Pioneer Traders and Others

Vs

Chief Controller of Imports and Exports Pondicherry

Petitions Nos. 314 to 342 of 1961

(CJI B. P. Sinha, P. B. Gajendragadkar, K. N. Wanchoo, J. C. Shah, K. C. Das Gupta JJ

27.09.1962

JUDGMENT

WANCHOO, J. -

These twenty-nine petitions under Art. 32 of the Constitution rise common questions and will be dealt with together. They have been filed by two firms who obtained patentes to carry on business in Pondicherry in September, 1954, for the first time. As the facts in all the petitions are similar, we shall only give the facts generally to understand the questions raised before us. The two firms, it may be mentioned, did not carry on any business in Pondicherry before September, 1954, when they got a patente each and the proprietor of one of them is a resident of New Delhi while the proprietor of the other is a resident of Bombay.

The administration of Pondicherry was taken over by the Union of India from November 1, 1954. Before that Pondicherry was under the administration of the Government of France and was a free port. Import into Pondicherry was thus not subject to any restriction, except with regard to certain goods with which we are not concerned in the present petitions. Any merchant desiring to carry on business in the territory of Pondicherry had however to obtain a patente before he could do so. These patentes were of five kinds one of which was a patente authorising the trader to carry on the business of import of goods other than those which were under restriction. Though the importers were entitled by virtue of the patente to import goods subject to certain restrictions, this right could only be exercised by securing foreign exchange which was subject to certain limitations and was controlled by the Department of Economic Affairs at Pondicherry. There were two ways in which foreign exchange could be acquired, namely, (i) at the official rate through the Department of Economic Affairs, or (ii) in the open market at such rate as might be available; and both these ways were considered valid before November 1, 1954. Further there used to be authorisations for the purpose of import and the authorisations indicated the limit within which foreign exchange could be acquired either at the official rate or through the open market.

The petitioners' case is that though the patentes were secured in September, 1954, orders for import were placed before August 15, 1954. Thereafter after authorisations had been obtained from the French authorities, foreign exchange was acquired in the open market for the purpose of financing the import. There were in all twenty-nine transactions by the two firms, which are the subject-matter of these petitions; and in certain cases advances were paid, the balance being payable by means of bills of exchange drawn on "documents against payment" basis. But though the orders wear placed before August 15, 1954, and necessary foreign exchange had also been secured in the open market later, shipments could not be made because of an unexpected dock strike in England and on the Continent and also for want of shipping space, and therefore most of the consignments on the basis

of the twenty-nine orders where shipped after November 1, 1954, and only three consignments out of twenty-nine could be shipped in October, 1954, that is, before the administration of Pondicherry was taken over by the Government of India. The goods in all these cases arrived at Pondicherry after November 1, 1954. In the meantime, the administration of Pondicherry was taken over by the Government of India from November 1, 1954, in pursuance of an agreement between the Government of India and the Government of France, and two notifications were issued by the Government of India, namely, S.R.O.'s Nos. 3314 and 3315. By S.R.O. 3315, which was made under s. 4 of the Foreign Jurisdiction Act, No. XLVII of 1947, the Sea Customs Act, 1878, the Reserved Bank of India Act, 1934, the Imports and Exports (Control) Act, 1947, the Foreign Exchange Regulation Act, 1947, and the Indian Tariff Act, 1934, were extended to Pondicherry. This S.R.O. contained a saving clause which laid down that -

> "Unless otherwise specially provided in the schedule, all laws in force in the French Establishments immediately before the commencement of this Order, which correspond to the enactments specified in the Schedule, shall cease to have effect, save as respects things done or omitted to be done before such commencement."

As a consequence of these two S.R.O's a press communique was issued by the Government of India on November 1, 1954, explaining the effect of these notifications, in which it was stated that imports into and exports from the French Establishments would be regulated in accordance with the provisions of the Imports and Exports (Control) Act, 1947. It was further stated that as regards orders places outside the Establishments and finalised through grant of a licence by competent French authorities in accordance with the laws and regulations in force prior to November 1, 1954, licence-holders were advised to apply to the Controller of Imports and Exports for validation of licences held by them. Licence-holders were further advised not to arrange for shipment of goods until the licences held by them had been validated by the Controller of Imports and Exports. In view of this press communique, the petitioners tried to stop shipment until the authorisations held by them were validated by the Chief Controller of Imports and Exports, Pondicherry. But their suppliers told them that this could not be done, as the goods were in the course of shipment and it was too late to stop the shipment. The petitioners then applied for validation of the authorisations, but the Chief Controller of Imports and Exports, Pondicherry refused to validate them. The petitioners' case is that this refusal was arbitrary. Eventually, when the goods arrived at Pondicherry after November 1, 1954, the petitioners approached the Collector of Customs at Pondicherry to permit clearance of the goods. They were not, however, allowed to clear them, and notices were issued to them to show cause why the goods should not be forfeited on the ground that the import had been made in contravention of the Imports and Exports (Control) Act, 1947 and the Sea Customs Act, 1878. The petitioners thereupon showed cause and their case was that orders had been placed before August 15, 1954, and the imports had been made strictly in accordance with the law in force in Pondicherry before November 1, 1954, and therefore could not be said to be unauthorised. The Collector of Customs however refused to accept this explanation and ordered confiscation of the goods, and in the alternative imposes penalties for clearing them. These penalties amounted to over Rs. 64,000/- in the case of one of the firms and over Rs. 96,000/- in the case of the other firm. There were then appeals by the petitioners before the Central Board of Revenue against the orders imposing penalties. These appeals were dismissed, though the penalty was reduced to over Rs. 35,000/- in the case of one firm and Rs. 60,000/- in the case of other firm. The petitioners then went in revision to the Government of India but their revisions were rejected on January 23, 1957. It appears that the petitioners paid the penalty though the date is not clear from the petitions and cleared the goods. The petitioners were apparently satisfied with the order passed against them for they took no steps to go to Court after the revisions had been dismissed by the

Government of India in January, 1957, though they say that they have been making representations to the Government of India in that behalf without any effect and that the last communication from the Government of India was received by them in this connection in August, 1961.

