Supreme Court of India
Kunwar Ram Nath And Others vs The Municipal Board, Pilibhit on 2 June, 1983
Equivalent citations: 1983 AIR 930, 1983 SCR (3) 321
Author: E Venkataramiah
Bench: Venkataramiah, E.S. (J)

PETITIONER:
KUNWAR RAM NATH AND OTHERS

Vs.

RESPONDENT:
THE MUNICIPAL BOARD, PILIBHIT

DATE OF JUDGMENT02/06/1983

BENCH:
VENKATARAMIAH, E.S. (J)
BENCH:
VENKATARAMIAH, E.S. (J)
ERADI, V. BALAKRISHNA (J)

CITATION:
1983 AIR 930 1983 SCR (3) 321
1983 SCC (3) 357 1983 SCALE (1)672

ACT:
U.P. Municipalities Act, 1916 (Act. No. 11 of 1916)-section 128(1) (viii)-Power to impose octroi on certain goods-Read with section 157(3)-Power to exempt from payment of tax. Exemption-granted by U.P. Government Order No.3613(1)/XI-395 dated November 20, 1936 from octroi duty-Whether available after publication of new bye-laws on May 18, 1960. Order of exemption under s. 157(3) is not the same as any general rule or special order referred in s. 128(1).

Words & phrases-Cess-Interpretation of-Whether tax or fee depends upon purpose of its levy.

Words and phrases-Octroi-Interpretation of-Octroi exempted by 1936 order and levy of 1960 are both taxes levied under the Act.

HEADNOTE:
The respondent Municipal Board filed a complaint in the trial court against the appellants under s. 155 of the U.P. Municipalities Act, 1916 alleging that the appellants had brought by railway on November 30, 1967 at the railway siding in their sugar factory within the limits of the respondent for purposes of consumption or use certain quantity of sugarcane without paying octroi payable under the new bye-laws of the respondent published on May 18,

1960. The appellants pleaded that since the payment of octroi on sugarcane brought by railway at the railway siding situated inside their factory had been exempted by U.P. Government's order dated November 20, 1936 passed under s. 157 (3) of the Act the prosecution should fail. As the respondent went on seeking adjournments and the case remained undisposed of for nearly four years, the appellants filed a petition under s. 561-A of the Code of Criminal Procedure, 1898 in the High Court for quashing the proceedings on the ground that they were vexatious. The High Court dismissed the petition observing that after the commencement of the Constitution there has been a material change in the nature of octroi levied under the Act and on account of the framing of the new bye-laws the exemption granted under s. 157(3) of the Act would no longer be available. The High Court held that since a petition filed by the appellants challenging the notification containing the new bye-laws was earlier dismissed by the High Court it was not open to the appellants now to contend that the exemption granted under the Order of 1936 was still available.

In this appeal the respondent contended that the levy from which exemption had been given by the Order of 1936 was either a terminal tax or a fee and not a tax and since what was being levied as octroi from the year 1960

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under the new bye-laws was a tax, the order of exemption would not be applicable to it.

Allowing the appeal,

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HELD: The respondent was not entitled to collect octroi on sugarcane brought into its municipal limits by the appellants by rail on the relevant date.

[336 B]

The word 'octroi' in s. 128(1) (viii) of the Act is found in the group of taxes referred to in s. 128. The sum received by a Municipal Board on account of octroi is also dealt with like any other tax. There is no element of quid pro quo between the person who pays the octroi and the Municipal Board. The octroi leviable under entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935 was not a fee but was a tax. [332 B-C, 335 A]

A cess may either be a tax or a fee. Whether a cess in a given context is a tax or a fee depends upon the purpose for which it is levied. In entry 49 of List II of the Seventh Schedule of the Government of India Act, 1935 the expression 'cesses' is used in the sense of 'taxes'. In entry 52 of List II of the Seventh Schedule of the Constitution the expression 'taxes' is substituted in the place of the expression 'cesses' which was in the former entry 49 in the Government of India Act, 1935, but the nature and content of the legislative power under both are the same. [331 C, E-F]

When tax is clearly levied on goods when they are brought into a local area for purposes of use, sale or consumption, it does not cease to be a tax levied under s. 128(1) read with entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935 merely because the municipalities concerned render no service with regard to it. [330 F, 334 G]

The Punjab Flour and General Mills Co., Ltd., Lahore v. The Chief Officer, Corporation of the City of Lahore and the Province of the Punjab, [1947] F.C.R. 17; and The Hingir-Rampur Coal Co., Ltd., & Ors. v. The State of Orissa & Ors., [1961] 2 S.C.R. 537 referred to.

