GUJARAT HIGH COURT

Dalpathbhai Hemchand

Vs.

Municipality of Chansma

Special Civil Appln. No. 193 of 1961 with Civil Appln. No. 467 of 1961

(N.M. Miabhoy, C.J., and J.B. Mehta, J.)

11.08.1966

JUDGMENT

N.M. Miabhoy, C.J.

1. This petition is filed under Article 226 of the Constitution of India. Petitioners are proprietors of hotels situated in the town of Chanasma. Respondent No. 1 is the Municipality of Chanasma constituted under the Bombay District Municipal Act, 1901, (hereafter called "the Act"). Respondent No. 2 is the State of Gujarat. Petitioners challenge the validity of an impost under which they are required to pay under certain rules and bye-laws to be presently mentioned a certain amount annually as a licence fee for running their hotels. Petitioners pray for a declaration that those rules and bye-laws are illegal and that a writ of mandamus should be issued commanding first respondent not to enforce them. Petitioners also pray for a writ of certiorari for quashing the said rules and bye-laws. They also pray for an injunction restraining first respondent from collecting the fee amount from any of them.

2. We may at first state a few facts which led up to the presentation of the petition. On 27th of February 1952, the General Body of first respondent passed a resolution adopting proposed rules and bye-laws and for sending them to Government for necessary sanction. The Director of Local Authorities, Northern Division, sanctioned the rules and bye-laws with some modifications. One of the suggested rules provided for the levy of a tax, amongst others, on hotels. Amongst the modifications suggested by the Director of Local Authorities was the modification that the word "tax" in rule 1 should be substituted by the words "licence fee" and at all other places wherever that word "tax" occurred in the rules. With these modifications, the rules and byelaws were brought into force with effect from 1st April 1953. Rule 1 provided for the levy of a licence fee from, among others, hotels. Rule 3 fixed the licence fee at Rs. 100 per year in respect of hotels. We are told that no protest was made by anyone at any of the earlier stages before or at any time after the rules and bye-laws were brought into force. On 29th March 1961, petitioners presented

the present petition challenging the validity of the aforesaid levy of fees. The levy has been challenged in the petition on a number of grounds. Mr. Nanavati, the learned Advocate for the petitioners, however, confined the challenge at the time of the hearing only on one ground. Therefore, it is not necessary for us in this judgement to mention the other grounds on which the challenge was based in the petition. It is common ground that the Act provides for different procedures for levying a tax and a fee. It is common ground that the procedure which was followed by first respondent in making the rules and bye-laws was not the procedure provided for levying a tax. The procedure which was followed was that which was provided for levying a fee. Mr. Nanavati submits that though, in the rules, the levy is designated as a fee, in fact, it is a tax and that, therefore, as the tax procedure was not followed, the levy is illegal and unsustainable. On the other hand, respondents contend that the impost is what it purports to be, namely, that it is a fee and not a tax. Mr. Nanavati concedes that, the impost is a fee, then, it would be legal and petition would deserve to be dismissed. On the other hand, the learned Advocates for respondents concede that if the impost is held to be a tax, then it would be illegal and the petition would deserve to be allowed. Having regard to these rival contentions and concessions, both the sides are agreed that the crucial question which requires to be decided in the present case is whether the aforesaid impost is a fee as it purports to be or whether, in reality, it is a tax. It is on a resolution of this controversy that the fate of the present petition depends. Therefore, the crucial question which requires to be considered in the petition is whether the aforesaid levy is a fee or a tax.

3. Before, however, we mention the facts on the basis of which the rival contentions are sought to be supported, we may refer to two preliminary objections which were raised on behalf of second respondent by Mr. Surti, the learned Assistant Government Pleader. Mr. Surti contends that the challenge to the aforesaid levy is belated and stale. He contends that the levy came into force on 1st April 1953 and the challenge is raised for the first time after a lapse of nearly eight years. He contends that during the intervening period, petitioners had not only failed to challenge the levy but hail paid the licence fee under the rules. Therefore, Mr. Surti contends that this Court should not have entertained the petition and should have directed petitioners to have their grievance redressed by recourse to the ordinary procedure of filing a suit. The second objection of Mr. Surti is that whether the levy is a tax or a licence fee is a mixed question of law and fact and unless facts are gone into, this Court will not be able to decide whether it is a tax or a licence fee and he submits that the parties are not agreed on facts as disclosed from the affidavits filed and that, therefore, this petition should be dismissed on the ground that the decision thereon depends upon disputed questions of fact. In regard to both these objections, there is one fundamental fact which requires to be borne in mind and that is that what petitioners, in effect, intend to safeguard in the present petition is their fundamental right which ensures them freedom from deprivation of their property save by authority of law. The second factor which requires to be borne in mind is that the object of the present petition is not to seek a refund of the amounts which amounts have already been paid under the impugned levy but its object primarily is to prevent first respondent from recovering in future any further amounts under the impost. Therefore, although the impost

was levied as far back as eight years, the grievance which is sought to be redressed by the petition is a present grievance and the alleged danger on the fundamental right which it seeks to remove is a present danger. It is true that when the jurisdiction of this Court is invoked under Article 226 of the Constitution even in the matter of the protection of fundamental right, it is a discretionary jurisdiction and it does not stand on the same footing as the jurisdiction which the Supreme Court exercises under Article 32 of the Constitution. It is true that, therefore, the principles which govern the exercise of jurisdiction by the Supreme Court under Article 32 for enforcement of fundamental rights are quite different from the principles which govern the exercise of the prerogative power conferred on this Court under Article 226. But, at the same time, in considering an objection of delay, it would but be proper for this Court to take into account that if the very same petition had been presented before their Lordships of the Supreme Court. Their Lordships would not have thrown off the petition on the aforesaid ground in view of the fact that the invocation of the jurisdiction of the Supreme Court for the protection of a fundamental right is itself a fundamental right and the Supreme Court has been constituted a guardian of that fundamental right. Another fact which is bound to weigh with us is that the present petition was not thrown off summarily on the ground of delay at the time of its presentation and that the same has been entertained, a rule nisi has been issued, the petition has been hanging fire in this Court for a period of nearly five years, and that if we were now to dismiss the petition in limine on the ground of delay, the grievance which petitioners have will not come to be redressed for several years more if they were called upon to resort to their ordinary remedy of filing a civil suit. Therefore, we do not deem it proper to dismiss the petition in limine on the first objection raised by Mr. Surti. As regards the second objection, Mr. Surti is not right in stating that the resolution of the controversy depends entirely upon disputed questions of facts. As we snail presently point out, the main submission of Mr. Nanavati is based upon an admitted factual position. It is true that if that main point of Mr. Nanavati comes to be rejected, then, there is a probability of this Court being required to enter into questions of facts. However, in our judgement, it will be better to undertake a consideration of this objection of Mr. Surti after we have considered the submission of Mr. Nanavati, based on admitted facts, and to undertake a discussion of the various facets of that question after we have reached our conclusion on the first and the main point raised by Mr. Nanavati. In undertaking a decision on the above objection of Mr. Surti, we will have to consider the question of the burden of proof, the question as to whether the facts do or do not disclose a prima facie infringement of fundamental right and, if that is so, whether it is or is not proper for this Court, having regard to the fact that it is called upon to protect a fundamental right, to undertake a decision even by entering into disputed questions of facts.

4. The rival contentions in regard to the character of the impost, whether it is a tax or a fee, may now be shortly stated. Petitioners allege that first respondent is not rendering any special service or giving any special facilities to hotel-owners and that it does not incur any expenditure whatsoever after the trade conducted by petitioners. This is denied by first respondent. First respondent says that it renders special services to hotels by providing for inspection of hotels by

its staff, by providing for special service for removal and collection of debris and rubbish collected on the roads in front of hotels and by using phenyle and other chemicals for maintaining sanitary conditions in and around hotels. First respondent says that filth and rubbish get collected on roads near hotels specially because it has not provided any gutters in the town for discharge of dirty water, that it has to engage more sweepers than would be necessary if such extraordinary collection of debris and rubbish does not take place in and around hotels, and that it has to make arrangements for removal of all this debris and filth several times in a day. It also says that it cleans water tanks and other vessels for storing drinking water in hotels with a certain kind of powder once in a fortnight. First respondent, therefore, denies that it did not incur any expenditure after the trade of petitioners. Petitioners allege that, even on the assumption that some expenses are being incurred by first respondent towards the trade the amount collected by way of fees is disproportionate to the expenses so incurred, and that, therefore, there is no reasonable co-relationship between the amount collected by way of fees and the amount expended in regard to the so-called special services to hotels. First respondent, on the other hand, contends that there is a relationship between the amounts collected by way of licence fees and the expenses specially incurred by the Municipality in providing the above special services and facilities to the hotel-owners. Petitioners aver that the collections by way of fees are not earmarked to meet the expenses for alleged special services. This is admitted by first respondent. It admits that it has not created a special fund from out of the collections of licence fees, nor does it keep a separate account of such collections and the expenses which it incurs in respect of the special services. But, first respondent contends that the amounts collected by way of fees can be easily ascertained from the accounts maintained by itself. Petitioners allege that the collections of licence fees are amalgamated with the general revenues of first respondent and they are being used for general public purposes. First respondent, however, denies this. It contends that it does not spend the licence fees for general public purposes.

5. From the aforesaid rival contentions, one broad fact which emerges is that first respondent admits that it does not earmark and set apart the collections of the impugned impost to meet the expenses of the alleged special services for which it alleges it levies the impost. The first submission of Mr. Nanavati is based on this admitted fact and it is the validity of this submission that first requires to be decided in the present petition. The submissions of Mr. Nanavati on the main question about the character of the aforesaid impost, according to him, are all based upon the decisions recorded by their Lordships of the Supreme Court in three cases decided in 1954 and one case decided in 1961. We shall mention those decisions just in a moment. According to Mr. Nanavati, the ratios of these decisions are as follows :-

> (i) That in order that an impost may be a fee, it must be intended to be and must be an impost levied for some special service to be rendered to a locality, a trade or a class and that there must exist an element of quid pro quo between fees received and services rendered;
> (ii) that a reasonable co-relationship must be established between the fee levied and the

expenses incurred for the rendition of special services; and
(iii) that the authority fails to establish such co-relationship unless a fund, earmarked for the purpose for which it is collected, is created and expenses of the special services are met therefrom.