In the meantime, certain importers of Pondicherry filed petitions in this Court in 1959 challenging the order of confiscation and the alternative order imposing penalties on them by the Collector of Customs, Pondicherry, in somewhat similar circumstances : (see Messrs. Universal Imports Agency v. The Chief Controller of Imports and Exports [[1961] 1 S.C.R. 305]). Those petitions were decided on August 23, 1960 and this Court held that in view of para. 6 of S.R.O. 3315, already referred to, which saved the effect of all laws in force in the French Establishments immediately before the commencement of the order even though those laws were repealed by the order, with respect to things done or omitted to be done before such commencement, the authorisations granted by the French authorities before November 1, 1954, for import were sufficient to protect the goods imported on the basis of those authorisations whether the exchange was secured officially or from the open market, from the operation of the Imports and Exports (Control) Act, 1947, and other provisions to the same effect. This view was taken on the ground that para. 6 saved "things done" before November 1, 1954 and as firm contracts had been entered into and authorisations granted before November 1, 1954, the subsequent arrival of goods in Pondicherry after November 1, 1954, as the consequence of the contracts and the authorisations was a "thing done " under para. 6 of S.R.O. 3315. It was held that the words "things done" must be reasonably interpreted and if so interpreted they not only meant things done but also the legal consequence flowing therefrom. Consequently, it was held that the imported goods in those cases were not liable to confiscation under the Imports and Exports (Control) Act and similar provisions of any other law, as firm contracts had been made before November 1, 1954 and exchange had been arranged either officially or through the open market in full or in part under authorisations granted by the French Government, and the subsequent import after November 1, 1954 was a consequence of these things which had been done before November 1, 1954 and was therefore protected by para. 6. In the result the penalty collected was ordered to be refunded.

This decision was given in August 1960, and it seems that after this decision, the petitioners wrote to the Government of India in September, 1960, of refund to penalties in their cases also; they were informed in February, 1961, that no refund could be made. The petitioners seems to have written again to the Government of India in June, 1961, and to this the Government of India gave a final reply in August, 1961. Thereafter the present writ petitions were filed in October, 1961. The petitioners rely on the decision of this Court in Messrs. Universal Imports Agency [[1961] 1 S.C.R. 305] and contend that they are entitled to refund of penalty as their cases are exactly similar to the case of Messrs. Universal Imports Agency [[1961] 1 S.C.R. 305]. They pray for a writ, order or direction in the nature of certiorari quashing the orders resulting in the imposition of penalty beginning with the orders of the Collector of Customs Pondicherry, and ending with those of the Government of India in revision and also for a direction requiring the respondents to refund to the petitioners the sum realised as penalty.

The petitions have been opposed on behalf of the Union of India on a number of grounds. It is however unnecessary for us to detail all the grounds raised on behalf of the Union of India in view of an objection that has been taken to the maintainability of these petitions based on the decision of this Court in Smt. Ujjambai v. The State of Uttar Pradesh [[1963] 1 S.C.R. 778]. We shall therefore refer only to such parts of the counter-affidavit filed on behalf of the Union of India as will suffice to explain the preliminary objection raised on its behalf.

The Union's case is that the talks for the de facto transfer of the French-Indian Establishments to the Government of India were resumed in August 1954, and that as a result of these talks, an agreement dated October 20, 1954, between the Government of India and the Government of France for the settlement of the question of the future of the French Establishments in India was arrived at. Pursuant to this agreement, the administration of the French Establishments (including Pondicherry) was transferred to the Government of India from November 1, 1954. In consequence, the Government of India promulgated two orders, namely, S.R.O's 3314 and 3315 on October 30, 1954, to come into force from November 1, 1954. The first of these orders was known as the French Establishments (Administration) Order while the second order was known as the French Establishments (Applications of laws) Order, 1954, by which the Sea Customs Act, 1878, and the Imports and Exports (Control) Act, 1947, and certain other Acts were made applicable to the said settlements. Some persons, including the petitioners, who had no business in Pondicherry from before mala fide with intent to defeat the laws in force in the Indian Union which were legally to be extended to the French Establishments when their administration was taken over by the Government of India, managed to procure some colourable documents on the strength of which they claimed that they had placed firm orders with foreign firms for import of goods which were restricted under the Indian Import Control Regulations. After the Government of India had applied S.R.O's 3314 and 3315 to the French Establishments and taken over their administration from November 1, 1954, a press communique was issued on November 1, 1954, that orders placed outside the French Establishments and finalised through a grant of licence by the competent French authorities in accordance with the laws and regulations in force prior to November 1, 1954 should be got validated by the Controller of Imports and Exports appointed for Pondicherry. Further, the licence-holders were advised not to arrange for shipments of goods until the licences held by them were validated. Later on January 5, 1955, the Union of India issued another press communique in view of certain representations received on the basis of Art. 17 of the Indo-French Agreement and the public was informed that import of goods against open market transactions after November 1, 1954, would be treated as unauthorised. But having regard to the hardship likely to be caused to genuine importers who had placed orders in pursuance of their normal trading operations against which goods were in the normal course shipped by the suppliers prior to the date of merger, the Collector of Customs, Pondicherry was being authorised to accord certain concessions to genuine importers. One of these concession was that goods shipped before November 1, 1954, but ordered before August 15, 1954, would be cleared without penalty irrespective of origin and value. The petitioners tried to take advantage of this concession and therefore tried to show before the Collector of Customs, Pondicherry that they had placed firm orders before August 15, 1954, through shipments could only be made in three cases before November 1, 1954, and were delayed in others because of dock strike in England and in Continental countries. This case was scrutinised by the Collector of Customs and he pointed out in his order that though the orders for these goods are said to have been placed before August 15, 1954, the two firms could only start functioning in Pondicherry from the month of September in which month they had obtained patente for conducting business there legally. The Collector also pointed out that in the ordinary course of business, commitments were not made without entering into correspondence with the suppliers regarding the prices, terms of payment etc., but in these cases, the petitioners produced no such correspondence. It was also found that the petitioners had not done any business of this kind even in the Indian Union before this. The Collector therefore held that it had not been proved that the goods had in fact been ordered before August 15, 1954, and therefore ordered their confiscation and imposed penalty in lieu thereof. The appeals of the petitioners to the Central Board of Revenue failed except to the extent that the penalty was reduced. The Board's order was silent on the point whether the goods had in fact been ordered before August 15, 1954. But the Board held that as the goods were imported without licence at a

