IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 31 OF 1982

For Approval and Signature:

HONOURABLE MR.JUSTICE R.H.SHUKLA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge ?

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DHORAJI NAGARPALIKA - Appellant(s)

Versus

MOHANDI HADIBHAI BUDHWANI OF DHORAJI - Respondent(s)

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Appearance :

Mr. Mehul S. Shah for Mr. Suresh M. Shah for Appellant(s).

Mr. B. P. Dalal for Respondent(s).

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CORAM : HONOURABLE MR.JUSTICE R.H.SHUKLA

Date : 29/02/2008

ORAL JUDGMENT

1. The present appeal has been filed by the appellant-Dhoraji Nagarpalika raising the substantial questions of law, as mentioned in

paragraph-5 of the memo of appeal, of which, at the time of admission, some of them were considered for admission as follows:

(i) *Whether the notice under Section 253 of the Gujarat Municipalities Act is required to be served before institution of the suit by the plaintiff?*

(ii) *Whether the preparation of the assessment List and the valuation of the property of the galaxy Cinema made by the defendant is in any manner illegal, ultra vires, invalid, inoperative, null and void or without any effect?*

(iii) *Whether the trial Court had jurisdiction to hear and try the suit?*

2. The facts of the case briefly summarised are that Regular Civil Suit No.72 of 1976 was filed by the respondent-original plaintiff for challenging the assessment of tax levied by the Municipality on the basis of annual letting value on various grounds raised therein, *inter alia*, non-compliance of the procedure, as provided under Section 108 of the Gujarat Municipalities Act, 1963 ("the Act" for short), and that as the notice, as required under the law, was not issued, the assessment was illegal. The said suit came to be dismissed by the judgement and order dated 22nd January, 1980 by the learned Civil Judge (J.D.), Dhoraji, against which Regular Civil Appeal No.15 of 1981 came to be filed by the appellant-original plaintiff on various grounds, as contended in the

memo, *inter alia,* that the trial Court has erred in holding that the notice of the Municipality is illegal, *ultra vires*, null and void and also that the trial Court has erred in holding that individual notice is not mandatory and thereby has erred in appreciating the evidence and also appreciating the provisions of the Act. The said appeal came to be allowed by the learned Extra Assistant Judge, Rajkot District, Gondal *vide* the judgement and order dated 31st July, 1981. It is against this judgement and order that the present second appeal has been preferred by the appellant-Municipality raising the substantial questions of law as stated above.

3. Mr. Mehul S. Shah, learned Advocate for Mr. S.M. Shah, learned Advocate for the appellant, submitted that the lower Appellate Court has failed to appreciate, interpret and construe the provisions of Section 138 of the Act. He submitted that in view of the specific provisions of Section 138 of the Act, the jurisdiction of the Civil Court is barred and if the respondent was aggrieved with the assessment, further recourse could have been taken, as provided under the Act, and the civil suit would not have been maintainable unless the powers exercised were *ultra vires* or where the property was not liable for assessment of tax at all. Mr. Shah contended that it is not in dispute from a bare perusal of the records and proceedings that the property in question was liable for assessment of municipal tax. Therefore, the question as to whether the assessment of tax is made proper or it is excess or it is not as per the

procedure prescribed, can be adjudicated upon by adopting the further recourse, as provided under the Act, and not by filing the civil suit. In support of his contention, he has referred to a judgement of the Bombay High Court in the case of ***Gopal Mills Co. Ltd. vs. The Broach Borough Municipality***, reported at ***1955 B.L.R. 800*** and submitted that the provisions of the Bombay Municipal Borough Act, as prevailed then, have been interpreted therein and it has been specifically observed by the Division Bench of the Bombay High Court that the jurisdiction of the Civil Court to decide the questions, which are to be decided by the Magistrate, is barred. He pointedly referred to the observations made with regard to the provisions of Section 111 of the Bombay Municipal Boroughs Act, 1925 as under:

> *"Section 111 of the Bombay Municipal Boroughs Act, 1925 excludes the jurisdiction of the civil Court to decide questions which are to be decided by the Magistrate and ultimately in revision by the appellate Court. The jurisdiction of the Magistrate under s. 110 of the Act is limited to considering the question with regard to the quantum of taxation. It is not open to him to consider whether the tax that was imposed was valid or ultra vires the municipality. Therefore, to that limited extent the jurisdiction of the civil Court is excluded. It is open to an assessee to challenge the order itself of the Magistrate, but so long as that order stands, it would not be open to an assessee to have the quantum of tax reviewed by a tribunal other than the tribunal set up under the Act."*

Mr. Shah, therefore, submitted that the learned Appellate Court below has erred in decreeing the suit inasmuch as the Civil Court will not have jurisdiction and the order passed would be a nullity and also contrary to the provisions of the Act.

3.1 Mr. Shah, learned Advocate for the appellant, also referred to and relied upon a judgement of the Apex Court in the case of ***Jalgaon Borough Municipality vs. Khandesh Spinning & Weaving Mills Co. Ltd.***, reported at ***AIR 1953 Bombay 205***. He also submitted that as it transpires from the judgement of the trial Court that the notice was issued, the findings given by the lower Appellate Court are contrary to the evidence on record. For that purpose, he has referred to the records and proceedings, which were called for, and contended that the lower Appellate Court has failed to appreciate that the notice, as required under Section 108 of the Act, has been published and therefore, the judgement and order passed by the lower Appellate Court requires to be set aside and the present appeal may be allowed.

4. Mr. B. P. Dalal, learned Advocate for the respondent, referred to the evidence on record from the records and proceedings and submitted that the assessment made by the appellant-Municipality is without authority and jurisdiction and therefore, the civil suit would be maintainable. It was submitted that the assessment made by the Officer

appointed by the State Government would be without authority and therefore, a nullity. For that purpose, he referred to the provisions of Sections 106, 107 and 108 of the Act and submitted that it is only the Chief Officer of the Municipality, who is empowered under the Act to make the assessment, whereas in the present case, the assessment is made by the Officer appointed by the State Government and therefore, such assessment is without authority and a nullity. Mr. Dalal specifically contended that even in the written statement filed by the appellant-Municipality, no contention has been raised that the powers have been delegated by the Chief Officer.

4.1 Mr. Dalal, learned Advocate for the respondent, also submitted that as per the provisions of Section 253 of the Act, it is mandatory to give the notice and as no such notice has been issued, the assessment is *ultra vires*, illegal and in breach of the provisions of law, and also in violation of the principles of natural justice.

4.2 Mr. Dalal strenuously submitted that as per the provisions of Section 108 of the Act, it is mandatory to issue a notice and it has not been issued to provide an opportunity of lodging any objection or hearing. Therefore, it was contended that as mandatory provision of issuing the notice has not been complied with, the entire assessment is a nullity and also in violation of the principles of natural justice. It was

submitted that if the notice could have been issued, then, the respondent could have an opportunity of filing the objections. However, he submitted that mere *ex parte* assessment without notice and without giving any opportunity of hearing or filing the objection, is in violation of the principles of natural justice and also contrary to the specific provisions of law and therefore also, it is *ultra vires* the powers and authority and the suit would be maintainable.

Mr. Dalal strenuously submitted that even if the powers provided under the statute are not exercised in the manner provided, then, it is *ultra vires* the provisions of law, which can be challenged by way of a civil suit.

4.3 Mr. Dalal submitted that the trial Court has also failed in appreciating the evidence at the time of making the assessment inasmuch as while making the assessment, they have not appreciated the fact that the other theatre, to which comparison was made, was an air-conditioned theatre, and therefore, in fact, the annual standard rent should have been considered for the purpose of assessment of tax. It was further contended that the annual letting value has also not been properly fixed and it is only on the basis of the annual letting value that the assessment has been made. He submitted that when the annual letting value itself is not fixed properly, the entire exercise is contrary to

the provisions of law and therefore, the judgement and order passed by the lower Appellate Court is just and proper. For that purpose, he also referred to some of the paragraphs with regard to the contention raised and emphasised that it has been observed referring to the earlier judgement of this High Court in the case of ***Dr. D.N. Dholakia & Ors. vs. The State of Gujarat & Ors.***, reported in ***AIR 1974 Gujarat 209,*** with regard to the provisions of Sections 105, 108 and 111 of the Act and there has been specific observations made by the High Court in the said judgement.

