ESSO inasmuch as it was governed by the special procedure prescribed by Rule 34(B). C

The High Court held that Rule 32 does not create an irrebuttable presumption. It directed the Panchayat to adjudicate on the Claim for refund made by ESSO in the light of the observations made by it in the judgment. So far as the valuation for the purpose of levy or octroi duty is concerned, the High Court upheld the Gram Panchayat's claim. With respect to the third contention, the High Court held that the failure to follow Rule 34 does not extinguish appellant's right to refund if it is entitled to it in law. D

Sri Rohinton Nariman reiterated the very same three contentions as were urged before the High Court whereas Sri Dholakia, learned counsel for the respondent-Panchayat sought to construe Rule 32 as creating an irrebuttable presumption. Sri Dholakia also supported the judgment of the High Court on other questions. E

For a proper appreciation of the questions arising herein, it is necessary to notice Entry 52 in List II of the Seventh Schedule to the Constitution, Sections 2(2) and Section 178 of the Act and Rule 27, 32, 34 and 34(B) of the Rules. F

"52. Taxes on the entry of goods into local area for consumption, use or sale therein." G

Section 2(20) of the Gram Panchayat Act defines octroi or octroi duty to mean "a tax on the entry of goods into a Gram or Nagar for consumption, use or sale therein." Section 178(1)(ii) empowers the Gram/Nagar Panchayat to levy octroi subject to any general or special order made by the Government in that behalf and subject to the minimum H

A and maximum rates fixed by the Government. Rules 27, 32, 34 and 34(B) may now be set out:

B "27. 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.

C 32. 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

D (ii) The goods are not exported within two months after their import, or

E (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.

F 34. (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 :-

(i) An application in writing is made to the Sarpanch within three days from the date of the Export and,

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

H (2) Where a claim for refund is rejected under Sub-rule (i), 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.

34(B). A panchayat if it thinks fit, instead of requiring payment of octroi, due from any person, merchantile 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 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 nature and character of the taxes mentioned in Entry 52 of List II of the Seventh Schedule to the Constitution has been the subject matter of more than one decision of this Court: The levy can be imposed on goods entering a local area " for consumption, use or sale therein therein". The words "for consumption" and "for use" do not present any difficulty but the words "for sale" presented some difficulty but it has since been held that even if the goods are sold within the local area, it must be for the purpose of consumption or use within that area to be a sale for the purposes of Entry 52. [See *Tata Engineering and Locomotive Company v. Municipal Counsel, Thane*, A.I.R. (1992) S.C. 645]. If the goods are not consumed, used or sold within the local area, no tax can be imposed under the said Entry. By way of illustration, if the goods merely pass through a local area to a destination beyond, no tax can be levied thereon under Entry 52. But where the goods are brought into a local area, stored or kept there for a sufficient length of time and then re-exported, questions of identity and quantity arise. With a view to discourage such long storage and also to prevent abuse of law, provisions have sometimes been made fixing an outer limit beyond which it will be presumed that the goods have been consumed, used or sold within that local area. An example of such a provision is Rule 28(2)(b) of Maharashtra Municipalities (Octroi) Rules, 1968, referred to in the decision of this Court in *Tata Engineering and Locomotive Company v. Municipal Council, Thane*, A.I.R. (1992) S.C. 645. The Rule provided that if the goods entering a local area are not exported within six months, refund will not be allowed even if the goods are exported as a fact. Dealing

- A with the said Rule and other allied Rules, this Court said: "Compliance with the procedure prescribed in the Rules for filing claims of refunds are not conditions precedent for the right or eligibility for refund or the liability to refund but are provisions regarding proof of export of the goods imported and are not meant to be exhaustive either. They are to be interpreted and understood in that sense. The object of the Rules fixing a period of limitation for export however is different. The export cannot be put in perpetual doubt and the goods may be considered to have come to a repose if they were not exported within a particular period provided in the rules." Similarly, in *Burmah Shell v. Belgaum Municipality*, A.I.R. (1963) S.C. 906, a Constitution Bench of this Court held: "That concept (concept of octroi) included the bringing in of goods in a local in a local area so that the goods comes to a repose there." Rule 32 of the Gujarat Gram Panchayat Rules, however, is of a deferent character altogether. It does not create any such irrebuttable presumption. On the contrary, the Explanation to Rule 32 makes it clear beyond any doubt that the presumption created by it is a rebuttable presumption. Let us see what Rule 32 says. The main limb of the Rule provides that an importer of goods on which octroi had been paid shall be entitled to refund of the amount so paid on export of such goods from the octroi limits if the goods have not been consumed, used or sold within the limits. The Explanation then says that in three situations mentioned by it, shall be deemed, unless the contrary is proved, that the goods have been used, consumed or sold within the octroi limits and refund shall be allowed in those cases. The three situations contemplated by the Explanation are (i) Where the goods have broken bulk, (ii) where the goods are not exported within two months after their import, and (iii) where the goods have changed its form by any process whatsoever. A reading of the Explanation clearly shows that the presumption created by the Explanation applies to all three situations. We are saying this because of the contention of Sri Dholakia that the words "unless the contrary is proved" qualify only clause (iii) of the Explanation (which speaks of "the goods have changed form by any process whatsoever") and not clauses (i) and (ii) in the Explanation. In our opinion, this contention is contrary to the plain language used in the Explanation. The interpretation sought to be placed thereupon by Sri Dholakia is simply and plainly unacceptable. The Explanation says that in any of those situations the goods shall be deemed to have been used, consumed or sold within the