time when a licence was required for their import, the appeal must fail. The petitioners then went in revision to the Government of India but failed there also.

The preliminary objection is that the orders imposing penalty are quasi-judicial orders passed by a competent authority having jurisdiction under a taxing statute. It is not the case of the petitioners that the statute under which the orders had been made read with S.R.O. 3315 of 1954 is in any way ultra vires. The sole basis of these petitions is that para. 6 of S.R.O. 3315 has been misconstrued by the authorities concerned and thus a penalty has been levied which could not be levied if para. 6 had not been misconstrued. The petitioners therefore question the validity of the order imposing penalty based on a misconstruction of para. 6 of S.R.O. 3315 of 1954 and this they cannot do by petition under Art. 32, whatever other remedies they might have against such an order, in view of the decision of this Court in Ujjambai's case [[1963] 1 S.C.R. 778]. It is therefore contended on behalf of the Union of India that these petitions under Art. 32 of the Constitution are not maintainable and should be dismissed on this ground alone.

In reply, it is submitted on behalf of the petitioners that Ujjambai's case [[1963] 1 S.C.R. 778] does not apply in the circumstances of these petitions. It is not seriously disputed that the orders imposing penalty were quasi-judicial orders; but it is urged that these orders were passed without jurisdiction and infringe the fundamental right of the petitioners under Art. 19(1)(f) and Art. 19(1)(g), and would be liable to challenge by petition under Art. 32 and the actual decision in Ujjambai's case [[1963] 1 S.C.R. 778] will not be applicable.

It is therefore necessary to consider the effect of the decision in Ujjambai's case [[1963] 1 S.C.R. 778]. That case was heard by a Bench of seven learned Judges of this Court, and the final decision was by a majority of five to two. The following two questions came up for decision in that case :-

> "1. Is an order of assessment made by an authority under a taxing statute which is intra vires, open the challenge as repugnant to Art. 19(1)(g), on the sole ground that it is based on a misconstruction of a provision of the Act or of a notification issued thereunder ?
>
> 2. Can the validity of such an order be questioned in a petition under Art. 32 of the Constitution ?"

As was pointed out by Das, J., in that case, the two questions were inter-connected and substantially related to one matter, namely, "is the validity of an order made with jurisdiction under an Act which is intra vires and good law in all respects, or a notification properly issued thereunder, liable to be questioned in a petition under Art. 32 of the Constitution on the sole ground that the provisions of the Act, or the terms of the notification issued thereunder, have been misconstrued ?" It was not disputed in that case that where the statute or a provision thereof is ultra vires, any action taken under such ultra vires provision by a quasi-judicial authority which violates or threatens to violate a fundamental right does gives rise to a question of enforcement of that right and a petition under Art. 32 of the Constitution will lie. Further, it was not disputed that when the assessing authority sought to tax a transaction the taxation of which came within the constitutional prohibition, the violation of fundamental right must be taken to have been established and such cases were treated as on a par with those cases where the provision itself was ultra vires. It was also not disputed that where the statute was intra vires but the action taken under it was without inherent jurisdiction, a petition under Art. 32 would lie. Finally, it was also not disputed in that case that where the action taken is procedurally ultra vires, the case is assimilated to a case of an action taken without inherent

jurisdiction and would be open to challenge by a petition under Art. 32. The controversy was "what is the position with regard to an order made by a quasi-judicial authority in the undoubted exercise of its jurisdiction in pursuance of a provision of law which is admittedly intra vires ? " It was in that connection where the authority has inherent jurisdiction to decide the matter and the law under which it proceeds is intra vires that the question arose whether the decision of such an authority could be challenged by a petition under Art. 32 on the sole ground that it was based on a misconstruction of the provision of law or of the notification properly issued thereunder. Five of the learned Judges composing the Bench answered both the questions raised in that case in the negative. Das, J., held as follows :-

> "An order of assessment made by an authority under a taxing statute which is intra vires and in the undoubted exercise of its jurisdiction cannot be challenged on the sole ground that it is passed on a misconstruction of a provision of the Act or of a notification issued thereunder. Nor can the validity of such an order be questioned in a petition under Art. 32 of the Constitution."

Kapur, J., held as follows :-

> "If the statute and its constitutionality is not challenged then every part of it is constitutionally valid including the provisions authorising the levying of a tax and the mode and procedure for assessment and appeals etc. A determination of a question by a Sales-Tax Officer acting within his jurisdiction must be equally valid and legal. In such a case, an erroneous construction, assuming it is erroneous, is in respect of a matter which the statute has given the authority complete jurisdiction to decide. The decision is therefore a valid act irrespective of its being erroneous.
>
> An order of assessment passed by a quasi-judicial tribunal under a statute which is ultra vires cannot be equated with an assessment order passed by that tribunal under an intra vires statute even though erroneous. The former being without authority of law is wholly unauthorised and has no existence in law and therefore the order is an infringement of fundamental rights under Art. 19(1)(f) and (g) and can be challenged under Art. 32. The latter is not unconstitutional and has the protection of law being under the authority of a valid law and therefore it does not infringe any fundamental right and cannot be impugned under Art. 32."