The octroi which was being levied in 1936 when the exemption was granted and the subsequent levy imposed in the year 1960 are both taxes levied under the Act and fall within the State List both under the Government of India Act, 1935 and under the Constitution. It was not a terminal tax falling under entry 58 of List I of the Seventh Schedule to the Government of India, Act, 1935. It does not also fall under entry 89 of List I of the Seventh Schedule to the Constitution now. The said levy came within entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935 and now falls under entry 52 of List II of the Seventh Schedule of the Constitution. The exemption granted in the year 1936 should be construed as an exemption from all taxation by way of octroi leviable and levied under the Act on rail-borne sugarcane and that exemption would continue until it is either rescinded or modified by the State Government or becomes inapplicable for any other reason. The new set of bye-laws brought into force in 1960 by the Municipal Board though with
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the sanction of the State Government does not have the effect of rescinding or annulling the exemption granted under s. 157(3) by the former Provincial Government. [330 G, 331, A-B, 336 A-D]

There is no irreconcilable in-consistency between notification published in 1960 and the order of exemption made in the year 1936. While under the Notification of 1960 octroi is payable on the import of sugarcane into municipal limits for purposes of sale, use or consumption, by virtue of the order made in 1936 under section 157(3) sugarcane brought by rail and delivered at the railway siding inside the factory premises alone is exempted from the levy of octroi. Sugarcane brought by other means of transport would be governed by the notification issued in 1960. There is no provision in the notification of 1960 to the effect that the said exemption is either withdrawn or that sugarcane brought by rail would be taxable. [335 C-E]

The High Court was in error in holding that the order of exemption granted under section 157(3) was the same as any general rule or special order of the State Government referred to in sub-section (1) of section 128 subject to

which the Municipal Board may impose any tax referred to therein and the effect of the exemption granted in 1936 was also in issue in earlier writ petition. In that writ petition the said question was neither directly nor constructively in issue. An exemption becomes operative only when the tax is validly imposed under section 128. The restriction that may be imposed by any general rule or special order of the State Government under section 128(1) affects the initial power of the Municipal Board to levy a tax. An order under section 157(3) operates only after a tax is validly imposed with the sanction of the State Government or of the Commissioner as the case may be, as stated in section 133 of the Act. It is therefore, open to the appellants to contend even after the dismissal of their earlier petition that they are entitled to the limited exemption granted by the Order of 1936. [333 D-G]

Vir Singh & Ors. v. Municipal Board & Anr., Civil Misc. Writ No. 3181 of 1960 decided on May 4, 1960, not relevant to the point raised.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 440 of 1976.

Appeal by Special leave from the Judgment and Order dated the 3rd September, 1975 of the Allahabad High Court in Criminal Misc. Case No. 3291 of 1972.

Shankar Ghose, R.P. Bhatt, S. R. Aggarwala, Praveen Kumar, and Anil Kumar Sharma for the Appellants.

B.D. Sharma, Dalveer Bhandari, H. M. Singh, and R. S. Yadav for the Respondent (State).

Yogeshwar Prasad and Mrs. Rani Chhabra for Municipal Board.

The Judgment of the Court was delivered by VENKATARAMIAH, J. This appeal by special leave arises out of a complaint instituted under section 155 of the U.P. Municipalities Act, 1916 (Act. No. II of 1916) (hereinafter referred to as 'the Act') by the Municipal Board of Pilibhit in the court of the Sub Divisional Magistrate, Puranpur, District Pilibhit against the Managing Director, the General Manager and the Cane Manager of L. H. Sugar Factory Pilibhit and one Bishan Swaroop, an employee of the said Sugar Factory, the appellants herein, alleging that they had brought by railway on November 30, 1967 into their godown at the railway siding situated within their Sugar Factory which was within the limits of the Pilibhit Municipal Board for purposes of consumption or use three wagon loads of sugarcane weighing in all 804 maunds for which octroi of Rs. 8.48 P. was payable under the bye-laws of the Municipal Board published under notification dated May 18, 1960 without paying the said octroi. The said complaint was filed on September 12, 1968. During the proceedings before the Magistrate the appellants pleaded that since the payment of octroi by the

factory of the appellants on sugarcane brought by railway had been exempted by an order of the Government of the United Provinces bearing G. O. No. 3613(1)/XI-395 dated November 20, 1936, the prosecution should fail. The relevant part of the Government order which is contained in a letter addressed by the Municipal Department of the Government of the United Provinces to the Commissioner of Rohilkhand Division reads thus:

> "I am directed to say that Government have, after full examination of the question of local taxation of sugarcane imported for the manufacture of sugar in factories situated within the limits of certain municipalities, decided that there is no justification for the continuance of taxes on rail-borne cane which is delivered at the railway sidings situated inside the sugar factories because the municipalities concerned render no service with regard to it. The Governor acting with his ministers is accordingly pleased to exempt, under section 157(3) of the United Provinces Municipalities Act, 1916, with immediate effect, all such sugarcane from the octroi duty levied in the municipality of Pilibhit. The Municipal Board of Pilibhit may be informed accordingly and also directed to take formal action to amend its octroi schedule to that effect."

After the above plea was raised, the complainant Municipal Board went on seeking adjournments in the criminal case and the case remained undisposed of for nearly four years. So the appellants filed a petition under section 561- A of the Code of Criminal Procedure, 1898 (Act No. V of 1

98) before the High Court of Allahabad in Criminal Misc. Case No. 3291 of 1972 in September, 1972 requesting the High Court to quash the proceedings on the ground that they were vexatious. In the High Court the appellants admitted that they had brought into the municipal area of Pilibhit sugarcane by railway as pleaded by the Municipal Board without paying octroi but submitted that octroi was not payable in view of the exemption granted by the State Government under section 157(3) of the Act. The High Court rejected the plea of the appellants and dismissed the petition filed by them on the ground that the case was governed by certain earlier judgments of the High Court and that the exemption was no longer available as the octroi claimed was a new levy not covered by it. Although there was some dispute about the existence of the Government order granting the exemption, the High Court held that such an order had been passed by the Provincial Government but it was of no avail to the appellants. Accordingly the High Court dismissed the petition filed by the appellants. Against the judgment of the High Court, this appeal has been filed.

At the outset it should be stated that until the complaint was filed in the year 1968 the Municipal Board had not collected any octroi from the factory in question on sugarcane brought by railway. We are also informed that by an order communicated to all the Divisional Commissioners and the District Magistrates of the State of Uttar Pradesh on June 3, 1982, the levy of octroi on sugarcane brought by sugar factories into the municipalities in the State of Uttar Pradesh for crushing purposes is generally exempted irrespective of the mode of transport used to bring such sugarcane. The relevant part of that communication reads thus:

"Sub:Exemption from octroi on sugarcane brought for crushing in sugar mills within municipal limits.

Sir, On the above subject, in continuation of the radiogram of the Government No. 2065 B/11-9-82 dated 27.5.1982, I have been directed to state that in exercise of the powers conferred under sec. 157(3) of the U.P. Municipalities Act, 1916, the Governor exempts sugarcane brought within municipal limits for crushing in sugar mills from octroi duty with immediate effect. You are requested to ensure that the order is carried out and acknowledge receipt of the Government order.

Yours faithfully, Sd/-

Shashi Kant Jain Under Secretary"

This communication may, however, have no bearing on the period in question but only shows how the State Government has understood the scope of its power under section 157(3) of the Act. Since all the facts are admitted the only question which requires to be considered is whether on the relevant date the appellants were liable in law to pay octroi on sugarcane brought by them by railway into the sugar factory which was situated within the municipal limits of Pilibhit.. Chapter V of the Act contains the provisions relating to municipal taxation. Section 128(1) (viii) and section 157 of the Act are in that Chapter. The relevant part of section 128 (as it stood in the year 1936) and section 157 are as follows:

"128. Taxes which may be imposed-(1) Subject to any general rules or special orders of the Local Government in this behalf, the taxes which a board may impose in the whole or any part of a municipality are-

(i) a tax on the annual value of buildings or lands or of both;

