K. S. Venkataraman & Co.

Vs

State of Madras

Civil Appeal No. 618 of 1963

(V. Ramaswami – I, K. Subba Rao, K. N. Wanchoo, J. C. Shah, S. M. Sikri JJ)

18.10.196

JUDGMENT

SUBBA RAO, J. –

This appeal by certificate raises the question whether a suit for the refund of sales tax assessed under a provision of the Madras General Sales Tax Act, 1939 (Act IX of 1939) declared to be ultra vires the powers of the State Legislature would lie.

The appellants are a private company incorporated under the Indian Companies Act. They carry on the business of building contractors. During the years 1948-49 to 1952-53 they were assessed to sales tax by the State of Madras on the basis that the contracts executed by them were "works contracts". On April 5, 1954, the High Court of Judicature at Madras held in Gannon Dunkerley and Co. v. The State of Madras (5 S.T.C. 216.) that the relevant provision of the Madras General Sales Tax Act empowering the State of Madras to assess indivisible building contracts to sales tax was ultra vires the powers of the State Legislature. On July 5, 1954, the appellants issued a notice to the State of Madras under s. 80 of the Code of Civil Procedure claiming the refund of the amounts collected from them. As the demand was not complied with, on March 23, 1955, they filed O.S. No. 2272 of 1955 in the City Civil Court, Madras, for the recovery of a sum of Rs. 36,320-1-11, being the total amount of taxes illegally levied and collected from them for the years 1948-49 to 1952-53 and for incidental reliefs. The main basis of the claim was that the relevant provisions of the Madras General Sales-tax Act empowering the sales-tax authorities to impose sales-tax on indivisible building contracts were unconstitutional and void, that the sales-tax authorities had no jurisdiction to assess the said tax in respect of the said transactions and that the appellants, having paid the amount under a mistake of law, would be entitled to have a refund of the same. The State of Madras raised various defences. It pleaded, inter alia, that s. 18-A of the Sales-tax Act was a bar to the maintainability of the suit, that the suit was barred by limitation and that a suit to recover money on the ground of mistake of law was not maintainable. The learned City Civil Judge held, following the principle laid down by the Judicial Committee in Raleigh Investment Co. Ltd. v. The Governor-General in Council ((1947) L.R. 74 I.A. 50.), that the suit was not maintainable under s. 18-A of the Madras General Sales-tax Act. The learned City Civil Judge further held that a suit for a refund of money paid under a mistake of law was not maintainable and that it was also barred by limitation. On appeal, a Division Bench of the High Court of Madras held that a suit for a refund on the basis of mistake of law would lie but dismissed the appeal on the ground that the said decision of the Judicial Committee directly covered the point raised; that is to say, it held that the remedy of the appellants was only to pursue the machinery provided under the Act and that the suit was not maintainable in view of s. 18-A of the said Act. It did not express any opinion on the question of limitation. Hence the appeal.

Mr. Desai, learned counsel for the appellants, raises before us the following points : (1) The provisions of s. 2(h) and 2(i), Explanation (1)(i), of the Madras General Sales Tax Act, 1939, hereinafter called the Act, read with r. 4(3) of the Turnover and Assessment Rules, so far as relevant to indivisible works contracts, were held by this Court to be without legislative competence and, therefore, wholly void; that s. 18-A of the Act does not bar a suit for the recovery of tax assessed under the said ultra vires provisions. (2) Section 18-A of the Act was introduced by the Amending Act of 1951 (Mad. Act 6 of 1951), which came into force on April 20, 1951, and, therefore, in any event the suit would be maintainable in respect of refund of amounts paid towards sales-tax for a period before the said date. And (3) the suit is not barred by limitation, as art. 96 of the Limitation Act governs the said suit and in terms of the said article the appellants had filed the suit within three years from the date they had knowledge of the mistake whereunder they paid the amounts.