Sarkar, J., agreed with Das and Kapur, JJ.

Hidayatullah, J., held as follows :-

> "But where the law is made validity and in conformity with the fundamental rights and the officer enforcing it acts with jurisdiction, other considerations arise. If, in the course of his duties, he has to construe provisions of law and miscarries, it gives a right of appeal and revision, where such lie and in other appropriate cases, resort can be had to the provisions of Arts. 226 and 227 of the Constitution, and the matter brought before this Court by further appeals. This is because every erroneous decision "does not give rise to a breach of fundamental rights. Every right of appeal or revision cannot be said to merge in the enforcement of fundamental rights. Such errors can only be corrected by the processes of appeals and revisions. Art. 32 does not, as already stated, confer an appellate or revisional jurisdiction on this Court, and

> if the law is valid and the decision with jurisdiction, the protection of Art. 265 is not destroyed. There is only one exception to this, and it lies within extremely narrow limits. That exception also bears upon jurisdiction, where by a misconstruction the State Officer or a quasi-judicial tribunal embarks upon an action wholly outside the pale of the law he is enforcing. If, in those circumstances, his action constitutes a breach of fundamental rights, then a petition under Art. 32 may lie."

Mudholkar, J., summarised his conclusions as below :-

> "1. The question of enforcement of a fundamental right will arise if a tax is assessed under a law which is (a) void under Art. 13 or (b) is ultra vires the Constitution, or (c) where it is subordinate legislation. It is ultra vires the law under which it is made or inconsistent with any other law in force.
>
> 2. A similar question will also arise if the tax is assessed and/or levied by an authority (a) other than the one empowered to do so under the taxing law or (b) in violation of the procedure prescribed by the law or (c) in colourable exercise of the powers conferred by the law.
>
> 3. No fundamental right is breached and consequently no question of enforcing a fundamental right arises where a tax is assessed and levied bona fied by a competent authority under a valid law by following the procedure laid down by that law, even though it be based upon an erroneous construction of the law except when by reason of the construction placed upon the law a tax is assessed and levied which is beyond the competence of the legislature or is violative of the provisions of Part III or of any other provisions of the Constitution.
>
> 4. A mere misconstruction of a provision of law does not render the decision of a quasi-judicial tribunal void (as being beyond its jurisdiction). It is a good and valid decision in law until and unless it is corrected in the appropriate manner. So long as that decision stands, despite its being erroneous, it must be regarded as one authorised by law and where, under such a decision a person is held liable to pay a tax that person cannot treat the decision as a nullity and contend that "what is demanded of him is something which is not authorised by law. The position would be the same even though upon a proper construction, the law under which the decision was given did not authorise such a levy."

Mudholkar, J., therefore, agreed with Das, J., and was of the view that the two questions must be answered in the negative.

The other two learned Judges, Subha Rao and Ayyangar, JJ., took the contrary view. They were of the view that there could be no valid distinction between an order passed by an authority without jurisdiction, in the sense that the authority is not duly constituted under the Act or that it has inherent want of jurisdiction, and a wrong order passed by the authority on a misconstruction of the relevant provisions of the Act; in either case if the order affects a fundamental right it will be open to challenge by petition under Art. 32 on the ground that by a wrong construction, a fundamental right either under Art. 19(1)(f) or under 19(1)(g) is violated.

It will be seen from the above summary of the views of the learned Judges who constituted the

majority that, though the reasons given for coming to their conclusion were slightly different they were all agreed that where an order of assessment is made by an authority with jurisdiction under a taxing statute which is intra vires, it is not open to challenge as repugnant to Art. 19(1)(g) on the sole ground that it is based on a misconstruction of a provision of the Act or of a notification issued thereunder and the validity of such an order cannot be questioned in a petition under Art. 32 of the Constitution, though it may be open to question such an order on appeal or in revision in case the statute provides for that remedy or by a petition under Arts. 226 and 227 in appropriate cases.

The contention on behalf of the Union is that the orders in the present case are orders of an authority with jurisdiction acting quasi-judicially and even if they are based on a misconstruction of para. 6 of S.R.O. 3315 they will not be open to challenge by petition under Art. 32 of the Constitution, whatever other remedies the petitioners might have against them. It is urged that in principle there is no difference between an order of assessment under a taxing statute and an order of confiscation, with an alternative penalty, for both are orders of a quasi-judicial authority under a taxing statute which is intra vires; and if orders are passed with jurisdiction in either case they will not be open to challenge under Art. 32 on the sole ground that they are passed on a misconstruction of a provision of an Act or a notification issued thereunder.

It has not been disputed that the order of a customs authority imposing confiscation and penalties under s. 167(8) of the Sea Customs Act (No. 8 of 1878) is quasi-judicial and the customs authority has the duty to act judicially in deciding the question of confiscation and penalty : (see Leo Roy Frey v. The Superintendent District Jail, Amritsar [[1958] S.C.R. 822]). But it is urged on behalf of the petitioners that the orders in this case were passed without inherent jurisdiction and would thus be open to challenge and in this connection reliance was placed on the observations of Kapur, J., in Ujjambai's case [[1963] 1 S.C.R. 778 in connection with the decision in the case of Messrs. Universal Imports Agency [[1961] 1 S.C.R. 305]. Kapur, J., observed with respect to this decision that "in any case this is an instance of want of jurisdiction to tax transactions which the law excludes from the taxing powers of the authority levying the tax", though he pointed out further that the question of the applicability of Art. 32 to quasi-judicial determinations was not raised in that case. With respect, it may be pointed out that as the question of the applicability of Art. 32 to quasi-judicial determinations was not raised at all in the case of Messrs. Universal Imports Agency [[1961] 1 S.C.R. 305], the Court had no occasion to consider the question whether the authority in that case had inherent jurisdiction to decide the matter. The majority judgment on which the petitioners rely has nowhere considered the question whether the authority in that case suffered from inherent lack of jurisdiction when it decided to confiscate the goods imported and levy penalties in the alternative. All that the learned counsel for the petitioners could draw our attention to was a sentence in the majority judgment to the following effect :

> "We would, therefore, hold that paragraph 6 of the Order saves the transactions entered into by the petitioners and that the respondent had no right to confiscate their goods on the ground that they were imported without licence."