(ii) a tax on trades and callings carried on within the municipal limits and deriving special advantages from, or imposing special burdens on, municipal services;

(iii)a tax on trades, callings and vocations including all employments remunerated by salary or fees;

(iv) tax on vehicles and other conveyances plying for hire or kept within the municipality or on boats moored therein;

(v) a tax on dogs kept within the municipality;

(vi) a tax on animals used for riding, driving, draught or burden, when kept within the municipality;

(vii)a toll on vehicles and other conveyances, animals and laden coolies entering the municipality;

(viii)an octroi on goods or animals brought within the municipality for consumption or use therein;"

(There are seven other clauses in section 128(1) which relate to other taxes).

"157. Exemption-(1) A board may exempt, for a period not exceeding one year, from the payment of a tax, or any portion of a tax, imposed under this Act by any person who is in its opinion, by reason of poverty, unable to pay the same and may renew such exemption as often as it deems necessary.

(2)A board may, by a special resolution confirmed by the Local Government in the case of cities and by the Commissioner in other cases, exempt from the payment of a tax, or any portion of a tax, imposed under this Act any person or class of persons or any property or description of property. (3)The Local Government may, by order, exempt from the payment of a tax, or any portion of a tax, imposed under this Act any person or class of persons or any property or description of property."

It may be noted that while the power of exemption under sub-sections (1) and (2) of section 157 of the Act is vested in the Municipal Board, the power of exemption under sub- section (3) of section 157 is exercisable by the Local Government. Under sub-section (2) of section 157 the resolution of the Municipal Board granting exemption should, however, be confirmed by the Local Government or the Commissioner, as the case may be.

The first submission made before us is somewhat subtle and needs to be considered in some detail. It is argued that since the exemption had been given under the order dated November 20, 1936 on the ground that there was no justification for the continuance of the levy of taxes on rail-borne sugarcane as the municipalities were not rendering any service in regard to it, the levy from which exemption had been given by that order was either a terminal tax or a fee and not a tax. Since what is being levied as octroi from the year 1960 was a tax, the order of exemption would be inapplicable to it. In support of the first part of this argument that the tax referred to in the order of exemption could only be a terminal tax reliance was placed on a decision of the Federal Court in The Punjab Flour and General Mills Co., Ltd. Lahore v. The Chief Officer, Corporation of the City of Lahore and the Province of the Punjab.(1) In that case the Federal Court had to construe the meaning of entry 58 of List I of the Seventh Schedule to the Government of India Act, 1935 which read as '58. Terminal taxes on goods or passengers carried by railway or air; taxes on railway fares and freights' and of entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935 which read as '49. Cesses on the entry of goods into a local area for consumption, use or sale therein'. The facts in that case were these: The Lahore Municipality had in the year 1926 imposed under its then existing power of taxation a tax called terminal tax calculated on the gross weight of consignments or per tail as the case might be at the rates and on the specified articles or animals, specified in the Schedule to the notification imposing the levy, imported into its municipal limits by rail or by road.

This was superseded by a notification issued in the year 1938 by which the municipality gave notice of the imposition of a new tax called 'octroi (without refunds)' which was to be calculated on the gross weight of consignments and on animals per tail at the rates and on the articles specified in the Schedule to the relevant notification imported into its limits. This notification was superseded by a further notification of the year 1940 by which a tax called 'octroi (without refunds)' was to be charged at the new rates with effect from May 11, 1940 on consignments including grain, imported into its limits. The Punjab Flour and General Mills Co. Ltd., Lahore which was importing for use or consumption grain into its factory which was situated within the Lahore municipal limits contended that the tax in question was a terminal tax, by whatever name it might have been called, falling under entry 58 of List I of the Seventh Schedule to the Government of India Act, 1935 and was not imposable in 1938 or in 1940 after the relevant provisions of the Government of India Act, 1935 had come into force. It was contended by the company that the tax in question did not fall under entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935. The Federal Court after explaining the difference between the terminal taxes and cesses which can be levied on goods imported into a local area for purposes of use, consumption or sale therein rejected the contention of the company with these observations:

> "There appears to us a definite distinction between the type of taxes referred to as terminal taxes in entry No. 58 of List 1 of the Seventh Schedule and the type of taxes referred to as cesses on the entry of goods into a local area in entry No. 49 of List II. The former taxes must be (a) terminal (and) (b) confined to goods and passengers carried by railway or air. They must be chargeable at a rail or air terminus and be referable to services (Whether of carriage or otherwise) rendered or to be rendered by some rail or air transport organisation. The essential features of the cesses referred to in entry No. 49 of List II are on the other hand simply (a) the entry of goods into a definite local area and (b) the requirement that the goods should enter for the purpose of consumption, use sale therein. It is to be noted that there is no limitation on the manner by which the goods to be subjected to such cesses may enter. There is no ground for suggesting that entry of goods by rail or air is any less contemplated than entry by waterway or road. It was argued by the appellant's counsel that because by entry No. 20 of List I Federal railways and the regulation of railways and so forth is included in the Central Government Legislative List and by List II the Provincial Government is mainly given powers of legislation over roads and internal waterways and transport thereon (entry No. 18), it should therefore be deduced that all taxation on rail and air borne goods must be imposed, if at all, under the powers conferred by entry No. 58 of List 1 and that powers of taxation conferred by entry No. 49 of List II must be confined to goods that enter by road or internal waterway only. We cannot accept this argument. It is not in our judgment justified by the wording of the various entries in the two Lists and would impose a limitation on local taxation under entry No. 49, in List II, which would often work most inequitably in practice between those importing goods by road or waterway and those who could import by rail or air. In our judgment there is no limitation to be implied in entry No. 49 List II, in regard to the manner in which goods may be transported into a local area. It follows that so far as rail borne goods are concerned the same goods may well be subjected to taxation

> under entry No. 58 of List I as well as to local taxation under entry No. 49 of List II. The grounds of taxation under the two entries are as indicated above, radically different, and there is no case for suggesting that taxation under the one entry limits or interferes in any way with taxation under the other."

It is true that in the course of the above decision it is observed that the element of service to be rendered is treated as an ingredient of a terminal tax but that does not mean that when tax is clearly laid on goods when they are brought into a local area for purposes of use, sale or consumption, it ceased to be a tax levied under section 128 (1) (viii) read with entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935 merely because of the reason given for granting exemption under the order the Provincial Government dated November 20, 1936 issued under section 157 (3) of the Act. There is no doubt that the octroi which was being levied in 1936 when the exemption was granted and the subsequent levy imposed in the year 1960 are both taxes levied under the Act and fall within the State List both under the Government of India Act, 1935 and under the Constitution. It was not a terminal tax falling under entry 58 of List I of the Seventh Schedule to the Government of India Act, 1935. It does not also fall under entry 89 of List I of the Seventh Schedule to the Constitution now. The said levy came within entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935 and now falls under entry 52 of List II of the Seventh Schedule to the Constitution. The exemption granted in the year 1936 should be construed as an exemption from all taxation by way of octroi leviable and levied under the Act on rail-borne sugarcane and that exemption would continue until it is either rescinded or modified or becomes inapplicable for any other reason. The second part of the above submission was that the levy was in the nature of a fee and not a tax as it had been described as a cess in entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935. There is no merit in this submission also. A cess may either be a tax or a fee. Whether a cess in a given context is a tax or a fee depends upon the purpose for which it is levied. The very decision relied on by the respondents in this connection, namely The Hingir-Rampur Coal Co., Ltd. & Ors. v. The State of Orissa & Ors.(1) substantiates the above view. In that case this Court held that the cess imposed by the Orissa Mining Areas Development Fund Act, 1952 was a fee relatable to entries 23 and 66 of List II of the Seventh Schedule to the Constitution having regard to the object and the scheme of that Act and the purpose for which the cess collected under it was to be used. There is no doubt that in entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935 the expression 'cesses' is used in the sense of 'taxes'. In entry 52 of List II of the Seventh Schedule to the Constitution, the expression 'taxes' is substituted in the place of the expression 'cesses' which was in the former entry 49 in the Government of India Act, 1935 but the nature and content of the legislative power under both are the same. The decision of the Federal Court in the case of the Punjab Flour and General Mills Co. Ltd. (supra) itself shows that a cess levied in exercise of the power under entry 49 of List II of the Seventh Schedule to the Government of India Act, 1935 was a tax irrespective of any refund allowed or not allowed by the Government as can be seen from the following observation made by the Federal Court at page 26 of the Report:

> "We can see no cause whatsoever for holding that if cesses are imposed in pursuance of the powers conferred by entry No. 49 in List II, any provision need be made for refunds. Whether or not there should be any refunds in respect of such cesses

> appears to us to be a matter open for determination by Provincial or local taxing authority, and the existence or non-existence of a provision of system of refunds cannot affect the tax being or not being a cess within entry No. 49."