The arguments of Mr. A. Ranganadham Chetty, learned counsel for the respondent, may be briefly put thus : On a fair reading of the provisions of s. 18-A of the Act it should be held that a suit to set aside or modify an assessment made under the machinery of the Act is not maintainable. The expression "assessment" has three elements, namely, (i) power to make the assessment; (ii) the process of assessment; and (iii) its content. The section emphasizes the making of assessment, i.e., its two component parts, power and process, under the Act and not its content. If it be held that it refers to the content, it will lead to anomalies, for in making an assessment the assessing authority has to consider the principles of different laws and it cannot obviously be held that his decision based upon laws other than Sales-tax law is a decision made under the provisions of the Act. Any provision of the Act relating to the content of assessment cannot have a higher sanctity than a provision of law other than the Sales-tax law relating to the content of assessment. So, the argument proceeds, the expression "under the Act" can be correlated only to the expression "make", with the result the bar against the maintainability of the suit is attached to the making of an assessment under the machinery of the Act. In short, his argument is that the principle laid down in the Raleigh Investment Co.'s case (L.R. 74 I.A. 50.) directly applies to a similar case arising under the Act. His further contention is that this Court had not declared the relevant provisions of the Act ultra vires and, even if it had, there is no evidence that the contracts in question were indivisible works contracts.

At the outset it will be convenient to consider the question whether the contracts in respect whereof the sales tax was assessed were indivisible works contracts not involving any element of sale of material, for if they were not such contracts, the entire argument of the learned counsel for the appellants would fall to the ground.

The appellants in paragraph 3 of the plaint averred thus :

> "As such building contractors the plaintiffs had executed construction of buildings, bridges, drains, roads, on lump-sum basis or on the basis of tender accepted by the other contracting parties. During the years 1948-49 to 1953-54 the plaintiffs were assessed to sales-tax on various sums mentioned in the particulars herein on the basis that the contracts were works contracts and therefore liable to be taxed under section 3(1) read with Rule 4(3) of the Madras General Sales-Tax (Turnover and Assessment) Rules, 1939."

In paragraph 4 of the plaint they stated that the said assessments were illegal, unconstitutional and were without any jurisdiction, as the plaintiffs were not dealers as defined in the Act. In paragraph 9 thereof they referred to the decision of the Madras High Court in Gannon Dunkerley & Co. v. The

State of Madras (5 S.T.C. 216.) and stated that they came to know of their mistake on April 5, 1954, when the Madras High Court delivered the judgment in that case. It is, therefore clear from the plaint that the appellants stated that they entered into building contracts with the State on a lump-sum basis and that the assessment made in respect of those contracts were unconstitutional and without jurisdiction, in view of the decision of the Madras High Court in Gannon Dunkerley and Co.'s case (5 S.T.C. 216.). There were clear averments in the plaint that the contracts were indivisible building contracts. In the written-statement, the State did not deny that they were indivisible building contracts; indeed, it assumed that the said contracts were covered by the decision of the Madras High Court in Gannon Dunkerley & Co.'s case (5 S.T.C. 216.), but stated that the said decision required reconsideration and that the matter was pending in appeal before this Court. Issue (1) framed by the City Civil Judge reads :

> "Has sales-tax for the years 1948-53 been validly levied and as such the suit claim is untenable ?"

On that issue the learned City Civil Court Judge, on a consideration of the entire material placed before him, held that the plaintiffs entered into works contracts only and there was no element of sale of the materials used in the buildings separately in the said contracts. He observed :

> "It is clear from the assessment files produced by the defendants that the plaintiffs were assessed only on the basis that they entered into "works contracts" and not on the basis that they sold building materials."

In the High Court no attempt was made to canvass the correctness of that finding. Indeed, the High Court proceeded on the basis that the appellants' turnover from the works contracts was computed in accordance with the rules framed under the Act and that the decision in the Gannon Dunkerley and Co.'s case (5 S.T.C. 216.) directly applied to the said assessments. In the statement of case filed by the respondent in this Court, there is no allegation that the assessments did not relate to indivisible works contracts. The entire statement of case was based on the assumption that they were such contracts. In the circumstances we must hold that the assessments in question were made in respect of indivisible works contracts.

We shall now read the relevant provisions of the Act and the effect of the decision of this Court in Gannon Dunkerley and Co.'s case ([1959] S.C.R. 379.) on the said section.