We may mention that Mr. Patel, the learned Advocate for first respondent, and Mr. Surti, the learned Assistant Government Pleader, do not dispute the validity of the first two submissions of Mr. Nanavati. Those two submissions of Mr. Nanavati are well established and have been clearly laid down by their Lordships of the Supreme Court in all the four cases, to be presently mentioned. It is not disputed on behalf of respondents that those first two conditions distinguish a fee from a tax and that in order that an impost can be sustained, it is necessary that those two conditions must be satisfied. It is not disputed that, in order that an authority may levy a fee, it must do so in consideration of some special service or benefit which it seeks to render to the person from whom the fee is sought to be levied and that, therefore, there must be an element of quid pro quo. It is also not disputed that, in order to sustain a fee, it is further necessary that there must be a reasonable co-relationship established between the levy imposed and the expenses incurred by the authority for the purpose of rendering such service. However, Mr. Patel and Mr. Surti seriously dispute the third submission of Mr. Nanavati. According to Mr. Nanavati, that third condition is a test for determining whether an impost is a fee and he submits that, if that condition is not satisfied, then, the impost cannot be regarded as a fee but must be regarded as a tax and must be dealt with on that footing. On the other hand, Mr. Patel and Mr. Surti contend that that condition is not a test in the sense that it is a sine qua non for establishing an impost as a fee, but that the statement implied in the submission only is a mode of proving that it is a fee in fact and not a tax and that a failure to comply with that condition does not necessarily brand an impost as a tax automatically, but that, in spite of the absence of such a condition, it is still open to the authority to prove by evidence aliunde that the levy complies with the other two conditions already mentioned. In other words, according to Mr. Patel and Mr. Surti, the third submission formulates only a mode of proof. According to them, even compliance of that statement, though it may tend to prove that it is a fee, does not in fact so prove it inasmuch as it is open to the tax-payer to prove that, in spite of the compliance with that condition, in fact there is no reasonable co-relationship between the levy imposed and the amount expended for the rendition of the special service or that, in fact, the fund collected under the levy is being used for general public purposes.

6. The question as to what distinguishes a tax from a fee first came up for consideration before their Lordships of the Supreme Court in three cases decided by them in 1954, two of which were decided on one and the same day and the third a few days thereafter. The first of these cases is the case of *Commr. Hindu Religious Endowments, Madras v. Lakshmindra Thirth Swamiar, reported in*[1] The second of these cases is the case of *Sri Jagannath Ramanuj Das v. State of Orissa, reported in the same volume*[2] The third of these cases is the case of *Ratilal Panachand Gandhi v. State of Bombay, reported in the same volume*[3] The same question also came up for

consideration and was decided by their Lordships in 1961 in the case of *Hingir Rampur Coal Co., Ltd. v. State of Orissa, reported in*[4] In addition to these authorities, the question appears to have come up for consideration before their Lordships also in two other cases. One is the case of *Moti Das v. S.P. Sahi, reported in AIR 1959 Supreme Court 942*, and the other is the case of *Sudhindra Thirtha Swamiar v. Commr. for Hindu Religious and Charitable Endowments, Mysore, reported in AIR 1963 Supreme Court 966.* However, it is conceded by the learned Advocates on both the sides that the specific point which is raised in the present petition has not been dealt with by their Lordships of the Supreme Court in the last mentioned case and, therefore, no further mention of that case will take place in the course of this judgement. Moti Das case, AIR 1959 Supreme Court 942 is entirely based upon a quotation from Jagannath's case, AIR 1954 Supreme Court 400, and we shall deal with that quotation at the proper place. Both the sides, however, have considerably relied upon the first four cases referred to above and submitted that each of the aforesaid four cases supports the proposition which each side canvasses for.

7. Firstly, we shall mention the passages on which Mr. Nanavati relies in support of his proposition. Mr. Nanavati first quotes the following passage from Jagannath's case (AIR 1954 Supreme Court 400) which is at p. 403 of the report in support of his proposition :

[1] AIR 1954 SC 282
[2](AIR 1954 SC) at p. 400
[3](AIR 1954 SC) at p. 388
[4] AIR 1961 SC 459

> " Two elements are thus essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly w unwillingly. Bat this by itself is not enough to make the imposition a fee, if the payments demanded for rendering of such services are not set apart or specifically appropriated for that purpose but are merged in the general revenue of the State to be spent for general public purposes."

Secondly, Mr. Nanavati relies upon the following passage from Ratilal's case. AIR 1954 Supreme Court 388, at p. 395 :

> "Thus two elements are essential in order that a payment may be regarded as a fee. In the first place, it must be levied in consideration of certain services which the individuals accepted either willingly or unwillingly and in the second place, the amount collected must be earmarked to meet the expenses of rendering these services and must not go to the general revenue of the State to be spent for general public purposes."

Thirdly, Mr. Nanavati relies upon the following passage in the first Swamiar's case, AIR 1954 Supreme Court 282, at p. 296 :

> "In the other class of cases, the Government does some positive work for the benefit of persons and the money is taken as the return for the work done or services rendered. If the

> money thus paid is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues for the benefit of the general public, it could be counted as fees and not a tax."

Mr. Nanavati further reinforces his argument that the aforesaid passages lay down a definite test by urging that, in the first Swamiar's case, AIR 1954 Supreme Court 282, the impost was struck down as illegal on the ground that no separate fund was set apart for the rendition of the alleged special services and that it was upheld in the other two cases specifically on the ground that such a separate fund was created for the rendition of such services. He contends that, therefore, not only the test is implied in the aforesaid passages but emerges from the fact that it was on the aforesaid ground that ultimately the decision regarding the validity or otherwise of the impost was reached. The passage on which Mr. Nanavati relies from Hingu" Rampur Coal Co.'s case, AIR 1961 Supreme Court 459, is at p. 464 and it is as follows :-

> "Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilised for all public purposes, whereas a cess levied by way of fee is not intended to be, and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied."

Mr. Nanavati contends that, apart from the aforesaid passages, the submission which he makes is no longer res integra so far as this Court is concerned inasmuch as a Division Bench of this Court has definitely decided that the third submission which he makes is a definite test which must be satisfied. He says that the aforesaid four judgements of the Supreme Court have been construed by this Court in the sense for which he contends and that it is no more open to this Court to decide otherwise. The question as to what is the nature of fee and what are its characteristics was also one of the questions which fell to be decided by a Division Reuch of this Court consisting of Shelat, C.J. and Bakshi, J. in *Chandulal fethalal Jayaswal v. State of Gujarat*[5], The learned Chief Justice who delivered the judgement after an exhaustive review of all the aforesaid four Supreme Court cases summarizes his conclusion in the following passage reported at p. 1070 (of Guj LR) :

> "In other words, whether or not a particular cess levied by a statute amounts to a fee or a tax would always be a question of fact to be determined from the circumstances of each case. It is thus clear that two essentials are necessary to constitute a fee : (1) the existence of the element of quid pro quo, and (2) the necessity of earmarking and setting apart the collections of such an impost to meet the expenses of services for which it is levied and not merging them into the consolidated funds meant for utilization for all public purposes."

After doing so, the learned Chief Justice in the next paragraph refers to an argument of the learned Advocate General that the impugned vend fee was really a fee and then proceeds to state as follows :-

> "But he (the learned Advocate General) had to concede that the cess was neither set apart as a separate fund for the rendition of services to those applying for import passes, nor were its collections earmarked for such a purpose, and that they were in fact merged in the general consolidated fund which is utilised by means of proper appropriations for all general public purposes. Under these circumstances, it is impossible to say that the levy amounts to a fee within the definition laid down by the Supreme Court."

8. The passages on which Mr. Nanavati relies are at first sight indeed impressive and it they and the conclusions reached in the cases are generally read, they do seem to support the proposition for which he canvasses. However, in our judgement, the matter is not so simple that it should be decided only on the strength of the passages relied upon. The passages must be read in their proper context and in the light of the general principles governing the subject of the characteristics of a fee which distinguishes it from a tax. In appreciating the passages quoted from the other cases decided by their Lordships of the Supreme Court, the important fact must be borne in mind that the main decision was delivered by them in the first Swamiar's case, AIR 1954 Supreme Court 282, and that it is this case which must govern the question in hand unless it is found that in the other and/or subsequent cases their Lordships laid down a new test or departed from the test which had been laid down in the first Swamiar's case, AIR 1954 Supreme Court 282. In our judgement, therefore, in order to reach the right conclusion, it is first of all necessary to consider the principles which were enunciated by their Lordships of the Supreme Court in the first Swamiar's case, AIR 1954 Supreme Court 282. In that case, their Lordships had to consider the constitutional validity of Section 76 of the Madras Hindu Religious and Charitable Endowments Act (19 of 1951) in so far as that section levied a contribution at a certain percentage from religious endow merits. The validity of that provision was attacked on two grounds of which we are only concerned with the first. The first ground

[5]4 Guj LR 1033

was that the contribution was in reality a tax and as such it was beyond the legislative competence of the State Legislature. Their Lordships point out the fact that the Constitution of India makes a clear distinction between a tax and a fee in several Articles and entries in the three Lists and that, therefore, it was necessary to consider the exact distinction between a tax and a fee. Thereafter, their Lordships refer to the classical definition of the word 'tax" given by Latham, C.J., of the High Court of *Australia in Matthews v. Chicory Marketing Board*[6]. at p. 276. the definition being as follows :-

> "A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered'."

Their Lordships state that this definition brings out the essential characteristics of a tax as distinguished from other forms, of imposition which, in a general sense, are included therein. Thereafter, their Lordships refer to the characteristics of a fee and state that :

> "....a fee is generally defined to be a charge for a special service rendered to individuals by some governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay, vide Lutz on "Public Finance", p. 215."

After so stating, their Lordships observe that though "these are undoubtedly some of the general characteristics, ... it is not possible to formulate a definition that would be applicable to all cases." After so stating, their Lordship compare the two definitions with a view to find out the exact differentia between a tax and a fee. Their Lordships first reject the differentia of compulsion or coerciveness by stating that "A careful examination will reveal that the element of compulsion or coerciveness is present in all kinds of imposition though in different degrees and that it is not totally absent in fees." Then their Lordships also reject the differentia of public purpose by staring "Public interest seems to be at the basis of all impositions, ...". After rejecting the test of compulsion and the test of public purpose as being the differentia between a tax and a fee, their Lordships at p. 296 point out in the sentence occurring immediately after the aforesaid quotation that x x x but in a fee it is some special benefit which the individual receives." From the discussion of their Lordships summarized so far, it is quite clear that, in their judgement, the main differentia between a tax and fee is not to be derived from any of the parts of the definition of the term 'tax'given by Latham, C.J., except the last part in which it is stated negatively that a tax is not a payment for services rendered. Their Lordships further state as follows at p. 296 :

> "If as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should, on the face of the legislative provision, be correlated to the expenses incurred by Government in rendering the services".