It is urged that when the majority said that the authorities had no right to confiscate the goods, it was meant that they had no inherent jurisdiction to do so. As we read the majority judgment, however, we do not find any warrant for coming to the conclusion that it was decided in that case that the authorities in that case had no inherent jurisdiction to confiscate the goods or impose penalties in lieu thereof. It is true that it was said in the majority judgment that the respondents had no right to confiscate the goods but that was because just before in that very sentence it was held that para. 6 of the Order saved the transactions. Therefore, when the majority in that case said that

the authorities had no right to confiscate the goods, all that was meant was that the authorities had misconstrued para. 6 and so confiscated the goods, but that on a correct construction of para. 6 they could not do so. It cannot therefore he said that the majority decision in that case was based on lack of inherent jurisdiction. The petitioners therefore cannot get out of the decision in Ujjambai's case [[1963] 1 S.C.R. 778] on the ground that the authorities who confiscated the goods and levied penalties in the alternative in the present cases had not inherent jurisdiction to do so.

As we have just indicated, the decision of this Court in the case of Messrs. Universal Imports Agency [[1961] 1 S.C.R. 305] was not based on the ground that the appropriate authority who confiscated the goods lacked inherent jurisdiction to do so. The decision, in substance, proceeded on the ground that in exercising the said jurisdiction, the authority had misconstrued S.R.O. 3315. The question as to whether a writ petition under Art. 32 can lie on that ground was not raised before the Court and has not been considered. Therefore, it seems to us, with respect, that the observation made by Kapur J. in the case of Ujjambai [[1963] 1 S.C.R. 778] that the decision in the case of Messrs. Universal Imports Agency [[1961] 1 S.C.R. 305] affords an instance of want of jurisdiction to tax transactions which the law excludes from the taxing powers of the authority levying the tax, is not very accurate. Similarly, it may be added that the inclusion of the said decision in the list of judgments cited by Das, J., which, in his opinion, illustrated categories of cases where executive authorities have acted without jurisdiction, is also not justified. Since the point about the competence of the writ petition was not raised or considered in the case of Messrs. Universal Imports Agency [[1961] 1 S.C.R. 305], it would not be accurate or correct to hold that that decision turned on the absence of jurisdiction of the appropriate authority. It is well known that after the decision of the Court in the case of Kailash Nath v. State of U.P. [A.I.R. (1957) S.C. 790], some writ petitions were entertained on the ground that the jurisdiction of the Court under Art. 32 could be invoked even if a tribunal exercising quasi-judicial authority had misconstrued the law under which it purported to act. Having regard to the decision of the Special Bench in the case of Ujjambai [[1963] 1 S.C.R. 778], these precedents have now lost their validity.

Then we come to the question whether this is a case of misconstruction of a provision of the law which is intra vires by an authority acting under a taxing statute. It is contended on behalf of the petitioners that the taxing statute in this case was the Sea Customs Act and the misconstruction, if any, would be of para. 6 of S.R.O. 3315. This in our opinion is not correct. The Sea Customs Act was applied to Pondicherry by S.R.O. 3315. This S.R.O. has six paragraphs. The first paragraph gives the name of the S.R.O. and the date from which it will come into force. The second paragraph defines what are "French Establishments" to which the S.R.O. was applicable. The third paragraph lays down that certain Acts mentioned in the Schedule which are twenty-two in number would apply to the French Establishments subject to certain conditions which are not material. Sub-paragraph (2) of para. 3 applies all rules under the various enactments in the Schedule to the French Establishments. Paragraph 4 lays down how references in any enactment, notification, rule, order or regulation applied to the French Establishments have to be construed. Paragraph 5 gives power to any Court, tribunal or authority required or empowered to enforce in the French Establishments any enactment specified in the schedule to construe enactment with such alterations, not affecting the substance, as may be necessary or proper. Then comes para. 6 which we have already set out. It will be seen therefore that S.R.O. 3315 applied the Sea Customs Act and certain other Acts to the French Establishments, including Pondicherry, and para. 6 in particular is similar to a repealing and saving provision to be found in an Act which repeals and re-enacts an earlier enactment. It would therefore be not improper to read para. 6 as if it was incorporated in each one of the twenty-two Acts which were extended to the French Establishments by S.R.O. 3315. The construction therefore of para. 6 of the S.R.O. which must be deemed to have been inserted in each one of the Acts mentioned in the

Schedule would be a construction of the Sea Customs Act itself. Original s. 2 in the Sea Customs Act provided for repeal of earlier enactments and for saving, (though it no longer exists in the Act as it was repealed by the Repealing Act No. 1 of 1938). In effect, therefore, para. 6 of the S.R.O. would take the place of original s. 2 of the Sea Customs Act. Therefore, an interpretation of para. 6 of the S.R.O. which must be deemed to have been inserted in the Sea Customs Act in place of original s. 2 would be an interpretation of the Sea Customs Act. So the contention that Ujjambai's case [[1963] 1 S.C.R. 778] does not apply, for there has been no misconstruction of any of the provisions of the Sea Customs Act, has no force. It may be added that it is not disputed in this case that the Collector of Customs had inherent jurisdiction to deal with this matter and the only attack on his order and on the subsequent orders passed in appeal and revision is that they misconstrue the provision of para. 6 of the S.R.O.