Section 2(i-i) "Works contract" means any agreement for carrying out for cash or for deferred payment or other valuable consideration, the construction, fitting out, improvement or repair of any building, road, bridge or other immovable property or the fitting out, improvement or repair of any movable property.

Section 2. (h) "Sale" with all its grammatical variations and cognate expression means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration and includes also a transfer of property in goods involved in the execution of a works contract but does not include a mortgage, hypothecation, charge or pledge.

Section 2. (i) "Turnover" means the aggregate amount for which goods are either bought by or sold by a dealer, whether for cash or for deferred payment or other valuable consideration provided that the proceeds of the sale by a person of agricultural or horticultural produce grown by himself or

grown on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover.

Explanation (1) : Subject to such conditions and restriction, if any, as may be prescribed in this behalf :

> (i) the amount for which goods are sold shall, in relation to a works contract, be deemed to be the amount payable to the dealer for carrying out such contract, less such portion as may be prescribed of such amount, representing the usual proportion of the cost of labour to the cost of materials used in carrying out such contract.
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> Rule 4(3) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, reads :
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> "For the purpose of sub-rule (1), the amount for which goods are sold by a dealer shall, in relation to a works contract, be deemed to be the amount payable to the dealer for carrying out such contract less a sum not exceeding such percentage of the amount payable as may be fixed by the Board of Revenue, from time to time for different areas, representing the usual proportion in such areas of the cost of labour to the cost of materials used in carrying out such contract, subject to the following maximum percentages :
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> . . . . . .

It will be seen from the said provisions that an indivisible works contract is deemed to be a sale and the person entering into such a contract, a dealer. The turnover of the dealer in respect of such contracts is arrived at by deducting from the amount payable to the dealer the cost of labour arrived at in the manner prescribed thereunder. The provisions are wide enough to take indivisible works contracts where, under the terms of the contracts, the value of the materials supplied by a contractor and the charges he made for the labour are separately specified. As we have pointed out earlier, the assessments in the present case were made under the said provisions on the basis that the appellants entered into indivisible works contracts. This court in Gannon Dunkerley and Co.'s case ([1959] S.C.R. 379.) had to consider the validity of the said provisions. The Court, speaking through Venkatarama Aiyar J., held, agreeing with the High Court, that the said provisions introduced by the Madras General Sales Tax (Amendment) Act, 1947, were ultra vires the powers of the Provincial legislature. Mr. Ranganadham Chetty, learned counsel for the State, contended that this Court did not hold the said provisions to be ultra vires but in effect and substance construed them so as to limit their operation only to works contracts involving an element of sale of materials. We have gone through the judgment and it discloses an elaborate consideration of the only question raised before it, namely, whether the definition of "sale", which included building contracts, was within the constitutional competence of the State Legislature. After considering the relevant constitutional provisions and the relevant authorities, this Court came to the definite conclusion that the State Legislature had no competence to impose a tax on indivisible building contracts. It is true that in the last paragraph of the judgment, to avoid misconception, this court explained that its conclusion was applicable only to works contracts which are entire and indivisible. We have no doubt that this Court held in clear terms that the said provisions would be unconstitutional in so far as they dealt with indivisible building contracts. If there was any ambiguity, that was made clear by this Court in Pandit Banarsi Das Bhanot v. State of Madhya Pradesh ([1959] S.C.R. 427), which was decided on April 3, 1958, wherein, in the context of similar provisions in the Central Provinces and Berar Sales

Tax Act, 1947, it held that in a building contract there was no sale of materials as such and that, therefore, it was ultra vires the powers of the Provincial Legislature to impose tax on the supply of materials. We, therefore, hold that this Court in Gannon Dunkerley and Co.'s case ([1959] S.C.R. 379) held that the said provisions of the Madras General Sales Tax Act, 1939, in so far as they enabled the imposition of tax on the turnover of indivisible building contracts, were ultra vires the powers of the State Legislature and, therefore, void.