Thereafter, then Lordships refer to Article 110 of the Constitution and give an illustration of a licence fee for motor vehicles. After stating that the latter, though called a fee, would

[6]60 C.L.R. 263

properly belong to the category of a tax if the collections go for the upkeep of roads and other matters of general public utility, they observe as follows at p. 296 :

> "In the other class of cases, the Government does some positive work for the benefit of persons and the money is taken as the return for the work done or services rendered. If the money thus paid is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues the benefit of the general public, it could counted as fees and not a tax". After so stating, their Lordships summarize the position in the following words :

"There is really no generic difference between the tax and fees and as said by Seligman, the taxing power of a State may manifest itself in three different forms known respectively as special assessments, fees and taxes, Ibid p. 406". From the aforesaid summary, it is quite clear that the main differentia which their Lordships have pointed out which distinguishes a fee from a tax is the fact that a fee is levied in consideration for services rendered and that there is a correlationship between the collection under the levy and the expenses incurred for rendering the special service. This aspect has been emphasized by their Lordships in an earlier passage at page 295 where they express themselves as follows after referring to the second characteristic of tax that it is an imposition for public purposes without any reference to any special benefit to be conferred on the payer of the tax :

"This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said, no element of 'quid pro quo'between the tax-payer and the public authority, see. Findlay Shiras on 'Science of Public Finance', Vol. I, p. 203. Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the tax-payer depends generally upon his capacity to pay".

Therefore, what their Lordships emphasize is that whereas a tax is a common burden compulsorily imposed upon all tax-payers irrespective of the fact whether the tax-payer does or does not receive any benefit except such general benefits as he shares in common with all the citizens of the State and its collections are intended to be used for the general purposes of the State, in the case of a fee, it is levied in return for the special services which the State renders to particular individuals and the collections of which are not intended and meant to be used for the benefit of the general public but are earmarked or appropriated for the rendition of the special services for which the levy is imposed. From the aforesaid analysis, it is quite clear that the fact that a separate fund is created or that the amount is set apart for a particular purpose is not the indicium or the characteristic of a fee. That fact is emphasized only with a view to bring out the idea that the fund so collected is to be utilized and applied for the performance of the special service for which it is collected and not for the general public purposes. That the creation of a special fund or setting apart of the collections is not the main characteristic or indicium also flows from the second proposition which their Lordships have enunciated and if, as is contended by Mr. Nanavati, the setting apart or creation of a special fund were an independent test, then, the second test of correlationship would have not any importance. It is conceded by Mr. Nanavati that even if a separate fund is created and collections are earmarked for the special services, the authority concerned would still have to satisfy the test of reasonable correlationship. In our Judgement, if the setting apart or creation of the fund is an independent test by itself, then, the test of correlationship would be hardly of any importance. In order to escape his paradox, Mr. Nanavati went to the length of contending that, in his submission, the setting apart or the creation of a separate fund was the primary test which must be satisfied in all cases and that the test of

correlationship was evolved by their Lordships only for the purpose of further testing whether, in fact, the amount collected bore a reasonable relationship to the special services rendered. He submits that this test of correlationship was a subsidiary or a secondary test which was to be applied only in those cases where the test of separation and collection of a separate fund was satisfied. Having regard to the way in which their Lordships have dealt with the question, we are unable to see any merit in the aforesaid submission of Mr. Nanavati. There does not seem to be any good reason why so much store should be laid by the creation of or setting apart of a separate fund in itself. The fundamental fact is that a fee is levied for rendition of special services and, if that is so, then, it is clear that the amount collected must have a reasonable correlationship to the amount which is required for rendering such services. The idea of a separate fund is brought into prominence only with a view to show that the amount of collection is not intended to be or that it is not, in fact, utilized for the general public purposes. Even the warning that the funds should not be merged with the public purposes is given not with a view to emphasize that the same should not in form be merged with the general public revenues, but it is given with a view to emphasize that, in fact, the collections should not be utilized for general public purposes. That such is the intention of their Lordships may be made clear in another way. It is not the intention of their Lordships to say that a mere creation or separation of a fund is enough compliance with the rule. Their Lordships have emphasized the fact that the funds so collected are not to be merged with the public revenues "for the benefit of the general public". In other words, even after the separate creation of the fund if the collection is utilized for general public purposes, the levy will have the characteristics of a tax and not that of a fee. Therefore, reading the first Swamiar's case, AIR 1954 Supreme Court 282, there is no justification for the proposition that the" setting apart or creation of a separate fund is the sine qua non for levying a fee. What is of importance is that the funds so collected must not be used for the benefit of the general public hut must be applied or utilized for the rendition of special services for which the levy is collected. It is the latter characteristic which is of importance and which is one of the distinguishing features of a fee as compared with a tax. Now, if all the aforesaid passages on which Mr. Nanavati relies are read in the light of the aforesaid discussion, then, in our judgement, it is quite clear that in none of the aforesaid passages their Lordships have departed from the idea that the main characteristic of a fee is that the amount collected therein should not be utilized for general revenue purposes, and it will also he clear that the mere creation of a separate fund is neither a characteristic of a fee, nor the absence of it debars the authority imposing the levy from proving that, in fact, the amount collected is being utilized only for the purpose for which the special service is being rendered. In the passage from Jagannaths'case, AIR 1954 Supreme Court 400, this idea is brought out by the juxtaposition of the words "or specifically appropriated" with the words "are not set apart" in the passage relied upon by Mr. Nanavati. According to that passage, therefore, a fee ceases to be a fee not only when the payments demanded for rendering such services are not set apart but also when they are not specifically appropriated for the special purpose for which the levy is made. In Ratilal's case, AIR 1954 Supreme Court 388, the following passage which occurs immediately before the passage on which Mr. Nanavati relies completely supports the view for which Mr. Patel and Mr. Surti contend and the view which we have indicated above.

> "Fees, on the other hand, are payments primarily in the public interest, but for some special service rendered or some special work done for the benefit of those from whom the payments are demanded. Thus in fees there is always an element of 'quid pro quo'which is absent in a tax. It may not be possible to prove in every case that the fees that are collected by the Government approximate to the expenses that are incurred by it in rendering any particular kind of services or in performing any particular work for the benefit of certain individuals. But in order that the collections made by the Government can rank as fees, there must be correlation between the levy imposed and the expenses incurred by the State for the purpose of rendering such services. 'This can be proved by showing that on the face of the legislative provision itself, the collections are not merged in the general revenue but are set apart and appropriated for rendering these services.'"

The portion which is underlined by us (here in ") above-Ed.) completely negatives the theory propounded by Mr. Nanavati. That passage is altogether inconsistent with the proposition for which Mr. Nanavati canvasses. This passage clearly brings out the purpose why their Lordships have indicated in the other passages that, in the case of a fee, separate fund may be earmarked. The creation of a separate fund and maintenance of separate accounts would provide an amount to the authority concerned against the challenge on the ground that the levy is not a fee. If the authority creates a separate fund and maintains separate account, then, it will be prima facie proof of the fact that it is not merging the fund collected for the rendition of special services for the benefit of the general public and that it is utilizing the fund only for the rendition of the special services for which the collection is made. Of course, the matter will not be conclusive. Even after the creation of a special fund, it is open to the tax-payer to prove that there is no reasonable correlation-ship between the amount collected under the levy and the expenses incurred thereby or that, in fact, the collection is being utilized for the benefit of the general public. In the first Swamiar's case, AIR 1954 Supreme Court 282, the same idea is brought out by the context in which the passage relied upon by Mr. Nanavati occurs. In that passage, their Lordships have not merely put forward the idea of a separate fund but also juxtaposed it with the specific appropriation of that fund and further emphasize it by stating that it "is not merged in the public revenues for the benefit of the general public". That such was the intention of their Lordships is further and irretrievably brought out by their Lordships in the following passage at p. 296 which occurs whilst their Lordships are applying the tests which they formulated for determining whether the levy in that case was a fee.

> "But the material fact which negatives the theory of fees in the present case is that the money raised by levy of the contribution is not earmarked or specified for defraying the expenses that the Government has to incur in performing the services. All the collections go to the consolidated fund of the State and all the expenses have to be met not out of these collections but out of the general revenues by a proper method of appropriation as is done in case of other Government expenses. That in itself 'might not be conclusive', but in

this case there is total absence of any correlation between the expenses incurred by the Government and the amount raised by contribution under the provision of Section 76 and in these circumstances the theory of a return or counter-payment or 'quid pro quo'cannot have any possible application to this case".

The words underlined by us (put in "here- Ed), in our judgement again negative the theory of Mr. Nanavati. If the test of the creation of a separate fund or earmarking the same were a test to be applied, the breach of which would brand the imposition as a tax, then, it is hardly probable that their Lordships after pointing out that a separate fund was not created should say that that fact might not be conclusive. In Moti Das'case, AIR 1959 Supreme Court 942 the quotation from Jagannaths case, AIR 1954 Supreme Court 400, which has been relied upon is as follows :

"The collections made are not merged in the general public revenue and are not appropriated in the manner laid down for the appropriation of expenses for other public purposes". From this passage, it is also quite clear that the emphasis is upon the appropriation or the utilization of the collections and not upon the creation of a separate fund alone. In Hingir-Rampur Coal Co.'s case, AIR 1961 Supreme Court 459, their Lordships have pointed out that the question as to whether a levy is a fee or a tax would always be a question of fact to be determined in the circumstances of each case. This clearly points out that, in the opinion of their Lordships, the mere creation or non-creation of a separate fund is not conclusive, but that, in each case, it has got to be considered on its own merits as to whether the characteristics of a fee have or have not been established. In our judgement, therefore, a perusal of all the Supreme Court authorities aforesaid does not support the proposition of Mr. Nanavati that the creation of a separate fund or setting apart or earmarking of the amount collected for the purpose of rendering special services is a sine qua non for establishing that an imposition is a levy. The creation of a separate fund or earmarking is only indicated as one of the ways in which the authority levying the imposition may prove that the imposition is intended to be a fee. If the authority imposing the levy adopts this procedure, it would facilitate the authority in proving the fact that, in fact, it is a fee. This method is specially useful specially in those cases, as has been pointed out in Ratilal's case, AIR 1954 Supreme Court 388, where the authority concerned may not be in a position at the time of the imposition of the levy to ascertain with reasonable exactness the exact amount which is likely to be collected and that which is likely to be spent. It may furnish it with a defence that, even though the collections have been in excess of the expenses, the excess is not being utilized For the general expenses of the authority but are being earmarked for the special purpose for which the collection is being made. The adoption of the aforesaid method may have its repercussions also on the question of the burden of proof. The initial burden is always on the tax-payer to show that the levy is, in fact, a fee and is unjustified by the relevant law on the subject. If, however, the authority concerned does not create a separate fund or maintain a separate account, the Court concerned may shift the burden of proof on to the authority levying the imposition

> to prove that, in fact, the fund is not utilized for the general expenses of the authority. The aforesaid rule is not intended to provide that, in every case of a fee, the amount collected must be kept separate and must not be merged into the general mass of the revenue proceeds. What is material is that the amount must not be spent for the general expenses and must be applied only for the purposes of the special service. It is not as if the amount may be too small for being treated as a separate item. In some other cases, there may be a legal difficulty in creating a separate fund. In some cases, there may be administrative difficulties in giving separate receipts or maintenance of separate vouchers. It is hardly probable that the question as to whether a levy is a fee or a tax could have been intended to be made dependant upon a system or method of accounting. The essence of the matter is that the authority must render special services, that the fees must be in return for the rendition of such services and that the amount so collected must be used for those services and should not be used for meeting the general expenses. If, in a given case, all these essentials are established, then, the mere fact that a separate account has not been kept will not make the levy any the less a fee simply because a certain system or method of accounting is not adopted. Conversely, it is also quite clear that the mere maintenance of a separate account or a separate fund will not be enough if the collections happen to be utilized for the purposes of the general expenses.