Finally, it is urged that three was in fact no misconstruction of the provisions of para. 6 of S.R.O. 3315 in these cases and Ujjambai's case [[1963] 1 S.C.R. 778] will not apply to these petitions. Literally speaking, it may be correct to say that there was no actual misconstruction of para. 6 of S.R.O. 3315 in these cases by the Collector of Customs. What had happened was, as we have already indicated, that the petitioners tried to bring their case before him within the terms of the press communique of January 5, 1955, by which certain concessions were extended to genuine importers. They therefore tried to prove that they had placed firm orders before August 15, 1954, and had also provided for foreign exchange to the extent necessary after receiving authorisations and that three of the consignments had been shipped before the 1st of November while the other twenty-six could not be shipped before that date for reasons beyond their control. The petitioners thus wanted to take advantage of the concessions in the press communique. They do not seem to have raised before the Collector of Customs the question that even if they had not placed the orders before August 15, they would still be entitled to the benefit of para. 6 of S.R.O. 3315 if they had placed the orders before November 1, 1954 and had received authorisations from the French authorities before November 1, 1954, and had made arrangements to the extent necessary for foreign exchange either through official channels or through open market. The Collector considered the case put forward by the petitioners namely, that they had placed firm orders before August 15, 1954, and held, for reasons which we have already indicated, that could not be true. The Collector therefore refused to give the petitioners the benefit of the press communique. In the circumstances the Collector could not proceed further to consider that even if the orders were placed after August 15, the petitioners would be protected by para. 6 of S.R.O. 3315.

The Board in appeal however did not rest its decision on this. It held that as the goods were actually imported after November 1, 1954, when licence restrictions were actually in force, the goods would be liable to confiscation as imported without licence. This decision, in effect, refused to give the benefit of para. 6 of S.R.O. 3315 to the petitioners and to that extent the paragraph can by implication be said to have been misconstrued by the Board.

This matter can therefore be looked at in two ways. If it is held that the petitioners rested their case on only the ground that they had placed the orders for import before August 15, 1954 and were thus entitled to the benefit of the press communique, the finding of the Collector to the effect that he was not prepared to believe that case for three reasons given by him cannot be said to justify a prayer for a writ because it is a finding of fact; and a writ cannot issue even if the said finding is erroneous. If, therefore, that was all that was raised by the petitioners before the authorities concerned, and the authorities concerned have found against the petitioners on the main question of fact involved in their contentions before them, it cannot be said that the authorities were wrong in the view they took for the reasons given by them and there would therefore be no question of any interference under

Art. 32. Further, if a petition under Art. 32 is not maintainable when a provision of law is misconstrued, it would be much less maintainable when there is mistake of fact though as we have indicated already, it cannot be said in this case that the Collector was wrong in his conclusion on the facts.

The petitioners' case, as put forward in this Court, is that even if firm orders were not placed before August 15, 1954, they were entitled to take advantage of the judgment of this Court in Messrs. Universal Imports Agency's [[1961] 1 S.C.R. 305] case if they had placed orders after obtaining the patentes in September and had received authorisations and had arranged for foreign exchange to the extent necessary before November, 1, 1954. If this is the case of the petitioners now, and they want to succeed on it, it must be held that the Board by implication negatived it in appeal. This could only be done by a misconstruction of para. 6 of S.R.O. 3315, for if that paragraph had been rightly construed, as held by this Court in Messrs. Universal Imports Agency's case, [[1661] 1 S.C.R. 305] the goods would not have been confiscated.

Therefore, the position is this. If the petitioners only raise the claim based on the press communique that they had placed firm orders before August 15, 1954, their claim has been negatived on facts and we see no reason to differ from the conclusion of the Collector on the facts. On the other hand, if the petitioners seem to have raised the case which they are now raising before us on the basis of Messrs. Universal Imports Agency's case [[1661] 1 S.C.R. 305] before the Board, the Board must be deemed to have turned down that claim and that could only be on the basis of the misconstruction of para. 6 of S.R.O. 3315. The case, therefore, that is now put forward on behalf of the petitioners before us would be absolutely analogous to the position in Ujjambai's case [[1963] 1 S.C.R. 778]. In that case the assessing authority acting with jurisdiction upon a misconstruction of a statute which was intra vires or a notification properly issued thereunder assessed the tax and it was held that such an assessment cannot be impugned as repugnant to Art. 19(1)(f) and (g) on the sole ground that it was based on a misconstruction of a provision of the Act and the validity of such an order cannot be questioned in a petition under Art. 32. In the present case, a similar quasi-judicial authority i.e., the Board acting judicially within its jurisdiction must be deemed to have turned down by implication the contention raised on the basis of para. 6 of S.R.O. 3315 by the petitioners before it and this could only be done on the misconstruction of that paragraph in view of the decision in Messrs. Universal Imports Agency's case [[1661] 1 S.C.R. 305]. The petitioners however cannot question the validity of those orders by petition under Art. 32 of the Constitution, for the Act under which the orders were passed read with S.R.O. 3315 is not assailed as ultra vires and the only ground on which it is said that a fundamental right has been violated is that there has been by implication a misconstruction of para. 6 of S.R.O. 3315 by the Board. In that view the decision in Ujjambai's case [[1963] 1 S.C.R. 778] will apply with full force to the present petitions. We therefore hold that the validity of the orders impugned cannot be questioned in a petition under Art. 32 of the Constitution. The petitions are hereby dismissed with costs - one set of hearing costs.