Similarly, it was submitted that if the powers exercised are *ultra vires* the statute and also in breach of the provisions of law like the Act, then, no notice is required to be issued before filing a suit. For that purpose, he referred to the observations made in the judgement of the lower Appellate Court, which has quoted the earlier judgement of this High Court reported in ***3 G.L.T. 402***. Therefore, in light of these submissions, it has been contended that the judgement and order passed by the lower Appellate Court is just and proper and the present appeal may be dismissed.

5. In rejoinder, Mr. Mehul Shah, learned Advocate for the appellant, submitted that the Civil Court will have the jurisdiction only if the powers exercised are *ultra vires* the provisions of the statute, that is,

beyond the scope of powers or there is total lack of power. However, the assessment in the present case is made in exercise of powers under the Act and it is not in dispute that the property in question was liable for the assessment of tax. Therefore, the question as to whether the assessment is proper and in accordance with the procedure prescribed or not, can be challenged by the aggrieved party by having a recourse, as provided in the Act, that is, by filing an appeal under Section 138 of the Act and further revision provided under the Act. He strenuously submitted that it is not in dispute that the property in question is not liable for assessment of tax; it is also not in dispute that the powers are not vested with the Municipality for the assessment of tax and the only contention, which has been raised, that only the Chief Officer of the Municipality should have published the notice himself, is required to be considered. For that purpose, he referred to the records and proceedings and pointedly referred to Exh.51, which is the public notice issued by the Chief Officer, and submitted that as it is evident, the Chief Officer has himself published the public notice, as provided under Section 108 of the Act. Mr. Shah further submitted that after the publication of notice, if the assessment is required to be revised, then, individual notice is required to be given, which is also given, for which he referred to Exh.58. He submitted that on the basis of these two notices, the resolution at Exh.59 was passed and thereafter, there was authentication after hearing all concerned, which is at Exh.55. Therefore, it is submitted that the

contention raised with regard to lapse or non-compliance of the provisions of the Act is misconceived.

Mr. Shah submitted that Section 253 starts with the words, “No suit shall lie”, which refers to the fact that no suit can be filed either against any officer of the Municipality for the acts done in purported exercise of powers under the Act, nor a suit can be filed against the Municipality for any act or power exercised under the Act. He further submitted that there is no procedural irregularity, as sought to be canvassed, and therefore, all the substantial questions of law formulated at the time of admission of the second appeal may be answered in favour of the appellant and the present appeal may be allowed.

6. Mr. Dalal, learned Advocate for the respondent, in further rejoinder, referred to the deposition of the plaintiff at Exh.61 and submitted that he has specifically deposed that he purchased subsequently. He submitted that the notice, which is said to have been issued at Exh.58, does not disclose the name of the plaintiff and the name of the predecessor in title of the plaintiff has been shown and therefore, it cannot be said to be a proper notice. He also referred to the deposition of Sadaruddin Karmani Budhwani at Exh.62 and submitted that the provisions of law cannot be said to have been followed and no legal and valid notice can be said to have been issued/served. Therefore,

the judgement and order passed by the lower Appellate Court is just and proper and is required to be confirmed.

7. In view of the rival submissions made by the learned Advocates for the parties, it is required to be considered that whether the contention raised by Mr. Mehul S. Shah, learned Advocate for the appellant, regarding the bar of jurisdiction of the Civil Court in light of the provisions of Section-138 of the Act is required to be considered. At the same time, the contention raised by Mr. B. P. Dalal, learned Advocate for the respondent, about the procedural lapses or the assessment having been made without any jurisdiction or authority by the officer and therefore is a nullity, is also required to be considered. Further, the contention of Mr. Dalal about the notice having not been served and therefore, the assessment is in violation of the principles of natural justice, is required to be considered.