9. However, Mr. Nanavati contends, as already stated, that the matter is concluded by the decision in Chandulal's case, 4 Guj LR 1033 . Mr. Patel and Mr. Surti, on the other hand, contend that the point which they have raised in the present petition was not raised and was not decided by the Division Bench in that case. To this, Mr. Nanavati has two answers. Firstly, he contends that it is not correct that the point was not raised. He says that the point that the non-creation of a separate fund was a ground for invalidating the levy was raised and that all that can be said is that the argument which Mr. Patel and Mr. Surti advanced in the present petition was not raised for the consideration of their Lordships in that case. Mr. Nanavati contends that, when such is the case, the authority is still binding on another Division Bench of this Court and, in support, Mr. Nanavati relies upon the case of *Smt. Somawanti v. State of Punjab, reported in*[7] wherein at pp. 160 and 161, their Lordships have stated that the binding effect of a decision does not depend upon whether a particular argument was considered therein or not provided that the point with reference to which an argument was subsequently advanced was actually decided. The second answer of Mr. Nanavati is that, not only the point has been decided, but that the actual decision is based on the application of the aforesaid principle for which he contends. He contents that, even if the point was not raised, the application of the aforesaid principle constitutes it the ratio of the decision and that would be binding on this Division Bench. In our judgement, none of these arguments is relevant on the subject. The principle which the learned Chief Justice has enunciated in the second proposition is not different from the principle which their Lordships have laid down in the four aforesaid Supreme Court cases. That this is so is quite clear from the fact that the learned Chief Justice has not merely rest content by saying that the second essential is the necessity of earmarking and setting apart of the collections of an impost to meet the

expenses of services for which it is levied, but the learned Chief Justice has gone on further to state that the second essential also is that the amount so collected is not merged "into the consolidated fund made for utilization of all public purposes". In that case also the concession" which was made by the learned Advocate General on which the ultimate decision of the Court was based was clearly to the effect, not merely that a separate fund was not created but that the funds "were in fact merged in the general consolidated fund which is utilised by means of proper appropriations for all general public purposes".

[7] AIR 1963 SC 151

Under the circumstances, in our judgement, the first submission of Mr. Nanavati that the creation of a special fund or the earmarking of such a fund is the sine qua non of a fee or is a characteristic of a fee and is a test the breach of which would negative the imposition as a fee cannot be upheld and must be rejected.

10. That brings into prominence the rival contentions on which each side relies in support of its proposition that it is either a tax or a fee. From the summary which we have given of the rival contentions, it is quite clear that apparently there is a dispute on a number of questions of facts between the parties. Firstly, there is a dispute as to whether first respondent is or is not rendering any special service to petitioners and whether the service, in fact alleged to be rendered to petitioners is a special service and not one of the general services which first respondent, in any case, is bound to render to all the persons residing within its limits. There is also a dispute on the question of corelationship. But, Mr. Nanavati's contention is that, in fact, the affidavit in reply of first respondent did not raise any dispute at all. He states that that affidavit is nothing but a bare denial and does not raise any dispute whatsoever. As regards the correlationship, the only averment which petitioner have made is that there was no correlationship or it was disproprotionate. Mr. Patel contends that the allegations themselves of petitioners are vague, and, therefore, the denials are also bound to be vague. He says that, in view of the aforesaid averments, first respondent could not do anything else but to deny that there was no correlationship or that it was disproportionate. To this, the reply of Mr. Nanavati is that, having regard to the fact that first respondent has not created a separate fund and that it does not maintain separate accounts, it was impossible for petitioners to say anything further than what they have done. In that case, according to Mr. Nanavati, it was for the first respondent to establish that, in fact, there was a correlationship and that it was reasonable. In other words, according to Mr. Nanavati, the initial burden which lay upon petitioners to establish that the levy was illegal must be taken to have been discharged and the burden to be taken to have been shifted on to the first respondent to justify the levy. Mr. Nanavati says that this should be so specially as all the relevant facts on the subject were not accessible to petitioners and would be within the exclusive knowledge of the first respondent. Mr. Patel, on the other hand, contends that, having regard to the fact that the levy was eight years old, the matter was one for investigation and collection of evidence and that the persons who were now in charge of the administration of the first respondent could not have thrown any light as to the facts on the basis of which the levy was imposed and the amount of the levy was fixed. Mr. Patel contends that,

even if there were any materials on the record, the person who would make affidavit on behalf of the first respondent would have no personal knowledge of the same and there is a probability of the evidence being insufficient. He says that, in order to prove the facts prevailing in 1953, witnesses would have to be called for and, unless this is done, first respondent would not be in a position to throw any light on the subject, Mr. Nanavati contends that the attitude taken up by Mr. Patel is in itself a sufficient ground for striking the levy as illegal. He reinforces this by stating that, though, in the affidavit in reply on behalf of the first respondent, it is stated that the amount of collection for the levy can be ascertained from the account-books, there is no averment to the effect that the amount of expenses can be so ascertained. Mr. Patel contends that, even on the latter subject, unless evidence is collected, nothing further can be stated by the first respondent. He says that a number of witnesses may have to be examined for the purpose of working out the figures which are relatable to special services which the first respondent says it was rendering to petitioners. Now, the contentions of Mr. Patel reveal a state of affairs which must bring the levy very near the area of illegality. Even if one proceeds on the basis that the first respondent is not in a position to collect all the evidence which was in its possession at the time when the levy was first imposed in 1953, the question would still arise when the amount of the levy was demanded in each year whether it still retained the characteristic of a fee or had lapsed into a tax in the sense that either there was no reasonable correlationship between the amount collected and the expenses incurred in connection with the special services or that the collection was being utilized for general purposes. In our judgement, each time the amount of the levy is demanded, the authority concerned must be able to justify it as a fee and if it does not maintain a separate account or a separate fund or mixes it up with the general revenues and is either not able to satisfy that the amount collected is not disproportionate with the amount expended or that the collection is not being utilized for general purposes, then, it is not justified in collecting the amount unless the proper procedure for levying a tax is followed. From that aspect, the absence of any definite averments of the first respondent on the aforesaid crucial questions as to what amount of expenses it incurs on the special services and whether the collection is utilized for general expenditure must prima facie at least establish that an illegal levy is collected and the imposition must be struck down as an illegal levy. But Mr. Patel contends that, if we were to do this, then, we would be striking the levy as illegal not on a definite finding recorded that it is not a fee and that it is a tax, but merely on the ground that the first respondent had not discharged a burden which, in the opinion of the Court, shifted on to it because the latter had not maintained a separate fund. Mr. Patel contends that it would be improper for this Court to do so specially when it concerns public finance and would have the effect of disturbing the financial position of public body. We do see the force of this contention of Mr. Patel. We are aware of the fact that a tax should not be struck down in the exercise of the special Jurisdiction of this Court simply because one or the other party has not discharged its burden of proof specially when the finding comes to be recorded as a result of shifting of the burden of proof. This would be so because of the danger inherent in such an approach of a legal fee being declared as illegal. In deciding the case in the above manner, the probability of a fee-levying authority's case being thrown off by default which case by collection and production of proper evidence it might be able to prove cannot be

overlooked. There is one more principle which is involved in this and which principle was applied by their Lordships of the Privy Council in *Radha Krishan Jaikishan v. Municipal Committee, Khandwa*[8], That was an appeal arising from a suit. This is what their Lordships observed in that case at p. 67 :

> "In their Lordships'opinion, the original burden of proof on the appellants was shifted when the Committee produced their written record of the resolution of 16th July 1922, and took their stand on it. But their Lordships were reluctant to come to any conclusion which would involve the voidance of taxation which has been in operation for so many years, without first ensuring that all the available evidence had been placed before the Court. The public interest is concerned in this matter".

On the other hand, there is considerable force in the argument of Mr. Nanavati based upon the case of *Kavalappara Kottarathil Kochunni v. State of Madras, reported in*[9] at p. 734, in which their Lordships have observed in a petition

[8] AIR 1934 PC 62
[9] AIR 1959 SC 725

arising under Article 32 of the Constitution for enforcement of a fundamental right as follows :

> "We are not unmindful of the fact that the view that this Court is bound to entertain a petition under Article 32 and to decide the same on merits may encourage litigants to file many petitions under Article 32 instead of proceeding by way of a suit. But that consideration cannot, by itself, be a cogent reason for denying the fundamental right of a person to approach this Court for the enforcement of his fundamental right which may, prima facie, appear to have been infringed. Further, questions of fact can and very often are dealt with on affidavits".

Still further up, their Lordships observe as follows :

> "If the petition and the affidavits in support thereof are not convincing and the Court is not satisfied that the petitioner has established his fundamental right or any breach thereof, the Court may dismiss the petition on the ground that the petitioner has not discharged the onus that lay on him. The Court may, in some appropriate cases, be inclined to give an opportunity to the parties to establish their respective cases by filing further affidavits or by issuing a commission or even by setting the application down for trial on evidence, as has often been done on the original sides of the High Courts of Bombay and Calcutta, or by adopting some other appropriate procedure'. It is true that, in this very judgement, their Lordships have refused to express any opinion as regards the view which has been taken in some of the High Courts that even when a petition is filed under Article 226 for enforcement of a fundamental right, the High Court may not

interfere when there are disputed questions of fact. But, in our judgement, having regard to the fact that, if, on the same facts, petitioners had gone to the Supreme Court, their Lordships would have approached the question in the aforesaid manner, we do not see why we should not follow the same principles which their Lordships of the Supreme Court follow in such cases specially in a case which has been hanging fire for a period of five years. Under the circumstances, in view of our opinion that the burden has shifted on the facts of the present case and probably because the first respondent may not have been aware that it would be called upon to justify the levy and might have relied upon the initial presumption of validity in favour of the levy, we decided on 27th October 1964 when this case was heard that a further opportunity should be given to the first respondent to lay such material before the Court as it might choose in order to justify the levy as a fee. We may mention that Mr. Nanavati very strongly protested against this opportunity being given. He submitted that the moment this was done, the first respondent would be in a position to bring facts on record which would at once make those facts disputed questions even on that part which, at present, was not disputed. However, in view of the observations made by their Lordships of the Privy Council in the passage aforesaid, we decided to give an opportunity to Mr. Patel and accordingly we adjourned the case for further affidavits to another date. Respondent municipality filed the affidavit of its secretary on 16th November 1965, and petitioner No. 1 filed the affidavit in rejoinder on 1st December 1964.