It is also significant that the word 'octroi in section 128 (1) (viii) of the Act is found in the group of taxes referred to in section 128. All sums received by a Municipal Board on account of the various levies made under section 128 have to be credited to the municipal fund under section 114 of the Act which can be utilised for the purposes of the Municipal Board as stated in section 120 of the Act. The sum received as octroi is also dealt with like any other tax. There is no element of quid pro quo between the person who pays the octroi and the Municipal Board. Hence octroi being a tax it was competent to the Provincial Government to make an order under section 157 (3) of the Act exempting railborne sugarcane from payment of octroi.

The next submission urged before us is that the appellants having failed in an earlier writ petition in which they had questioned the validity of the levy of octroi cannot now be permitted to challenge the levy again in these proceedings. The facts bearing on the above contention are these: In the year 1960, by a notification published in the Official Gazette dated April 23, 1960 the Municipal Board of Pilibhit promulgated new rules relating to the levy of octroi and also published a fresh schedule of rates of octroi in the Official Gazette dated May 18, 1960. This was done with the previous sanction of the State Government under section 133 of the Act. The octroi imposed by these notifications related to number of articles including sugar, sugarcane etc. The appellants who were liable to pay octroi on many of those articles challenged in a petition filed under Article 226 of the Constitution in Civil Misc. Writ No. 2310 of 1960 on the file of the High Court of Allahabad the validity of the levy on the ground that the procedure followed in imposing octroi at the fresh rates was not valid It was also pleaded that sugar industry being a controlled industry levy of octroi on sugar was invalid. By that notification octroi had been imposed also on the import of sugarcane into the municipal limits of Pilibhit for purposes of sale, use or consumption. That petition was dismissed by the High Court. It is urged that because that petition had been dismissed, it is not open to the appellants now to contend that the exemption granted under the order of 1936 was still available. The High Court has accepted this contention urged on behalf of the respondents. With due respect, we should say that the conclusion of the High Court on the above point is erroneous. In the earlier writ petition, the appellants had challenged the validity of the new octroi bye-laws and the imposition of octroi on many articles brought by them into the municipal limits. By reason of the dismissal of the writ petition, they would no doubt be not entitled to reagitate the same question. In this case the question involved is a different one and that is whether even if the octroi bye-laws and the imposition of octroi on sugarcane was good, the Municipal Board of Pilibhit is competent to recover octroi on sugarcane brought by rail by reason of the exemption accorded under section 157 (3). There is however, no dispute that octroi would be payable under the octroi bye-laws when sugarcane is brought by the appellants by any other means of transport. In the circumstances, the High Court was in error in holding that the order of exemption granted under section 157 (3) was the same as any general rule or special order of the State Government referred to in sub-section (1) of section 128 subject to which the Municipal Board may impose any tax referred to therein and the effect of the exemption granted in 1936 was also in issue in the earlier writ petition. In that writ petition the said question was neither directly nor constructively in issue in that case. An exemption becomes

operative only when the tax is validly imposed under section 128. The restriction that may be imposed by any general rule or special order of the State Government under section 128 (1) affects the initial power of the Municipal Board to levy a tax. An order under section 157 (3) operates only after a tax is validly imposed with the sanction of the State Government or of the Commissioner as the case may be, as stated in section 133 of the Act. It is, therefore, open to the appellants to contend even after the dismissal of their earlier petition that they are entitled to the limited exemption granted by the order of 1936, generally in favour of a number of sugar factories in several municipal areas. The decision of the High Court of Allahabad in Vir Singh & Ors. v. Municipal Board & Anr.(1) also has no bearing on this question.