8. The first aspect with regard to the bar of jurisdiction of the Civil Court with reference to the provisions of Section 138 of the Act is required to be considered. For that purpose, the factual background, which is not in dispute, is required to be considered. It is not in dispute that the property in question is not liable for assessment of municipal tax levied by the Municipality. Therefore, it is not the case that the property is not liable to be taxed or that it has been wrongly covered for the

purpose of assessment. A close scrutiny of the evidence would suggest that the entire focus is with regard to the procedure and method for assessment of the tax, which has been challenged. Therefore, the moot question, which arises, is if the statute itself provides a specific procedure for adjudication of any issue or dispute, then, a civil suit can be filed without having recourse to the appeal or revision, as provided in the statute itself. The answer has to be in the negative because if that is accepted, then, the provision providing for further recourse under the special statute like the Gujarat Municipalities Act, would be rendered redundant. There is no quarrel with regard to the proposition that in light of the provisions of Section 9 of the Code of Civil Procedure, 1908, the jurisdiction of the Civil Court is not readily to be interfered with unless it is expressly barred. Therefore, the provisions of Section 138 of the Act has to be read and for the matters, issues or disputes provided therein like assessment of tax, etc., the aggrieved party is required to have the recourse of appeal or revision, as provided under the Act itself.

9. Section 138 of the Act provides for appeals to the magistrates, which reads as under:

> *"(1) Appeals against any claim included in a bill presented under sub-section (1) of section 132 may be made to any Judicial Magistrate or Bench of such Magistrates by whom under the direction of the Session Judge such class of cases is to be tried.*

(2) No such appeal shall be entertained unless-

(a) xxx xxx xxx xxx

(b) xxx xxx xxx xxx

(c) xxx xxx xxx xxx

(3) The decision of the Magistrate or Bench of Magistrate in any appeal made under sub-section(1) shall, at the instance of either party, be subject to revision by the Court to which appeals against the decision of such Magistrate or Bench ordinarily lie."

Therefore, when the scheme of the Act and in particular Section 138, provides for the remedy or recourse to the aggrieved party under the Act itself, that an appeal could be filed against the bill for tax and that a revision also lies against the order passed in appeal by the Magistrate or Bench of the Magistrate, as the case may be, then, such remedy has to be exhausted without filing the civil suit. It is a well settled law that unless the jurisdiction of the Civil Court is barred either expressly or by necessary implication, it cannot be said that the jurisdiction is altogether excluded. It is also well settled law that exclusion of the jurisdiction of the civil court is not readily inferred, but, such exclusion must either be explicitly expressed or clearly implied, as laid down in the case of ***Secretary of State vs. Mask & Company***, reported in ***AIR 1940 PC 105***. Following these guidelines in the judgement in the case of ***Firm Seth Radha Kishan vs. Ludhiana***

Municipality, reported in ***AIR 1963 SC 1547***, the Honourable Apex Court has considered this very issue regarding jurisdiction of the Civil Court, whether expressly barred in light of the provisions of Punjab Municipal Act with regard to the levy of terminal tax on salt. The Honourable Apex Court, while considering this aspect, referring to the provisions of Section 9 of the Code of Civil Procedure and the special provision made under the Punjab Municipal Act, 1911, observed that "a remedy is given to a party aggrieved in the enforcement of that liability. Against the order of the municipal committee levying terminal tax, an appeal lies under Section 84 to the Deputy Commissioner and a reference under Section 84(2) to the High Court. Applying the principle stated *supra*, the party aggrieved can only pursue the remedy provided by the Act and he cannot file a suit in a civil court in that regard."

10. In short, the Act itself contains a self-contained code conferring a right, imposing the liability and prescribing a remedy for the aggrieved party. In such a situation, the question arises whether the Civil Court can entertain the suit for revision of tax wrongly collected from the assessee and if so, what are the limits of its jurisdiction.