11. From the affidavit of the Secretary, it is quite clear that, there is nothing to show now as to whether, income which was likely to be derived by the municipality from the above source and the likely expenditure in connection with the alleged special services, were at all estimated at the time when the licence fee was originally levied in 1953-54, so that the position now is that, the municipality is not able to throw any light as to whether there was or was not any reasonable relationship at the time of the first levy between the amount of the levy expected to be collected and the estimated expenditure which was likely to be incurred in regard to the rendering of the alleged services to licensees. The same affidavit also confirms the fact which was originally admitted that respondent municipality is not maintaining a separate account in regard to income and expenditure in regard to the aforesaid levy. The affidavit, however, gives the figures of income from the above source for the years 1957-58 to 1960-61. There does not appear to be any dispute in this regard. The same affidavit also discloses that, no settled figures are available in regard to the expenditure in respect of the alleged special services to licensees. We have already mentioned earlier what special services respondent municipality claims to render to licensees. However, respondent municipality has taken the following stand in regard to the amount of the expenditure in regard to such services. In Annexure II attached to the affidavit of the Secretary, the total expenditure incurred by respondent municipality under the head, "General and special conservancy, Sanitary Inspector's pay and other sanitary requirements", has been given, the totals of which are shown in column No. 4 of that Annexure. The stand which respondent municipality has taken is that, ten per cent of this total expenditure represents the amount of the expenditure which respondent municipality has had to incur in connection with the aforesaid alleged special

services. Mr. Patel did not place reliance upon that part of the affidavit which suggests that 20 per cent of the total expenditure should be attributed to the alleged special services. The deponent has attempted to establish a co-relationship in another way also on which Mr. Patel does place reliance. The deponent says that, the municipality, in all, engages ten sweepers to cleanse the lengths of roads within its area totalling about four miles and one furlong, but that, out of this total length, 6000 feet constitute two roads known as the Bazar Road and the Station Road, that almost all the hotels and eating houses, except one, are situated on the latter two roads; that whereas one sweeper can sweep about 1500 running feet everyday and four sweepers only will be necessary to sweep the aforesaid two roads, actually, four extra sweepers have to be assigned to the aforesaid two roads on account of the fact that greater quantity of garbage and rubbish accumulate in the aforesaid two roads on account of their accumulation in the hotels and eating houses. The deponent deposes that the pay and allowances of municipal sweepers amount to Rs. 3,072 annually. In addition to this, the deponent says that, Rs. 200/- are spent on disinfecting hotels and eating houses and from out of the services rendered by the Sanitary Inspectors, half an hour's service is being rendered to the hotels and eating houses. The deponent says that, in addition to this, some time of the municipal staff is consumed in issuing licences and for printing licence forms. According to the deponent, the total expenditure incurred on the latter subjects comes to Rs. 300/- per annum. According to the deponent, the total expenditure incurred under the aforesaid three heads by the municipality comes to Rs. 3,572/-. The deponent says that, this comes to about ten per cent of the total expenditure incurred under the aforesaid general and other heads by the municipality. It is on this basis that the deponent states that ten per cent of the expenditure is being incurred for the hotels and eating houses from out of the total of the expenditure incurred under the aforesaid general heads. Now, apart from the question as to whether all or some of the aforesaid services are special services being rendered to petitioners to the exclusion of the other citizens, and apart from the question as to whether the services which are being rendered by the Inspectors and the other municipal staff are more in the nature of municipal services for controlling the actions and conduct of petitioners in regard to their business of hotel-keepings, it does not require any elaborate argument to show that, the aforesaid part of the affidavit is based more on conjecture, if not fancy, than on reality. The basis of the aforesaid affidavit is the engagement of four extra sweepers for sweeping the aforesaid two roads. But, in our judgement, there are no materials on the record which would justify the submission that four extras are engaged because of the accumulation of extra garbage. Having regard to the bye-laws framed by the municipality, it will be odd it the municipality allows such extra garbages to be thrown on the street. The bye-laws contemplate all refuse and garbage in the hotels and eating houses to be accumulated in lidded bins expected to be emptied by them in municipal lorries. Probably, anticipating some such conclusion on our part, when the matter came up for hearing on 25th January 1966, Mr. Patel indicated to us that he would like to withdraw from the concession which he had earlier made that the levy was in the nature of a fee and not a tax. Mr. Patel then brought to our notice the decision of their Lordships of the Supreme Court in the case of *Corporation of Calcutta v. Liberty Cinema, reported in*[10] a case which came to be reported after the matter was first heard by us in October 1964, Mr. Patel then indicated to

us that, in view of the above decision, he would like to urge that the impugned fee was a tax and not a fee in the sense of a levy made in return for special services, to licensees. At that time, Mr. Nanavati suggested that this would be a volte-face on the part of respondents and that, having regard to the way in which the case was presented to us at the earlier dates and the reasons for which the case was adjourned, Mr. Patel should not be permitted to change his front. On the same day, it was agreed by both the learned counsel that, some of the aspects, which had been urged by them in regard to the true test for determining whether the levy of a fee in the above sense, were to be raised in *in the case of Chief Officer, Rajkot Borough Municipality v. I.R.G. Shastri*[11], in the Supreme Court and that, that appeal was already on the Board of their Lordships and, therefore, if a short adjournment were to be given and the present case kept pending for some time, the counsel should have the advantage of the decision of their Lordships on the aforesaid aspects of the case. As the decision in this case we are told, affected a large number of municipalities and their revenues and that the case would be better dealt with by us after the above case was decided by the Supreme Court, we acceded to the request of learned counsel on both sides. The judgement in the aforesaid Civil Appeal No. 101 of 1964 was delivered by their Lordships on 16-3-1966 and a certified copy thereof was shown to us. Learned counsel on both sides, however, are agreed that, the judgement in the above appeal proceeds on the same lines as the earlier judgements of their Lordships and on that basis, none of learned counsel referred to the aforesaid judgement. However, the question which Mr. Patel intended to raise on the basis of the Liberty Cinema's case, AIR 1965 Supreme Court 1107 was attempted to be raised in Rajkot Borough Municipality's case, Civil Appeal No. 101 of 1964, D/-16-3-1966 (SC), but the attempt was unsuccessful and it was not allowed to be raised on the ground that that would be setting up a totally different case. However, after learned counsel on both sides had addressed us on the question of co-relationship between the amount of the levy and the expenditure incurred on the alleged special services, Mr. Patel submitted at the latest hearing that, he should be

[10] AIR 1965 SC 110

[11] Civil Appeal No. 101 of 1964 (SC)

permitted to urge that the levy was a tax
within the meaning of the Act, but that, though this was so, the levy was not required to be processed through the procedure laid down by the Act for the imposition of taxes. Mr. Nanavati repeated his objection on the ground that was a change of front. Mr. Nanavati drew our attention to the concessions made by Mr. Patel on the earlier occasions, and relied upon the fact that the case was adjourned on 27th October 1964 only for the purpose of enabling respondent municipality to file affidavits to prove the co-relationship. Mr. Nanavati is right in making this submission. But, it is to be noticed that petitioner is also to a certain extent guilty of a change of front. The original case, as set up in the petition, was that, the levy was a tax and that because the procedure laid down by the Act for the imposition of that tax had not been followed, the tax was illegal. Therefore, Mr. Patel is right in contending that, when he now contends that the fee is a fax, he only asserts the contention as originally raised in the petition and what he withdraws from is only the concession that the tax was illegal because the aforesaid procedure was not followed.

But Mr. Patel submits that, this was a concession on a point of law and that, in law, be is entitled to withdraw from such a concession. In any case, he contends that, in exercise of our discretion, we should not debar petitioners from raising the aforesaid important point, specially when the same affects a large number of municipalities in the State. Mr. Patel contends that, he had not the benefit of the decision in Liberty Cinema's case, AIR 1965 Supreme Court 1107, when he made the aforesaid concession and, in his submission, having regard to that decision, this Court will be exercising its discretion rightly if the point is allowed to be raised. We found considerable force in the submissions made by Mr. Patel in this behalf and we permitted him to raise the new aspect for our consideration. The new point raised by Mr. Patel has a number of ramifications and, in our judgement, before indicating them, it is necessary that we should refer to some relevant provisions in the Act.

12. Section 3, Clause (14), defines the term "tax" as including, unless there is something repugnant in the subject or context, "any toll rate, cess, fee or other impost leviable under this Act" Chapter IV deals with rules and bye-laws. That chapter consists of five sections beginning with Section 46 and ending with Section 49. Section 46 enacts that, every municipality shall make rules but not so as to render them inconsistent with the Act. The topics on which rules can be made are mentioned in Clauses (a) to (j) in that section. Before these rules can become legally operative, they require to be approved by certain authorities. Clause (i) of Section 48 plays an important role on the new point raised by Mr. Patel. That clause empowers a municipality to prescribe rules for taxes to be levied by municipalities and fee to be charged "for licences or permissions granted under Section 70" and other allied matters. Section 48 empowers a municipality to make bye-laws but not so as to render them inconsistent with the Act. These bye-laws can be made only with the previous sanction of the authorities mentioned in the section and after undergoing the procedure laid down therein. Broadly speaking, the procedure is that the draft of the bye-laws has to be published, objections thereto are to be invited after fixing a date on or after which the draft win be considered by the municipality and the bye-laws are to be made by the latter only after taking the objections or suggestions received into consideration. These bye-laws are then to be submitted to the authorities concerned for then approval. Clause (b) of Sub-Section (1) of Section 48 empowers the municipality to prescribe for the grant of licences for the use of any place not belonging to the and, amongst the places so mentioned, are hotel, eating house, tea or coffee shop, restaurant, dining saloon or a refreshment room. A number of other topics are also mentioned in Section 48 in Clauses (a) to (w) on which bye-laws can be made by a municipality. Some of these clauses also empower a municipality to prescribe for the grant of licences in regard to various matters. Clause (n) empowers a municipality to regulate the conditions on which permission may be given for the temporary occupation of, or the erection of temporary structures on, public streets or for projections over public streets. Chapter VII of the Act deals with municipal taxation. The chapter consists of a number of sections beginning with Section 59 and ending with Section 81-A. These sections are grouped together under five sub-heads, the principal head being "Municipal Taxation" Sections 59 to 62 are grouped together under the sub-heading "Imposition of Taxes" Section 59 says that, any