DAS GUPTA, J. -

In sixteen petitions under Art. 32 of the Constitution the petitioner, a merchant carrying on business under the name and style, Messrs. Eastern Overseas (Pondicherry), seeks relief against the orders by which the Collector of Customs purporting to act under s. 167(8) of the Sea Customs Act read with s. 3(2) of the Import and Export Control Act, 1947 directed confiscation of goods which he had imported into Pondicherry, at the same time giving him option to pay in lieu of confiscation, fines aggregating in all 16 cases to Rs. 96,400/-. The appeals against these orders to the Central Board of Revenue were unsuccessful except that the penalty of find payable was reduced to a total sum of Rs.

60,235/-. The petitioner then moved the Government of India for revision of these orders but the revision applications were rejected.

Shortly stated, the petitioner's case is that in all the sixteen cases he had concluded before November 1, 1954, firm contracts with foreign suppliers for supply of these goods by shipment of Pondicherry and it was on these contracts that the goods in question were imported by him. By the date the goods reached Pondicherry, the Sea Customs Act had become applicable to Pondicherry as a result of an order made by the Government of India on October 30, 1954, - the S.R.O. No. 3315. This order was made under s. 4 of the Foreign Jurisdiction Act, 1947, in pursuance of the Indo-French Agreement under which the administration of Pondicherry was vested with the Government of India from November 1, 1954. Paragraph 6 of that order however contained a saving clause. By reason of that the Sea Customs Act did not apply to the imports made by him. That paragraph is in these words :-

> "Unless otherwise specifically provided in the Schedule, all laws in force in the French Establishments immediately before the commencement of the order, which correspond to enactments specified in the Schedule, shall cease to have effect, save as respect things done, or omitted to be done before such commencement."

It was held by this Court in Universal Imports Agency v. The Chief Controller of Imports & Exports [[1961] 1 S.C.R. 305] that importations of goods into Pondicherry after November 1, 1954, would have the benefit of this saving clause, if the importation is in pursuance of a contract concluded prior to November 1, 1954. The petitioner bases his case on the law as settled by this Court in the case mentioned above and contends that as the Sea Customs Act was not applicable to the importations of the goods, in these sixteen cases, the importations being in pursuance of contracts concluded before November 1, 1954, the orders of confiscation of his property and the orders of penalty made upon him were illegal. There has thus been by these orders an invasion of the petitioner's fundamental right under Art. 19(1)(f) of the Constitution and for the protection of that right these petitions have been made.

The respondent contends that the basis of the petitioner's case that the importations were in pursuance of a control concluded before November 1, 1954, has not been established. Apart from this defence on merits, a preliminary objection is raised at the hearing on the authority of the decision of this Court in Smt. Ujjam Bai v. The State of U.P. [[1963] 1 S.D.R. 778] that a petition under Art. 32 does not lie. The argument is that the order of confiscation and penalty has been made by an authority under a statute which in intra vires and in the undoubted exercise of its jurisdiction. The validity of such an order cannot therefore be called in question in a petition under Art. 32 of the Constitution even though the authority may have misconstrued the provisions of Para. 6 of S.R.O. 3315.

In resisting the preliminary objection, Mr. N.C. Chatterjee has argued on behalf of the petitioner that all these 16 cases are cases of a quasi-judicial authority acting without jurisdiction and so, the decision in Ujjam Bai's Case [[1963] 1 S.C.R. 778], far from creating any difficulty in the way of the issue of a writ, definitely helps the petitioner. It is not disputed that in deciding the preliminary objection the Court has to proceed on the basis that the petitioner's allegations about the importations having been made on the basis of contracts concluded before November 1, 1954, are correct. The necessary consequence of this fact, it is argued, is that the Sea Customs Act would not apply to these cases of importations and consequently the Collector of Customs, an officer, who derives his jurisdiction from the Sea Customs Act, would have no jurisdiction to make any order in

respect of them. In my opinion, there is considerable force in the argument and the preliminary objection raised on behalf of the respondent should fail.

The majority decision in Ujjam Bai's case [[1963] 1 S.C.R. 778] is clear authority for the proposition, that an order of confiscation or penalty made by an authority under a statutory provision which is intra vires cannot be questioned in a petition under Art. 32 of the Constitution on the ground that it has been passed under a misconstruction of the provision of law, provided the order is made "in the undoubted exercise of its jurisdiction." Ujjam Bai's case also appears, however, to be equally clear authority for the proposition that "if a quasi-judicial authority acts without jurisdiction or wrongly assumes jurisdiction by committing an error as to a collateral fact and the resultant action threatens or violates a fundamental right the question of enforcement of that right arises and a petition under Art. 32 will lie." this proposition has been recently reiterated by a Bench of five judges of this Courts in The State Trading Corporation of India v. The State of Mysore (Writ Petitions Nos. 65 and 66 and 1960). In that case also an objection was raised on the authority of Ujjam Bai's Case to the maintainability of writ petitions under Art. 32 of the Constitution. Repelling the objection, Sarkar, J., speaking for the Court, observed :-

> "It was however said that the petitions were incompetent in view of our decision in Ujjam Bai v. State of Uttar Pradesh [[1963] 1 S.C.R. 778] in as much as the Taxing Officer under the Mysore Acts had jurisdiction to decide whether particular sale was an inter-State sale or not and any error committed by them as a quasi-judicial tribunals in exercise of such jurisdiction did not offend any fundamental right. But we think that case is clearly distinguishable. Das, J., there stated that "if a quasi-judicial authority acts without jurisdiction or wrongly assumes jurisdiction by committing an error as to a collateral fact and the resultant action threatens or violates a fundamental right, the question of enforcement of that right arises and a petition under Act. 32 will lie." He also said that where a statute is intra vires but the action taken is without jurisdiction, then a petition under Art. 32 would be competent. That is the case here. There is no dispute that the taxing officer had no jurisdiction to tax inter-State sales, there being a constitutional prohibition against a State taxing them. He could not give himself jurisdiction to do so by deciding a collateral fact wrongly. That is what he seems to have done here. Therefore, we think the decision in Ujjambai's case is not applicable to the present case and the petitions are fully competent."