If the said provisions to the extent indicated are ultra vires the State legislature, the next question is whether a suit for the refund of the amounts paid in respect of assessments made under the said ultra vires provisions is maintainable. The sheet-anchor of the arguments of the learned counsel for the respondent is the decision of the Judicial Committee in Raleigh Investment Co.'s case (L.R. 74 I.A. 50). Before we consider the scope of the said decision, it will be convenient to notice some of the propositions of law settled in the context of the ouster of jurisdiction of a civil court. Under s. 9 of the Code of Civil Procedure, "The Courts shall subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. "A suit is expressly barred if a legislation in express terms says so. It is impliedly barred if a statute creates a new offence or a new right and prescribes a particular penalty or special remedy. In that event, no other remedy can, in the absence of evidence of contrary intention, be resorted to : see Wolverhamptin New Water-works v. Hawkesford (1859 6 C.B. (N.S.) 336). The general rule is that statutes affecting jurisdiction of courts are to be construed, so far as possible, to avoid the effect of transferring the determination of rights and liabilities from the ordinary courts to executive officers : see Winter v. Attorney General ((1875) L.R.P.C. 380.). It has been held that a suit in a civil court will always lie to question the order of a tribunal created by a statute, even if its order is, expressly or by necessary implication, made final, if the said tribunal abuses its power or does not act under the Act but in violation of its provisions : see Firm Radha Kishan v. Ludhiana Municipality ((A.I.R. 1963 S.C. 1547.). It is also equally well established that civil courts have power to entertain a suit in which the question is whether the executive authority has acted ultra vires its powers : see King-Emperor v. Sibnath Banerji ((1945) L.R. 72 I.A. 241.) and Mohammed Din v. Imam Din ((1947) L.R. 74 I.A. 322.). So far there is, or can be, no doubt. But the further question that falls to be decided in this case is whether an assessment made under an ultra vires provision of a statute can only be questioned through the machinery provided by that Act or whether a suit in a civil court is maintainable in respect thereof.

This brings us to the consideration of the decision of the Judicial Committee in Raleigh Investment Co.'s case ((1947) L.R. 74 I.A. 50.). As the arguments at the Bar mainly turned upon the correctness of this decision it is necessary to scrutinize it in some detail. The facts of that case were as follows : The appellant, a joint stock company incorporated in the Isle of Man, with its registered office there and its main office in England, held shares in nine companies carrying on business in British India. Some of those companies were incorporated in England and the others in the Isle of Man, and while their businesses in India were managed by local bodies, the ultimate control lay with the London Boards. All the dividends received by the appellant company from the nine companies were declared, paid and received in England : no part of them was ever remitted to British India. The appellant was assessed in respect of income-tax and super-tax for the relevant years as a non-resident on an income which included the dividends received from the nine companies. The appellant paid the tax under protest and instituted a suit in the High Court at Calcutta in its ordinary original civil jurisdiction claiming a declaration that in so far as explanation 3 and the other provisions of s. 4 of the Indian Income-tax Act, 1922, as amended in 1939, purported to authorize the assessment and charging to tax of a non-resident in respect of dividends declared or paid outside British India, but not brought into British India, those provisions were ultra vires the legislature, and

that the assessment was illegal and wrongful. The Judicial Committee held that s. 67 of the Act was a bar to the maintainability of the suit. The argument on behalf of the assessee in that case was that an assessment was not an assessment "made under the Act" if the assessment gave effect to a provision which was ultra vires the Indian Legislature; that in law such a provision, being a nullity, was non-existent; and that an assessment justifiable in whole or in part by reference to, or by such a provision was more aptly described as an assessment not made under the Act than as an assessment made under the Act. This was an argument similar to that now advanced by Mr. Desai on behalf of the assessee. The argument was negatived by the Judicial Committee for the following reason, pp. 63-64 :

> "Effective and appropriate machinery is therefore provided by the Act itself for the review on grounds of law of any assessment..... The obvious meaning, and in their Lordships' opinion, the correct meaning, of the phrase "assessment made under this Act" is an assessment finding its origin in an activity of the assessing officer acting as such. The circumstance that the assessing officer has taken into account an ultra vires provision of the Act is in this view immaterial in determining whether the assessment is "made under this Act"."