municipality may impose, for the purposes of the Act any of the taxes specified therein. The taxes are specified in Clauses (i) to (xi). The taxes so specified are rate, toll octroi, a series of cesses and taxes proper. The last clause is a residuary clause and it specifies the tax as "any other tax". Section 59 says that, these taxes are to be imposed after observing the preliminary procedure required by Section 60 and with the sanction of the authorities mentioned therein. Sub-Section (2) of Section 59 limits the authority of the municipality to the imposition of only those taxes which the State Legislature has the power to impose in the State under the Constitution, except in regard to those cases which were already in force in the State, before the Constitution commenced Broadly speaking, the procedure prescribed for the imposition of a tax is as follows : First, the municipality is required to select one or the other of the taxes specified in Section 59. Secondly, the municipality is required to prepare rules for the purposes of clause (i) of Section 46, prescribing the taxes selected. In such resolution or in the rules, the municipality is required to specify the classes of persons or properties or both which the municipality desires to make liable, the amount for which or the rate at which, it is desired to make such classes liable and all other matters which the State Government may require it to specify. Broadly speaking, the procedure which has be undergone after the draft rules have prepared is the same as that prescribed for preparation of bye-laws. However, Section gives power to the State Government and one more authority to modify the proposed rule or to impose conditions. After sanction has bees accorded, the taxation rules are again required to be published by the municipality with a notice specifying the date from which the tax is to be effective, which date is not to be less than one month from the date of the publication of such notice. Section 62 imposes certain other limitations as regards the time when the tax is to be operative. Clause (b) of Section 62 required the municipality to publish such farther detailed rules as may be required prescribing the mode of levying and recovering a tax imposed by the municipality and the dates on which the tax or the instalments, if any, thereof, shall be paid. The next group of sections under the heading "Assessment of and liability to rates" provide for the preparation of assessment list in regard to the rates on buildings and lands. Then comes the crucial Section 70. Broadly speaking, that section empowers the municipality to charge a fee for any licence granted by the municipality under the Act, or any permission given by it for making any temporary erection or for putting up any projection, or for the temporary occupation of any public street or other land vested in the municipality under the Act. This Section 70 is the solitary section which stands under the sub-heading "Power to charge fees". Section 73 confers a power on the State Government to suspend the levy of any tax if, in the opinion of the Government, it is objectionable or injurious. Section 74 confers power upon the State Government to require a municipality to enforce all or any of the taxes specified in Section 59.

13. Now, it is common ground that the impugned fee has been levied by respondent municipality under the power vested in it under Section 70. The contention of Mr. Patel is that, the levy under this section is a tax in the true sense of the word and as defined by Section 3, clause (14) and that, it is not used in the sense of a levy imposed for return for special services. The second contention of Mr. Patel is that, though this is a tax, it is not necessary, in order to levy it, to undergo the

procedure prescribed for the imposition of a tax by Chapter VII. He contends that, a fee under Section 70 can straight off be levied by making a rule under Section 46, clause (e). Mr. Nanavati repels the above contentions by making a few counter-contentions. In the first instance, Mr. Nanavati contends that, on a true construction of Section 70, read in juxtaposition with Section 59 and the scheme of the Act, the provision authorises a municipality to levy fees for special services only and, therefore, the expression "fee" used in Section 70 is used in the sense of only a fee proper, i.e., a fee levied for return of special services. In the alternative, Mr. Nanavati contends that, even if the levy is not a fee proper, then, it is a tax as distinguished from a fee proper and, in that view of the matter, the levy under Section 70 is a tax falling under the residuary clause (xi) of Section 59, and, therefore, the procedure laid down under Section 60 is required to be followed and without such procedure, the levy win be illegal. Still alternatively, Mr. Nanavati contends that, even if the levy is a tax, but does not fall within the purview of clause (xi) of Section 59, still, the procedure prescribed by Sections 60 to 62 is required to be followed in view of Section 46(i) of the Act. We may mention that Mr. Sompura, learned counsel for the State, did not support any of the aforesaid propositions of learned counsel for petitioners and respondent municipality, but maintained that the levy was a fee proper made in return for services and should be upheld accordingly. In support of this latter contention, Mr. Sompura emphasized the fact that, the word "tax" which was originally used in draft bye-laws and rules was substituted by the word "fee" by the sanctioning authority. However, for the reasons already given, we have rejected the latter contention and we need not say anything further on that subject.

14. In view of the aforesaid rival contentions, in our judgement, it will be more convenient to take up for discussion first, the contention of Mr. Nanavati to the effect that the levy under Section 70 is a fee proper and not a tax. As it is obvious that, if that contention is upheld, then, having regard to our conclusion that respondent municipality has failed to establish the co-relationship, the petition will deserve to be allowed. However, if that contention of Mr. Nanavati is not upheld and for the reasons presently to be mentioned, in our judgement, the contention is not sound, the other contentions raised by Mr. Patel and Mr. Nanavati will have to be taken up for discussion.

15. It will be convenient to notice Liberty Cinema's case, AIR 1965 Supreme Court 1107, in the first instance, as quite a few arguments on all the submissions made by learned counsel on both sides are based upon that decision. In that case, the levy of a licence fee under Section 548, Sub-Section (2), of the Calcutta Municipal Act 33 of 1961 was challenged. One or the grounds on which the levy was challenged was that, because the section used the word "fee", the word must be construed in the sense of a levy in return for services and, therefore, not in the sense of a tax. Their Lordships repel the challenge on more than one ground. In the first instance their Lordships observe that, the word "fee" has not acquired a rigid technical meaning in the English language indicating only a levy in return for services. Secondly, their Lordships point out that, Sections 218, 222 and 229 of the Calcutta Municipal Act show that, the levies thereunder, though called

fees, are really taxes and that, those sections show that no services were required to be rendered in return for those levies. Their Lordships point out the distinction between a fee for licence and a fee for the contemplated services and, after noticing that these two expressions are used for different kinds of levies in our Constitution, they say that, the former kind of levy is not intended to be a fee for services. Their Lordships then refer to the decision of their Lordships of the Privy Council in *Shannon v. Lower Mainland Dairy Products Board*[12], and quote a passage therefrom in support of their conclusion. Then, their Lordships point out that, a statute has to be read as a whole to make it valid and, it the construction of the word "fee" as a fee for services makes the levy invalid, then, such a construction should be avoided. Their Lordships further point out that the use of the word "fee" is not conclusive of the question whether it is used in the sense of a fee proper or a tax and that, the question can only be decided by reference to the terms of the section in which that word is used. Thereafter, their Lordships examine their own previous decisions about the question of the exact connotation of the word "'fee" in the sense of a fee proper, and, point out that in the latter sense, the levy must confer some benefit or advantage to the licensee. Thereafter, their Lordships consider the question as to whether, any services are contemplated to be rendered for the imposition of the levy under the Act, and come to a conclusion that they are not. Their Lordships then consider some other arguments in support of the construction that the levy was a fee proper and was not a tax, and reject them. Mr. Nanavati's contention is that, this case does not mark a departure from the previous decisions of their Lordships of the Supreme Court. He submits that, even prior to our Constitution, the distinction between a fee and a tax was well known and, in support of this contention, Mr. Nanavati relies upon a number of passages from the judgement in the case of AIR 1954 Supreme Court 282 at pp. 295 and 296, to some of which we have referred in the earlier part of this judgement, when dealing with the question about the real characteristics of a levy in return for services, all of which we do not think it-necessary to reproduce. In our judgement, Mr. Nanavati is partially right, but not wholly correct. Mr. Nanavati is right in stating that, when a fee partakes of the characteristics of a levy imposed in return for service, it is not a tax. But, in our judgement, he is wrong when he contends that, the word "fee" is used in that sense alone and can never be a tax. In our judgement, none of the passages read out by Mr. Nanavati in Lakshmindra's case, AIR 1954 Supreme Court 282, support Mr. Nanavati's proposition. On the contrary, Mr. Nanavati's contention is directly negatived in Liberty Cinema's case, AIR 1965 Supreme Court 1107, where, as we have already Indicated, it is specifically stated that, whether the term "fee" in any statute is used in the sense of a fee proper or as a tax, must depend upon the construction of the word in the context of the statute in which it is used. But, contends Mr. Nanavati, that, even if this is so, we must start with a presumption that the term fee" is used in the sense of a fee proper and not in the sense of a tax, and Mr. Nanavati contends that this follows from the well-known distinction between the term "fee" and the term "tax" which is elaborately pointed out by their Lordships of the Supreme Court in Lakshmindra's case, AIR 1954 Supreme Court 282. In our judgement, there is nothing in that distinction which supports the view that such a presumption must necessarily be raised. In our judgement, it is not proper to construe a word occurring in a statute on any

[12]1938 A.C., 708

such a priori consideration. In our judgement, the best approach is to construe the term "fee" on the settled principles of construction of a word in a statute.

16. Therefore, in our judgement, in order to answer the first submission of Mr. Nanavati, we must read Section 70 of the Act, uninfluenced by any a priori consideration and ascertain the meaning of the word "fee" used in that section on the basis of the canons of construction of a word used in a statute. Section 70 of the Act reads as follows :-

> " 70. (1) When any licence is granted by the Municipality under this Act, or when permission is given by them for making any temporary erection or for putting up any projection, or for the temporary occupation of any public street or other land vested in the Municipality, the Municipality may charge a fee for such licence or permission :
> Provided that when permission is given for putting up a projection, the Municipality may charge every year a recurring fee until the projection is removed.
> (2) The Municipality may also charge such fee as may be fixed by by-laws under clause (a) of Sub-Section (1) of Section 48 for the use of any such places mentioned in that sub-section as belong to the Municipality."

Sub-Section (1) deals with two kinds of fees, a fee for a licence and a fee for permission. Sub-Section (2) deals with a fee too but, having regard to clause (a) of Sub-Section (1) of Section 48, it is quite clear that, it is not a fee either for a licence or a permission. It is a fee to be levied for the use of a municipal property of the kind mentioned in clause (a) of Sub-Section (1) of Section 48. Thus, there are three kinds of fees mentioned in Section
70. One is a fee for a licence, another is a fee for permission for making use of a municipal property or land, and the third is for the use of certain kinds of municipal properties.