It is hardly necessary to cite any further authority for the proposition that an inferior tribunal cannot give to itself jurisdiction by deciding a collateral fact wrongly. I shall only refer to the decision in Rex v. Shoreditch Assessment Committee [[1910] 2 K.B. 859] where the matter was discussed in picturesque language thus : "No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction; ..... a Court with jurisdiction confined to the city of London cannot extend such jurisdiction by finding as a fact that Piccadilly Circus is in the ward of Chepe."

What has happened in the cases now before us is that the Collector who has jurisdiction only in cases coming under Sea Customs Act has assumed jurisdiction, on a wrong finding that the Sea Customs Act applies to these cases, even though in law it does not.

There is no escape from the conclusion that on the authority of this Court's decision in Messrs. Universal Imports Agency v. The Chief Controller of Imports and Exports [[1961] 1 S.C.R. 305],

the Sea Customs Act will not apply and the law formerly in force in the French Establishments, immediately before November 1, 1954, would apply, in respect of all importations into Pondicherry made on the basis of contracts concluded before November 1, 1954. On the assumption which, as already stated, must be made in considering the preliminary objection, that the importations in these cases were made on the basis of contracts concluded before November 1, 1954, the irresistible conclusion is that the Sea Customs Act had no application to these cases. It necessarily follows that the Collector of Customs had, on the above assumption of facts, no jurisdiction to make any order in respect of these. The fact that the Collector of Customs thought, in exercising his functions as a quasi-judicial authority, that the Sea Customs Act did apply cannot possibly affect this question.

It appears that before the Collector the petitioner did not seek to make the case which he now wants to make, viz., that the contract for supply of the goods was made in all these cases before November 1, 1954. Before the Collector the petitioner's case was that the contracts in all the cases had been concluded before August 15, 1954. The collector came to the conclusion that this case, viz., that the contracts had been concluded before August 15, 1954, had not been established. It was in that view that he made the orders of confiscation with an option to pay penalty instead. It seems probable that in the appeals before the Central Board of Revenue and the revisional applications before the Government of India also the petitioner's case was that the contracts had been concluded before August 15, 1954, and the case that the contracts were concluded before November 1, 1954, was not pleaded. The Member, Central Board of Revenue, in disposing of the appeals recorded his view that it was not in doubt that the goods in question were imported into Pondicherry at a time when a licence was required for their import and that the appellant did not have such a licence. In that view he affirmed the Collector's orders with a modification that the fine in lieu of confiscation be reduced. The Government of India also found no reason to interfere with the orders passed by the Central Board of Revenue.

These facts can however make no difference to the position in law that if in fact the importations were made on the basis of contracts concluded before November 1, 1954, the Sea Customs Act would not apply and the Collector or the Central Board of Revenue would have no jurisdiction to make any order of confiscation or penalty. Where an authority whether judicial or quasi-judicial has in law no jurisdiction to make an order the omission by a party to raise before the authority the relevant facts for deciding that question cannot clothe it with jurisdiction.

The substance of the matter is that the Collector assumed jurisdiction on the view that the Sea Customs Act applied to these cases, if the importations were on the basis of contracts concluded before November 1, 1954 - as we have assumed, - the Sea Customs Act does not however apply to these cases. Therefore, the Collector acted without jurisdiction and the fact that the assumption of jurisdiction was based on the Collector's wrong decision, does not change that position. The writ petitions would therefore be maintainable, if the petitioner can satisfy the Court that the importations were made on the basis of contracts concluded before November 1, 1954. I would therefore reject the preliminary objection.

When the Universal Imports Agency Case [[1962] 1 S.C.R. 305] was decided by this Court, no objection to the maintainability of the writ petition was raised; and consequently, the Court had not to consider the question whether the action taken by the Collector of Customs was with or without jurisdiction. So long as however the law as laid down by the majority judgment in that case remains good law, we must hold that the Sea Customs Act would not apply to imports in these cases also if they were made on the basis of contracts concluded before November 1, 1954; and as explained above, that in my opinion compels the conclusion that the Collector of Customs acted without

jurisdiction, if the imports were on the basis of contracts concluded before November 1, 1954.

It may be mentioned here in this connection that S.K. Das, J., in his judgment in Ujjam Bai's Case [[1963] 1 S.C.R. 778] referred to the decision of this Court in Universal Imports Agency v. Chief Controller of Imports and Exports [[1961] 1 S.C.R. 305] as a case where a quasi-judicial authority has acted without jurisdiction. Kapur, J., has also referred to this case and said "in any case, this is an instance of want of jurisdiction to tax transactions which the law excludes from the taxing powers of the authority levying the tax."

Coming now to the merits of the petitions, I need only state that the materials that have been produced by the petitioner are by no means sufficient to establish the case that the contracts in these several cases were concluded before November 1, 1954. Mr. Chatterjee prayed to the Court for an opportunity to adduce further documentary evidence to convince us of the truth of the petitioner's case on this point. I might perhaps have been inclined to grant this prayer. No useful purpose will however be served by my discussing that question, or the materials already on the record, as may learned brethren having come to a conclusion that the preliminary objection should succeed, have not considered the merits of the petition.

The position is exactly similar in the other thirteen petitions filed by M/s. Pioneer Traders which were heard along with the petitions already discussed and my conclusion in regard to those petitions is also the same.

BY COURT :

In accordance with the judgment of the majority of the Court, the petitions are dismissed with costs. There will be one set of hearing costs.

Petitions dismissed.

</html