11. It has been further observed that "the learned Counsel contends that if a municipal committee levies terminal tax on an article not liable to tax under the Act, a suit would lie and, therefore, the same

legal position should apply even to a case where the municipal committee levies the tax in respect of an article under an entry not applicable to it. We do not see any analogy between these two illustrations, in the former, the municipal committee does not act under the Act, but, in the latter it only commits a mistake or an error in fixing the rate of tax payable in respect of a particular commodity; one is outside the Act and the other is under the Act; one raises the question of jurisdiction and the other raises an objection as to a matter of detail. We, therefore, hold that in the present case, the mistake, if any, committed in imposing the terminal tax can only be corrected in the manner prescribed by the Act. The appellants have misconceived their remedy in filing the suit in the civil Court."

12. In a subsequent judgement in the case of ***Dhulabhai etc. vs. State of Madhya Pradesh***, reported in ***AIR 1969 SC 78***, the Honourable Apex Court has also while considering this aspect has summarised the law and has laid down the principles regarding the exclusion of jurisdiction of the Civil Court in detail and principle-(6) provides that "questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case, the scheme of the particular Act must be examined because it is a relevant

enquiry".

13. Therefore, it makes it very clear that when the statute provides for a remedy or recourse to the aggrieved party, then, it has to be exhausted and the Civil Court will not have jurisdiction. In the facts of the present case, the dispute is with regard to the assessment of tax and it is not disputed that the property is not liable for the tax, but, the contention has been raised with regard to the manner and method of levying the tax and also the procedural aspect. It has also been contended that levy of tax itself will be *ultra vires* as the officer has exceeded the jurisdiction inasmuch as only the chief officer could have issued the notice and taken the further steps whereas the procedure has been followed by the officer of the Government. However, in light of the discussion on the factual aspects, the submissions of the learned Advocate for the respondent are dealt with and therefore, the contention raised that the jurisdiction of the Civil Court would not be barred cannot be accepted.

14. Another facet of the argument, which has been raised by the learned Advocate for the respondent, that if the levy of tax itself is *ultra vires* the authority of the officer or *ultra vires* the provision of law, the civil suit would be maintainable. There is no quarrel on this aspect. However, it has to be first established that the assessment made under

the Act by an Officer is without jurisdiction or that he is not competent and/or the property in respect of which the assessment is made is not liable for such assessment. In the facts of the present case, as stated above, it is not in dispute that the property is liable for assessment. Therefore, as provided under the Scheme of the Act, the Chief Officer is empowered to make the assessment, prepare the list and issue the bills for recovery.

Moreover, it is rightly pointed out by Mr. Shah, learned Advocate for the appellant, referring to the judgement of the Bombay High Court in the case of ***Gopal Mills Co. Ltd.*** *(supra),* which has interpreted the analogous provisions of the Bombay Municipal Borough Act, that the provisions of Section 138 excludes the jurisdiction of the Civil Court. In other words, when there is a dispute with regard to the quantum of tax or manner and method of the assessment of tax, the recourse has to be as provided under the Act, that is, by preferring an appeal under Section 138 of the Act.

15. It is required to be mentioned that it is well accepted that under the provisions of the Bombay Provincial Municipal Corporation Act, the assessment of the property tax is made on the basis of the annual letting value and the bill is prepared for levy of tax and the appeals are filed as provided under the said special statute, i.e. Bombay

Provincial Municipal Corporations Act itself, and there are specific Taxation Rules, as provided in Schedule-A of the Act. Therefore, though in the Gujarat Municipalities Act, there may not be such rules laying down a detailed procedure, but, the fact remains that a procedure for further recourse to the aggrieved party against the assessment is laid down and therefore, the further recourse has to be as provided under the special statute.