The main reason that persuaded the Judicial Committee accept the construction they placed on s. 67 of the Income-tax may be stated in their own words thus :

> "The absence of such machinery would greatly assist the appellant on the question of construction and, indeed, it may be added that, if there were no such machinery, and if the section affected to preclude the High Court in its ordinary civil jurisdiction from considering a point of ultra vires, there would be a serious question whether the opening part of the section, so far as it debarred the question of ultra vires being debated, fell within the competence of the legislature."

Indeed, in view of the said machinery, the Judicial Committee even doubted whether the enactment of s. 67 was necessary to exclude jurisdiction. In its opinion it was superfluous. The enter reasoning of the Judicial Committee was, therefore, based upon the assumption that the question of ultra vires can be canvassed and finally decided through the machinery provided under the concerned statute. The interpretation of s. 67 of the Income-tax Act was also based on the comprehensive scope given by the Judicial Committee to the said machinery provided under the said Act. Is this assumption correct ? If not, as the Judicial Committee itself realised, the construction put upon s. 67 of the Income-tax Act would not also be correct.

Before we scrutinize the correctness of the reasons given by the Judicial Committee, we shall briefly notice the decisions of the Privy Council and of this Court wherein the said decision was considered, as Mr. Ranganadham Chetty contended that the entire reasoning of the Privy Council was either expressly or impliedly accepted by the said decisions.

The Judicial Committee in Commissioner of I.T., Punjab, North-West Frontier and Delhi Provinces, Lahore v. Tribune Trust, Lahore ((1947) L.R. 74 I.A. 306.) had to deal with a case where an assessment was made by the income-tax authority in regard to an income which was exempt on the ground that it was derived from property held under trust wholly for charitable purposes. It held that the assessments of the Income-tax Officer, who had jurisdiction to decide whether the said income was exempt from the relevant provision and who had held that the said income was not exempt and on that basis made the assessment, were not a nullity,. In coming to that conclusion the Judicial

Committee found strong support in the decision in Raleigh Investment Company's case ((1947) L.R. 74 I.A. 50.). This is not a case where the income-tax officer made an assessment under a provision which was ultra vires.

In Raja Bahadur Kamakshya Narain Singh of Ramgarh v. Commissioner of Income-tax, Bihar ((1947) F.C.R. 130, 138-139.), the Federal Court was concerned with a case where the appellate tribunal relying upon the Bihar Regulations 1 of 1941 and IV of 1942, held that the assessment made by the Income-tax Officer before the said Regulations were passed was good. Before the Tribunal it was contended that the said Regulations were ultra vires, but that contention was rejected. After giving long extracts from the judgment in Raleigh's case ((1947) L.R. 74 I.A. 50.), Kania J., as he then was, observed :

> "These observations clearly show that the right of appeal and the machinery provided in the Income-tax Act to take a question of law for the opinion of the High Court are important provisions which have a bearing on the questions whether a certain piece of legislation is ultra vires or not."

These observation ex facie do not support the contention that the question of ultra vires of a statutory provision could be canvassed through the machinery provided under the statute. That apart, in that case, the Tribunal acted under the provisions of the Act, and the Federal Court was also bound by the decision of the Privy Council.

The first occasion when a serious inroad was made on the correctness of the decision in Raleigh's case ((1947) L.R. 74 I.A. 50.) is in The State of Tripura v. Province of Ease East Bengal ([1951] S.C.R. 1.). The facts there were : the Income-tax Officer, Dacca, acting under the Bengal Agricultural Income-tax Act, 1944, sent by registered post a notice to the Manager of an estate belonging to the Tripura State but situated in Bengal, calling upon the latter to furnish a return of the agricultural income derived from the Estate during the previous year. The State, by its then Ruler, instituted a suit in June 1946 against the Province of Bengal and the Income-tax Officer, in the court of the Subordinate Judge of Dacca for a declaration that the said Act in so far as it purported to impose a liability to pay agricultural income-tax on the plaintiff was ultra vires and void, and for a perpetual injunction to restrain the defendants from taking and steps to assess the plaintiff. It was contended that s. 65 of the Bengal Agricultural Income-tax, 1944, was a bar to the maintainability of the suit. That section read :

> "No suit shall be brought in any Civil Court to set aside or modify any assessment made under this Act, and no prosecution, suit or other proceeding shall lie against any officer of the Crown for anything in good faith done or intended to be done under this Act."