The next question is whether the nature of the tax levied under clause (viii) of section 128(1) of the Act has undergone any change after the commencement of the Constitution. The said clause has not been materially amended after the commencement of the Constitution. While it formerly read as 'an octroi on goods or animals brought within the municipality for consumption or use therein' now it reads as 'an octroi on goods or animals brought within the municipality for consumption, use or sale therein' by reason of the addition of the word 'sale' by an amending Act passed subsequent to the commencement of the Constitution. The High Court has observed that after the commencement of the Constitution there has been a material change in the nature of octroi levied under the Act and on account of the framing of the new bye-laws the exemption granted under section 157(3) would no longer be available for the following reasons:

> "It is significant that under Government of India Act, 1935, 7th Schedule, List II, item No. 49 provides cess on the entry of goods into the local area for consumption or use or sale therein. For the purposes of cess, it was necessary that the local body should render some service as principle of quid pro quo applies. Under the Constitution of India 7th Schedule, List II, item No. 52 provides for levying taxes on the entry of goods into the area for consumption or use or sale therein. The tax certainly is different from cess and as such different considerations arise for levying taxes. Learned counsel for the opposite party has also pointed out that by Act VII of 1953, section 128(1)
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> (viii) has been substituted and as such more powers were conferred on the Municipal Board. The only difference is that octroi can now be imposed on goods meant for sale also. The fact remains that the Government order of 1936 was under section 157(3) of the Act and as such had the effect of allowing exemption with regard to levy of octroi duty on sugarcane according to the rules then in force. When the rules themselves were changed and new bye-laws had been enforced, which had the sanction of State Government or the delegated authority that exemption could no longer apply unless fresh order was passed under section 157(3) of the Act."

With respect, we should express our disagreement with the above view. As already observed by us, under the Government of India Act, 1935, octroi leviable under entry 49 of List II of the Seventh Schedule thereto was not a fee but was a tax. The new set of bye-laws with the modified rates of octroi brought into force in 1960 by the Municipal Board though with the sanction of the State

Government does not have the effect of rescinding or annulling the exemption granted under section 157(3) by the former Provincial Government. An order under section 157(3) can be withdrawn or modified by the State Government only. Even if the said provision is capable of a construction that when the new bye-law or rates of tax imposed by the Municipal Board with the sanction of the Government under section 133 which are totally inconsistent with the exemption granted earlier under section 157(3) the exemption would cease, in the instant case we do not find any such irreconcilable inconsistency between the notification published in 1960 and the order of exemption made in the year 1936 which is in respect of a number of municipalities. While under the notification of 1960 octroi is payable on the import of sugarcane into the municipal limits for purposes of sale, use or consumption, by virtue of the order made in 1936 under section 157(3) sugarcane brought by rail and delivered at the railway siding inside the factory premises alone is exempted from the levy of octroi. Sugarcane brought by other means of transport would be governed by the notification issued in 1960. It is worthy of note that there is no provision in the notification of 1960 to the effect that the said exemption is either withdrawn or that sugarcane brought by rail would be taxable. The order of exemption does not say that it relates to a particular tax levied under a specific notification issued by a particular Municipal Board. It is in general terms and therefore the exemption would continue to operate even after the notification was issued in 1960 in supersession of the former notification in so for as rail-borne sugarcane is concerned. If the contention urged by the Municipal Board is accepted, then it would indirectly arm a Municipal Board to get over any order of exemption passed by the State Government by merely amending its taxation bye-laws. It may be noted here that in the case of municipalities other than city municipalities, the sanctioning authority is the Commissioner and not the State Government while under section 157(3) the State Government alone can grant exemption. Hence such a construction should be avoided. It is significant that for nearly eight years after the promulgation of the new bye- laws no claim was made by the Municipal Board in respect of octroi payable on rail-borne sugarcane and subsequently the State Government by the letter dated June 3, 1982 referred to above has enlarged the scope of exemption by exempting from payment of octroi on sugarcane brought into the municipal limits of all municipalities for crushing in the sugar mills irrespective of the mode of transport employed for bringing it.

On a consideration of all the contentions urged by the parties before us we hold that the Municipal Board of Pilibhit was not entitled to collect octroi on sugarcane brought into its municipal limits by the appellants by rail on the relevant date. The prosecution, therefore, is not sustainable.

In the result, this appeal is allowed, the judgment of the High Court is set aside and the proceedings in the Magistrate's court out of which this appeal has arisen are quashed. There will be no order as to costs.

H.S.K. Appeal allowed.