16. Though Mr. Dalal, learned Advocate for the respondent, has raised the contention about the total lack of authority by the officer, contending that it is only the Chief Officer, who can make the assessment, whereas in the facts of the present case, the assessment has been made by the officer appointed by the Government, but, on scrutiny of the record, the same appears to be without any merit. A close look at the record and particularly, public notice at Exh.51, clearly suggests that it has been given by the Chief Officer, as provided under Section 108 of the Act. Further, after publication of the public notice, as the assessment is sought to be revised, an individual notice, as provided under the Act, is also given, which is on record at Exh.58. The individual notice at Exh.58 though refers to the name of persons, who are original owners, that is, predecessors in title of the plaintiff, but, the resolution at Exh.59 clearly provides that after the notice was served upon the persons, the original owner had remained present and asked for time to produce necessary

material. As it transpires from the deposition of the plaintiff at Exh.61, he was the occupant and the notice at Exh.58 is dated 6th March, 1975 and as stated by the plaintiff in his deposition, he was the occupant since 1974. It is admitted that the document with regard to purchase of the property is not placed on record and he has also specifically deposed that he does not want to examine the original owners, namely, predecessors in title. It is required to be appreciated that the plaintiff has deposed that he has experience in the cinema business since 20 to 25 years. Further, he has admitted that he is managing the affairs of Liberty Cinema on behalf of his mother as she is the partner and at the same time, he deposes that he is not aware that whether such theatre is given on weekly hire. Similarly, Saraddin Karmani Budhwani examined at Exh.62 has deposed that he is managing the affairs of Galaxy Cinema. He has also deposed that originally, they were the tenants and thereafter, it has been purchased. Therefore, if the notice was served upon the owner, who has remained present and asked for time, the plaintiff, who was the occupant and the tenant or even if he had purchased, but, it is not brought on record, he cannot claim that the notice has not been served inasmuch as unless it is brought on record, the Municipality would not know. In any view of the matter, the public notice has been published at Exh.55 and thereafter, the resolution has been made which is at Exh.59. Therefore, the contention raised by Mr. Dalal, learned Advocate for the respondent, about the exercise of power regarding the assessment being

ultra vires or without authority, is misconceived. Similarly, the submission that if the notice could have been served, the plaintiff would have an opportunity of filing the objection and hearing in compliance of the principles of natural justice, is also misconceived.

Moreover, as observed by this Court in a judgement in the case of ***Municipal Corporation of the City of Ahmedabad vs.Oriental Fire & General Insurance Co. Ltd.***, reported in ***1994 (2) GLR 1498*** that under the Bombay Provincial Municipal Corporations Act and the Taxation Rules, which provides that the special notice to be served "to the owner or occupier" of the premises, the contention that special notice must be given to both, has been negatived. In the facts of the present case, the owner or the predecessor in title has remained present and subsequent transaction has not been brought on record as admittedly stated by the plaintiff in his deposition that when he has purchased, he cannot say and he does not desire to produce the document or the writing.

17. The submission made by Mr. Dalal, learned Advocate for the respondent, that the mandatory procedure regarding the assessment, publication of the public notice, inviting the objections, etc. has not been followed and/or opportunity has not been given, is also devoid of any merits. The submissions made by Mr. Dalal, referring to the judgement of

the Apex Court in the case of ***Corporation of Calcutta vs. Life Insurance Corporation of India***, reported in ***AIR 1970 SC 1417***, are also misconceived.

18. This Court, in a judgement in the case of ***Jamnagar Municipal Corporation vs. Shatrushalyasinhji Digvijaysinhji Jadeja***, reported in ***1995(2) G.L.R. 1277,*** referring to the provisions of the Gujarat Municipalities Act and more particularly, Sections 132 and 138 of the Act, clearly observed that the appeals filed against the levy of property tax by the Municipality, contending that it was excessive and heavy, would be maintainable under Section 138(1) and further, it has been observed that as provided under Sub-section (3) of Section 138, at the instance of either party, the order passed by the Magistrate would be subject to revision by the Court to which the appeals against the decision of the Magistrate ordinarily lie and the contention was also raised that ordinarily the Magistrate would be trying only the criminal cases as per the Criminal Procedure Code. It has also been observed, referring to the earlier judgement and also the provisions of Section 111 of the Bombay Municipal Borough Act, that the appeal would lie as provided under Section 138 of the Act. This Court, in paragraph 7, referring to the earlier judgement of the Division Bench of the Bombay High Court in the case of ***Lokmanya Mills, Barsi vs. Barsi Municipality***, reported in ***AIR 1939 Bombay 477,*** has observed that:

> "..... *Sections 110 and 111 of the Bombay Municipal Boroughs Act, 1925 are respectively similar to Sections 138(1) and 138(3) of the Gujarat Municipalities Act, 1963. Under Section 110, appeals against demand notices under the Act may be made to any Magistrate or Bench of Magistrates by whom, under the directions of District Magistrates, such class of cases is to be tried. Section 111 provides for a revision application against any such decision on appeal by the Magistrate or Bench of Magistrates being made to the Court to which appeals against his or their decisions ordinarily lie. In that set of circumstances, the Court observed that the position is somewhat anomalous, because the question of liability to tax is a purely civil matter, and the Magistrate hearing an appeal against a demand notice is a criminal Court, so that an appeal lies from him to the Sessions Court, and not to the District Court. ...."*

In view of the discussion made hereinabove and the evidence on record, it is required to be mentioned that as provided under Section 108 of the Act, the public notice was given and the objections were invited and thereafter, again individual notices were given, the list was prepared and the same was authenticated by passing a resolution of the Municipality, which is available on record at Exh.59. Therefore, the Question of Law No. (iii) that *whether the suit of the present nature before the trial court was barred under the provisions of Section 138 of the Gujarat municipalities Act*, is required to be answered in the affirmative and accordingly, it is so answered.

19. The question of law raised with regard to the maintainability of the suit itself even on the ground of want of notice under Section 253 of the Act requires to be considered. In paragraph 16 of the judgement of the trial Court, this aspect has been considered with reference to the observations made in a judgement reported in ***3 G.L.T. 402*** pressed into service by the learned Advocate for the plaintiff. However, it was with regard to the provisions of Section-107A of the Bombay District Municipalities Act and thereafter, referring to the provisions of Section 253 of the Act, it has been observed that as the action taken by the Municipality was not *ultra vires* or illegal, the statutory notice was required to be served. It appears that the lower Appellate Court has not given any specific finding or reason while deciding Issue No.4 on this aspect, but, has allowed the appeal while considering other issues. However, this aspect is no longer *res integra* in light of the judgement of this Court in the case of ***Billimora Town Municipality vs. M/s. Saurashtra Tobacco Stores & Ors.***, reported in ***1985 (2) G.L.R. 1252*** wherein it is observed that no suit would be maintainable for any act or action done in exercise of powers conferred upon the municipality under the Act or the resolution passed pursuant to the powers conferred under the provisions of the Act. The assessment is made by the officer and subsequently on that basis, as discussed above, it has been approved and the resolution at Exh.59 is passed in exercise of the powers under the Act

and therefore, any such action taken or resolution passed in exercise of powers under the Act can be challenged in the suit, which has to be filed after the notice, as provided under Section 253 of the Act. Further, in a judgement of this Court in the case of ***Morvi Municipality vs. J. N. Ganatra***, reported in ***1985 (1) GLR 309*** also, this aspect has been considered. Therefore, the suit itself would be barred for want of notice as provided under Section 253(1a) of the Act. Therefore, the substantial question of law No.(i) is required to be answered accordingly and it is answered in the affirmative. In light of the above discussion, the substantial question of law No.(ii) has to be answered as a necessary corollary and accordingly, it is answered in the negative.

20. Therefore, in light of the discussion made hereinabove, the present second appeal deserves to be allowed. All the substantial questions of law raised are answered as discussed hereinabove accordingly. The impugned judgement and decree passed by the learned Appellate Court below is quashed and set aside. No costs.

[***R. H. Shukla, J.***]

*kamlesh**