Relying upon the decision in Raleigh Investment Company's case ((1947) L.R. 74 I.A. 50.) it was contended that the said section was a bar against the maintainability of the suit. The authority of the said decision, as Fazl Ali J. pointed out, was not questioned before this Court. But the Court by majority held that the suit was maintainable and distinguished Raleigh's case on the ground that the suit was not to set aside or modify the assessment. The proposition laid down by the Judicial Committee in Raleigh's case, namely, that the machinery provided by the Act should be followed even when the contention of the assessee was that the impound Act or any provision thereof was ultra vires, would equally apply whether the suit was instituted before the assessment was made or thereafter. To the extent this Court held that such a suit would lie before the assessment was made

for an injunction restraining the authority from proceeding with the assessment on the ground of ultra vires, it detracts from the correctness of the decision in Raleigh's case ((1947) L.R. 74 I.A. 50.).

This Court in Firm Illuri Subbayya Chetty and Sons v. The State of Andhra Pradesh ([1963] 1 S.C.R. 752, 760, 764.) had to consider the scope of the bar of a suit under section 18-A of the Madras General Sales Tax Act, 1939. There, the appellants were carrying on commission agency and other businesses at Kurnool and as such they were purchasing and selling groundnuts. The sales-tax authorities during the relevant period, on the basis of the returns made by the assessees, assessed the total turnover of the dealers and collected the tax thereon. Having paid the tax, the assessees claimed to recover part of the tax collected from them on the ground that the said tax was wrongly collected on the turnover representing the groundnut sales. This Court held that the expression "any assessment made under this Act" was wide enough to cover all assessments made by the appropriate authorities under the Act, whether the said assessments were correct or not. The following principle was accepted :

> "It is the activity of the assessing officer acting as such officer which is intended to be protected and as soon as it is shown that exercising his jurisdiction and authority under this Act, an assessing officer has made an order of assessment, that clearly falls within the scope of section 18-A. The facts that the order passed by the assessing authority may in fact be incorrect or wrong does not affect the position that, in law, the said order has been passed by an appropriate authority and the assessment made by it must be treated as made under this Act."

But this Court, after considering the decision in Raleigh's case ((1947) L.R. 74 I.A. 50.) expressly left open the question whether s. 18-A of the Act would apply to a case where a particular provision of the Sales-tax Act bearing on the assessment made was ultra vires. Adverting to that question, it observed thus :

> "It is true that the judgment shows that the Privy Council took the view that even the constitutional validity of the taxing provision can be challenged by adopting the procedure prescribed by the Income-tax Act; and this assumption presumably proceeded on the basis that if an assessee wants to challenge the vires of the taxing provision on which an assessment is purported to be made against him, it would be open to him to raise that point before the taxing authority and take it for a decision before the High Court under s. 66(1) of the Act. It is necessary for us to consider whether this assumption is well founded or not."

The correctness of the said assumption falls to be considered in the present case. In this case this Court applied the decision in Raleigh's case ((1947) L.R. 74 I.A. 50.) only to a situation where the sales-tax authority was said to have included in the turn-over certain transactions which he should not have included therein.

In Kalwa Devadattam v. Union of India ([1964] 3 S.C.R. 191.) sons of one Nagappa, whose joint family had been assessed to income-tax, filed a suit for a declaration that the assessment orders were unenforceable against the property attached and that the sale of the property by the revenue authorities was without jurisdiction for the reason that the said item did not belong to the joint family but was their separate property. This Court held that s. 67 of the Income-tax Act barred a suit in so far as it sought to set aside the assessment. This was also a case where the plaintiffs sought to

set aside the order of assessment on the ground that it was vitiated by an error.