17. Now, Mr. Nanavati's contention is two-fold. Firstly, he lays emphasis on the use of the word "charge" before the term "fee". He contends that, whereas the Act uses the word "impose" for a tax, Section 70 uses the word "charge" for it and says that, whenever the term "charge" is used in connection with a fee, it always connotes a fee in return for services. He contends that, when a professional man renders services to his client or patient and receives remuneration, we say that he charges fees from his client or patient. Therefore, the first emphasis of Mr. Nanavati is on the, use of the term "charge" in Section 70 and the term "impose" in Section 59. Secondly, Mr. Nanavati lays emphasis upon the juxtaposition of the term "fee" for licence and "fee" for permission, in Section 70. He contends that, a fee for permission of a municipal property is always in return for services which the municipality gives. When it levies a charge for granting permission for making any temporary erection or projection or for temporary occupation of any public street or other land vested in the municipality, it is called a fee. Thirdly, Mr. Nanavati lays emphasis upon the solitary place of Section 70 under the subheading "Power to charge fees". Mr. Nanavati contends that, if really the levy was a tax and not a fee, then, there is no reason why there should have been a sub-heading "Power to charge fees" when there was already a

subheading "Imposition of taxes". He says that, if really the intention of the Legislature was to confer a power to levy a tax for the issuance of a licence, then, this subject could have been easily incorporated by the Legislature in Section 59 and would not be relegated to Section 70. Mr. Nanavati contends that the power to charge a fee for a licence under Sub-Section (1) should not have found a place there, but only the power to charge a fee for permission. In our judgement, none of the above arguments is conclusive. It is true that the definition of the word "tax" in Section 3, clause (14), including fee in a tax, can only mean that whenever the word "tax" is used, it connotes "fee" but that the converse thereof may not always be true, viz., that whenever the term "fee" is used, it necessarily means a "tax". But, in our judgement, clause (xi) of Sub-Section (1) of Section 59 is of real relevance to this question. That clause is "any other tax". Therefore, this clause must necessarily lead to the conclusion that, the municipality can, in addition to the taxes mentioned in the clauses (i) to (x), also decide to impose any other tax under that sub-section, and if the word "tax" is construed, as it must necessarily be so construed., as including inter alia a fee, then, there cannot be any doubt whatsoever that the term "fee" is included in clause (xi), of Sub-Section (1) of Section 59 and it must, therefore, follow that the procedure prescribed by Section 59 must necessarily be undergone if a "fee" amounts to a tax. The question for consideration is whether, there is anything in the context of Section 59 or clause (xi) of Sub-Section (1) thereof, which indicates that the term "fee" is intended to be excluded from the expression "any other tax". Mr. Nanavati is unable to show to us anything in that section or any other part of the Act which may even require a consideration that the term "fee" is intended to be excluded from the expression "any other tax" aforesaid. In our Judgement, the expression "charge a fee" does not necessarily connote, in all cases, a charge in return for services. The dictionary meaning of the term "charge" is "impose". Moreover, it is important to notice that, Section 70 does not confer power to charge a fee, but it confers a power to charge a fee for a licence and, as their Lordships point out in Liberty Cinema's case, AIR 1965 Supreme Court 1107, there is a clear distinction between the expression "fee for a licence" and "fee for services". The crucial question to be answered is whether, when the municipality levies a lee for a licence, does it levy it in return for services, or does it levy it because it issues a licence ? We have not been taken through all the provisions under which a municipality can issue a licence. Therefore, we are confining our attention only to the provisions of Section 48 wherein there are five clauses authorising a municipality to prescribe bye-laws for grant of licences. The clauses are (b), (bb), (cc), (q) and (t). Under clause (b), a municipality has power to grant licence "for the use of any place not belonging to the municipality" for the purposes mentioned in that clause. Under clause (bb), a municipality has power to grant licence "for the use of whistles and trumpets operated by steam or mechanical means in factories or otherwise...,". Under clause (cc), a municipality has power to grant licence "for carrying on the trade or business of a dealer in, or importer or seller of, sweetmeats, milk, butter or other milk products, or for the use for the purposes of trade, of any place for stabling milchcattle, for storing or selling milk or for manufacturing, storing or selling butter or other milk products" Pausing here for a moment, it is quite clear that, the licences issued under these clauses are not issued for the rendition of any municipal services to the licensees. They are issued for the use of premises for certain purposes

not belonging to the assesses or for carrying on certain trades. Therefore, there is no doubt whatsoever that, if a licence is granted under any of the aforesaid three clauses by a municipality, it cannot be a licence for the rendition of municipal services and the levy of a fee for the grant of such a licence cannot satisfy the test of return for services which is the sine qua non for holding a fee to be a fee proper as distinguished from a tax. The licences in the present case have all been issued in favour of petitioners under clause (b). Therefore, in our judgement, the fee levied by the municipality for the grant of a licence under that clause cannot be regarded to be a fee in the above sense. Under clause (q), a municipality can issue a licence for persons to work as surveyors or plumbers. Under clause (t), a municipality can issue a licence for the traction of special kinds of vehicles on public streets. But, if a municipality intends to levy fees for the licence under clauses (q) and (t), it need not resort to Section 70, for, under clauses (q) and (t), unlike clauses (b), (bb), and (cc), the municipality has been given further power of fixing fees chargeable for such licences. Having regard to the fact that, all the provisions relating to the grant of licences have not been pointed out to us, we do not wish to be dogmatic and say that a fee imposed under Section 70 can never be a fee in the sense of a levy in return for services. We will assume that under Section 70, the municipality can levy a fee for the latter purpose. Prima facie, a fee for permission levied under Section 70 appears to be a fee of this nature. It is possible to argue that, a fee charged under Sub-Section (2) may also partake of this character, though it is possible to argue that it is not so. Probably, to put the users of municipal and non-municipal properties for purposes of levy of fees on a par, the municipality is given the power to decide to levy fees for the grant of a licence under clause (a) of Sub-Section (1) of Section 48. But, whilst conceding that, a fee under Section 70 can be of the aforesaid type, in our judgement, it is not possible to subscribe to the general proposition that a fee, under Section 70 must always necessarily be in return for services and can never be a fee for the purpose of augmenting the municipal exchequer. That a fee for licence can be levied for the latter purpose was pointed out by their Lordships of the Privy Council in 1938 A.C. 708 , quoted and relied upon by their Lordships of the Supreme Court in Liberty Cinema's case, AIR 1965 Supreme Court 1107. This is what their Lordships state at pp. 721 and 722 (of App Cas) on the subject : -

> "if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province or of both purposes. It cannot, as their Lordships think, be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue."

Relying upon the aforesaid quotation, this is what their Lordships state in Liberty Cinema's case, AIR 1965 Supreme Court 1107 :-

> "It would, therefore, appear that a provision for the imposition of a licence fee does not necessarily lead to the conclusion that the fee must be only for services rendered."

We are prepared to assume that, even in the cases of the grant of licences under clauses (b), (bb) and (cc), fees may be only in return for services if the fees are, for example, levied only to meet the expenses incurred by the municipality for the grant of such licences. But, in our judgement, having regard to the aforesaid statement of the law by the Privy Council and approved by their Lordships of the Supreme Court, it cannot be held that a fee levied under Section 70 for the grant of a licence must always be regarded to be a fee in return for services and that, it cannot be for increasing the municipal revenues. Whether in a particular case, a tee is of the one or the other kind, would depend upon the facts of each case, as pointed out by their Lordships of the Supreme Court in AIR 1961 Supreme Court 459. Under the circumstances, in our judgement, if the fee happens to be levied by a municipality under Section 70 of the Act, not for return for municipal services, or if there is no relationship between the levy and the expenditure for such levy, the fee must be regarded to be a tax within the meaning of clause (14) of Section 3 of the Act, and, in that view of the matter, the levy must be regarded to be a tax and not a fee proper. In that view of the matter, in our judgement, the fact that Section 70 occurs under a separate heading and that, the power to levy a fee for a licence is juxtaposed with the power to levy a fee for a permission, is of no consequence. That the matters which are covered up by Section 59, Sub-Section (1), are also again dealt with for special reasons under other subheadings is quite clear from the fact that, octroi and tolls, dealt with by clauses (iv) and (ii) respectively of Sub-Section (1) of Section 59, are again dealt with under the heading "Octroi and Tolls" by Sections 75 to 81 and some of the taxes, like water-tax, sanitary cess, toll on vehicles and animals and pilgrims'tax, are dealt with under the sub-heading "Special provisions relating to certain taxes." Sections 63 to 69 deal with the rates on buildings and lands, although they are also dealt with by the earlier Sections 59 to 62. The argument based upon the different sub-headings, in our judgement, must lose its force by the fact that all the subheadings occur under the general heading "Municipal Taxation". It is difficult to understand why Section 70 should have been placed under this general heading "Municipal Taxation" if really the Legislature does not provide for matters in relation to a tax when enacting Section 70. Therefore the fact that Section 70 is dealt with under the special sub-heading "Power to charge fees", in our judgement, has not much significance. Mr. Nanavati, however, contends that, though some of the arguments in favour of his construction may be answered, there is no answer for his contention as to why the municipality was given power to charge a fee for a licence under Section 70, when the matter was covered already by Section 59. We may mention that this argument was emphasized by Mr. Patel also, but in favour of his construction that, the procedure prescribed for the imposition of a tax in Chapter VII is not required to be undergone in the case of the levy of a fee. That is the answer which Mr. Patel gives in regard to Mr. Nanavati's aforesaid contention. In our judgement, though it is difficult to judge the mind of the Legislature as to why the levy of a fee for a licence was accorded this special treatment, that in itself cannot override the construction indicated by a number of other circumstances presently to be mentioned. One possible answer is that, the Legislature intended to indicate specifically the power of the municipality to levy a fee whenever it granted a licence and possibly linked that matter with the power to grant permission because the two matters were connected in regard to levy of fees. It is also possible that whilst doing so, the Legislature

intended to give liberty to the municipality to decide, in each case, as to whether the amount of the fee should be related to the rendering of special services to the licensees, or, also augment the municipal exchequer. It is possible that, in the former case, as we shall presently point out, the Legislature intended the municipality to exercise the power only by the enactment of a simple rule, out that, in the latter case, it intended that the municipality must follow the tax procedure prescribed by Chapter VII. That, in our judgement, is the significance of die expression "subject to the provisions of Chapter VII" used in clause (i) of Section 46 of the Act. Therefore, on the whole, we have come to the conclusion that the first submission of Mr. Nanavati that, the term "fee" must always mean a fee in return for services, or must be construed in the context of Section 70 that way, must be rejected.