octroi limits unless the contrary is proved by the person concerned. Sri Dholakia then contended that if this is the meaning of the Explanation then the prescription of two months period in clause (ii) of the Explanation becomes meaningless and superfluous. He says - and with some justification - that even where the goods are exported from the octroi limits within two months, the person has to prove that they are very same goods which had entered the octroi limits whereupon duty has been paid. Only on proof of the said facts will he be entitled to refund. Sri Dholakia says that even where the goods are exported beyond two months, the very same facts have to be established. If so, asks he, what was the meaning and purpose behind the prescription of two months period in clause (ii) of the Explanation. He, therefore, contends that clause (ii) of Explanation creates an irrebuttable presumption of the nature considered in *Tata Engineering and Locomotive Company*. Once the two months period expires, no person can be allowed to claim that inasmuch as he has taken the goods outside the octroi limits without consumption, use or sale within such limits, he is entitled to the refund of duty, says Sri Dholakia. It is obvious that in the presence of the clear words "unless the contrary is proved", we cannot accede to the contention that clause (ii) of the Explanation creates an irrebuttable presumption. At the same time, Sri Dholakia is right that by saying so, the presumption of two months period in clause (ii) is bereft of any sanctity. We agree that where a person claims that he has exported the goods which had entered the octroi limits and whereupon he has paid the duty, the burden lies upon that person to prove those facts, whether the export is within two months or beyond two months. May be that where the goods are exported beyond two months, the onus becomes heavier. Be that as it may, we must keep in mind the essential nature of the tax/duty contemplated by Entry 52 of List II of the Seventh Schedule to the Constitution while construing the said Rule inasmuch as the Gujarat Panchayat Act, 1961 and the Rules are referable to that Entry and that Entry alone. We are, therefore, of the opinion that the Explanation creates a rebuttable presumption and not an irrebuttable presumption and that the object behind prescribing the period of two months in clause (ii) was merely to emphasise that after the expiry of two months the burden cast upon the person becomes heavier, viz., the burden to establish that the goods which have been imported into the octroi limits and whereon octroi had been paid have been exported without being used, consumed or sold

A

B

C

D

E

F

G

H

- A within the said limits. (We are told that the words "within two months" have since been deleted from clause (ii) of the Explanation).

- B The next question is whether the Panchayat is not entitled, by virtue of Rule 27, to include the excise duty while valuing the goods for the purpose of levy of octroi duty. In our opinion, Rule 27 does warrant the same. This is the opinion of the Gujarat High Court which is not been seriously questioned in this appeal.

- C Now remains the question whether Rule 32 does not apply to a person following the special procedure prescribed in Rule 34(B). Rule 34(B) provides for maintenance of an "account current" wherein the particulars of imports and exports and particulars of deposit of octroi duty and other specified particulars are entered.

- D The contention of Sri Rohinton Nariman is that inasmuch as Rule 34(B) contemplates accounts being settled at intervals not exceeding three months, the period of two months prescribed in Rule 32 cannot be applied or operated simultaneously. We are not impressed by the argument. Rule 43(B) is procedural in nature. It is meant for those persons who regularly import and export goods. It only provides for a facility - convenient to both the person concerned and the Panchayat. Such a procedural rule cannot over-ride the provisions of Rule 32 which is of a substantive nature. We see no difficulty, much less an impossibility in operating both Rules 32 and 34(B) simultaneously. Rule 34(B) does not say that accounts cannot be settled at an interval less than three months. It only prescribes the outer limit viz., that the account should be settled "at intervals not exceeding three months". Even while settling the account, whenever it may be, the Panchayat authorities are entitled to apply Rule 32.

For the above reasons, we dispose of the appeals with the following directions:

- G The Panchayat authorities shall look into the relevant facts and circumstance relating to the period concerned herein (from April 1, 1965 to June 10, 1969) and decided whether and if so, what amount is liable to be refunded to the appellant. Before taking a decision on the said question, the Panchayat authorities shall allow the appellant to place such material as it thinks appropriate before it and consider the same along with other relevant material. The appellant is permitted to file a written repre-
- H

sentation with necessary material before the Panchayat authorities, if not already filed. The amount found refundable to the appellant shall be refunded within three months from the date of such decision. It is also directed that the decision referred to above shall be taken within a period of four months from today. A

Sri Nariman lastly contended that since the Panchayat had the use of the appellant's monies, the amount found refundable should be directed to be refunded with interest. We are not inclined make any such direction in the facts and circumstances of this case. B

There shall be no order as to costs.

S.K.

Appeal disposed of. C