18. That brings us to the main contention of Mr. Patel. Mr. Patel's main contention is very simple. He contends that, even if a levy under Section 70 is a tax, the only procedure which is to be undergone for making an assessee liable for the fee is that prescribed by clause (i) of Section 46 of the Act and no more. Both the sides are agreed that Section 70 is an enabling section in the sense that it merely confers power on the municipality to charge a fee. They are agreed that, that section does not lay down the quantum of the fee and the manner in which that quantum is to be imposed. Both the sides are also agreed that, these topics are provided by clause (i) aforesaid. But, the controversy between the two sides on these topics arises on the construction of that clause. Therefore, it is necessary to reproduce that clause first :-

> "46. Every Municipality shall.... make .... rules, but not so as to render them inconsistent with this Act,...
> (i) prescribing, subject to the provisions of Chapter VII, the taxes to be levied in the municipal district for municipal purposes, the grounds on which exemptions are to be recognized, the conditions on which and the extent to which remissions may be granted, and the system on which refunds are to be allowed and paid, in respect of such taxes, and the limits of the charges or payments to be fixed in lieu of any tax under Section 71, and the fees to be charged for licences or permissions granted under Section 70, and the times at which and the mode in which the same shall be levied or recovered or shall be payable, and prescribing the fees for notices demanding payments due on account of any tax, and for the issue and execution of warrants of distress, and the rates to be charged for maintaining any livestock distrained, and designating the persons authorized to receive payment of any sums so leviable;". This clause confers power on the municipality to prescribe on more than one matter. Firstly, it gives power to prescribe for taxes, grounds for exemption, condition and extent of remissions and the system of refunds in regard to such taxes. Secondly, it confers power to prescribe for the limits of charges or payments to be fixed in lieu of any tax under Section 71. Thirdly, it gives power to prescribe fees to be charged for licences or permissions granted under Section 70. Fourthly, it gives power to prescribe the times at which and the mode in which the taxes, payments in lieu of taxes and fees, shall be levied or recovered and finally, it gives power to prescribe fees for

notices of demand, issue and execution of warrants, etc. The latter subject is dealt with by Section 85 of the Act. Now, the construction which Mr. Patel contends for is that, the expression "subject to the provisions of Chapter VII" does not apply to the fixing of fees to be charged under Section 70. Mr. Patel contends that, that limitation only governs the prescription of taxes or their modes. In our judgement, the contention is unsound for more than one reason grammatical and textual. In the first instance, it is to be noticed that the clause confers powers of prescription in regard to five topics, but uses the present participle "prescribing" only twice. Therefore, it is quite clear that the first expression "prescribing governs the latter clause up to "shall be payable" occurring before the word "and" and followed by the second expression "prescribing" which governs the matter referred to in Section 85. Therefore, grammatically, the first power of prescription governs the clause up to "shall be payable" and, therefore, the expression "subject to the provisions of Chapter VII" must govern all the parts of clause (i) upto that stage. That that clause is one whole unit is clearly shown by the fact that the latter part of that clause applies not merely to taxes, but also to charges or payments fixed in lieu of any tax under Section 71 and fees to be charged under Section 70. That latter part of the clause is "and the times at which and the mode in which the same shall be levied or recovered or shall be paid." This latter part clearly provides that the power to prescribe the time at which and the mode in which a levy is to be imposed or payment recovered, is not only in respect of taxes, but also in respect of charges and payments under Section 71 and fees under Section 70. In that view of the matter, in our judgement, the clause "subject to the provisions of Chapter VII" must govern not only the prescription of taxes, but also the prescription of fees to be charged under Section 70. If, as Mr. Patel contends, "subject to the provisions of Chapter VII" were to govern only the first part of the clause and not the latter parts beginning with "payments under Section 71", then, in our judgement, there was no necessity of using the expression "prescribing" a second time in the latter part of the clause. In our judgement, the use of the expression "prescribing" a second time clearly indicates that "subject to the provisions of Chapter VII" governs the earlier parts and is not intended to govern the latter part which deals with Section 85 only. In this connection, it is important to notice that the topic of "the times at which and the mode in which" a levy is to be imposed or recovered, is the topic which is dealt with specifically by clause (b) of Section 62 which occurs in Chapter VII, and it would be very odd that, though that topic is specifically mentioned in clause (i) the Legislature did not intend to subject that matter to the provisions of Chapter VII and subject only the prescription of taxes, the grant of exemptions and the conditions and extent of remissions and the system of refunds. In our judgement, therefore, both textually and grammatically, the construction for which Mr. Patel contends is unsound and must necessarily be rejected.

19. However, Mr. Patel's contention is that, even if the aforesaid construction is not accepted, petitions must fail on the ground that none of the other sections in Chapter VII is applicable by its own force. Mr. Patel contends that the idea which was intended to be conveyed by the

expression "subject to the provisions of Chapter VII" is to take in Section 70 alone and no other section of Chapter VII. In our judgement, the contention has no merit. In the first instance, in our judgement, if the intention is to take in Section 70 only, then, it is odd that clause (i) should subject that very section to itself. If there is any limitation to be found in Section 70 when using the aforesaid expression, the municipality would be bound by that limitation. But, however, if we turn to Section 70, we find that it confers power of charging a fee simpliciter and does not, impose any qualification or limitation on that power. The same is the case with regard to the power to charge a fee for permission or a fee for the purpose mentioned in Sub-Section (2) of Section 70. Therefore, in our judgement, ii: the contention of Mr. Patel is right, then, the Legislature will be guilty of superfluity or tautology, a conclusion which cannot be easily accepted unless one is driven to it. Mr. Patel's contention is secondly based on an argument which we have already noticed and that is the solitary position of Section 70 and its placement under the separate sub-heading "power to charge fees" and not under the sub-heading "Imposition of taxes". Mr. Patel says that, the Legislature could have done the latter easily. We have noticed this argument already when dealing with the earlier contention of Mr. Nanavati, but Mr. Patel makes use of that argument for a different purpose. In our judgement, the contention of Mr. Patel deserves to be rejected on the broad conclusion which we have already reached when dealing with the earlier contention of Mr. Nanavati, viz., that it a fee is a tax, then, it must necessarily fall within the purview of clause (xi) of Sub-Section (1) of Section 59. In our judgement, the moment one reaches this conclusion, it follows inevitably that the municipality must, before charging or imposing a tee, undergo the procedure prescribed by Sub-Section (1) of Section 59, which we have already indicated before. Firstly, the municipality must observe the preliminary procedure required by Section 60 and, secondly, must obtain the sanction of one of the authorities mentioned in clause (b) of Sub-Section (1) of Section 59. But, Mr. Patel contends that, in that view of the matter, a part of Section 60 will not be applicable in the case of the levy of a fee under Section 70. Section 60 enacts that, before imposing a tax, the municipality shall first select one or the other of the taxes specified in Section 59 and prepare rules for the purpose of clause (i) of Section 46, prescribing the tax selected. Mr. Patel contends that, if a charge is to be levied under Section 70, then, there is no question of selecting any one or the other of the taxes specified in Section 59. He says that, in that case, the levy of the tax is selected under Section 70. In our judgement, the argument is fallacious. In our judgement, Section 70 does not give power to select a tax. It only confers a power to charge a fee, i.e., a tax too. It is noteworthy that that section does not say that If the municipality decides to levy a fee for a licence, it must do so in the case of every licence issued under the Act. Though the municipality may issue licences under more than one clause of Section 48 already referred to, it is not bound to levy fees in respect of all these licences. It is optional with the municipality to select all or any of the licences for the purpose of charging a levy, and this process would be the process for the selection under Section 59, Sub-Section (1). Secondly, Mr. Patel contends that a levy under Section 70 cannot be said to be "one or the other of the taxes specified in Section 59". He says that the taxes which are specified are specific taxes mentioned in clauses (i) to (x). We cannot agree. Although the expression "any other tax" does not give us an indication of the kind eo nomine, nonetheless, it is

a tax which is specified in Section 59. In our judgement, the contention of Mr. Patel deserves to be rejected on broader considerations also. Broadly speaking, the Act has empowered a municipality to frame (1) rules, (2) bye-laws, and (3) taxation rules. It is noteworthy that the power to make a rule can be exercised by taking the approval of one of the authorities mentioned in Section 46, but does not require invitation or consideration of objections from the citizens. The power to frame bye-laws has been subjected to more stringent conditions. Bye-laws can be framed only after inviting objections, considering them and placing those objections also for the consideration of one of the authorities mentioned lit Sub-Section (3) of Section 48. It is only after sanction is accorded by one of those authorities that a bye-law comes into force. A tax rule, however, has been subjected to still more stringent conditions. A tax has to be selected and rules specifying one or the other matters mentioned in Section 60, clause (a), have to be framed. Thereafter, objections have to be invited, considered and placed for the consideration of one of the authorities mentioned in clause (c). The procedure upto this stage is the same as that prescribed for a bye-law. But, the Government or Commissioner has been given additional powers in regard to tax rules. Under Section 61, those authorities have the power, not only to modify a tax rule, but also the power to impose a condition as to the application of the proceeds of a tax. In addition to this, whereas a bye-law comes into effect from the date that it is sanctioned, a tax rule does not come into effect until after the procedure laid down in Section 62 is undergone. The Municipality is required to publish the rules with a notice, fix a date not less than one month from the date of the publication of the notice, on and from which the tax will be leviable. Clause (b) also requires the municipality to frame rules in regard to matters mentioned in the fourth topic, i.e., clause (i) of Section 46. The proviso to Section 62 enacts a further limitation as to the date or time at which a tax is recovered. In addition to this, in the case of a tax rule, the Act confers special powers in Sections 73 and 74 of suspension of levy or requiring the municipality to impose a particular tax. In our judgement, we would require a very strong case to be made out to hold that all these important provisions, some of which are important safeguards in favour of citizens, were not intended to be applied to a fee even though it is levied as a tax. We do not mean to say that the Legislature cannot have excepted a fee from the aforesaid provisions. But, in our judgement, we will expect the Legislature to express its mind clearly and indisputably on a matter of the aforesaid kind. There is one more serious objection in upholding the contention of Mr. Patel. We have said that Section 48, Sub-Section (1), clauses (q) and (t), themselves confer power on the municipality to fix licence fees by framing bye-laws. In our judgement, it would be odd that the Legislature should have subjected the power of the municipality to levy fees in connection with such matters as are dealt with by those two clauses by the stricter procedure or bye-law and left the levying of fee by way of tax by the simple provision of a rule, where an assessee would have no voice whatsoever.

20. For the above reasons, on the whole, we have come to the conclusion that the levy of fee in the present case was the levy of an imposition of a tax under Section 59(1)(xi) and that the levy of that tax requires the procedure prescribed by Chapter VII to be undergone and that, as that procedure was not undergone, the levy of the fee in the present case was illegal and requires to be

quashed. Therefore, we propose to make the rule absolute with costs. We declare the levy of the licence fee in respect of hotels, eating-houses, restaurants and other places where food, meals, refreshment, tea, coffee or other non-intoxicating drinks are provided on payment, to be illegal, and order that a writ of mandamus do issue against respondent No. 1, restraining it from enforcing its bye-laws and rules in connection with that levy. Rule absolute to that extent. Respondents shall pay the costs of this petition to petitioners.

21. Civil Application No. 467 of 1961. Rule discharged. Such of the petitioners as may have deposited the amount may be re-refunded the same.
Order accordingly.