This Court again considered the scope of the decision in Raleigh's case ((1947) L.R. 74 I.A. 50.) in Bharat Kala Bhander Ltd. v. Municipal Committee, Dhamangaon ([1965] 3 S.C.R. 499.). There the question raised was whether the suit filed by the appellant against the Municipal Committee, Dhamangaon, for refund of the excess tax paid on ginned cotton was barred under s. 48 of the Central Provinces Municipalities Act, 1922. The cause of action alleged was that the said excess tax collected from the appellant was in derogation of the constitutional prohibition under Art. 276 of the Constitution of India. Under s. 48 of the said Act, no suit shall be instituted against any committee for anything done or purporting to be done under the Act until the prescribed notice was given within the prescribed time and manner and every such suit should be dismissed if it was not instituted within six months from the date of the accrual of the alleged cause of action. For the Municipal Committee, reliance was placed, inter alia, on Raleigh's case ((1947) L.R. 74 I.A. 50.) and it was contended that, as that said Act prescribed a machinery for canvassing the correctness of the assessment and enacted a bar against the maintainability of a suit, the appellant should have raised the plea of constitutional invalidity before the tribunals constituted under the Act and that the suit was not maintainable. This Court, on a comparison of the provisions of the said Act and the Income-tax Act, distinguished Raleigh's case ((1947) L.R. 74 I.A. 50.) on the ground that the machinery provided under the said Act was neither exhaustive nor effective. That apart, the majority considered the decision in Raleigh's case ((1947) L.R. 74 I.A. 50.) and made the following observations :

> "But, with respect, we find it difficult to appreciate how taking into account an ultra vires provision which in law must be regarded as not being a part of the Act at all, will make the assessment as one "under the Act". No doubt the power to make an assessment was conferred by the Act and, therefore, making an assessment would be within the jurisdiction of the assessing authority. But the jurisdiction can be exercised only according, as well as with reference, to the valid provisions of the Act. When, however, the authority travels beyond the valid provisions it must be regarded as acting in excess of its jurisdiction. To give too wide a construction to the expression "under the Act" may lead to the serious consequence of attributing to the legislature, which owes its existence itself to the Constitution, the intention of affording protection to unconstitutional activities by limiting challenge to them only by resort to the special machinery provided by it in place of the normal remedies available under the Code of Civil Procedure, that is, to a machinery which cannot be as efficacious as the one provided by the general law. Such a construction might necessitate the consideration of the very constitutionality of the provision which contains this expression. This aspect of the matter does not appear to have been considered in Raleigh Investment Co.'s case ((1947) L.R. 74 I.A. 50.)."

These observations by this Court clearly question the correctness of the decision in Raleigh's case ((1947) L.R. 74 I.A. 50.) in so far as it held that s. 67 of the Income-tax Act was a bar to the maintainability of a suit, even if an assessment was made on the basis of a provision which was ultra vires the Constitution. Though in a sense it may be said that the said observations are in the nature of obiter, they are the considered views of this Court.

The decision in Raleigh's case ((1947) L.R. 74 I.A. 50.) was again considered by a Bench of this Court in M/s. Kamala Mills Ltd. v. The State of Bombay ([1966] 1 S.C.R. 64.). There the Sales-tax Authority held on the material placed before him that certain transactions were inside sales and on

that basis assessed the appellant to sales-tax. The appellant filed a suit on the original side of the Bombay High Court to recover the amount from the respondent on the ground that the Sales-tax Officer had no jurisdiction to assess the outside sales in view of the judgment of this Court in The Bengal Immunity Co., Ltd. v. The State of Bihar ([1955] 2 S.C.R. 603.). It was contested by the respondent, inter alia, on the ground that section 20 of the Bombay Sales Tax Act, 1946, (No. V of 1946), was a bar to the maintainability of the suit. This Court accepted the said contention and held that s. 20 of the said Act was a bar to the maintainability of the suit. Under s. 20 of the said Act no assessment made and no order passed under that Act or of the Rules made thereunder by the Commissioner or any person appointed under s. 3 to assist him shall be called in question in any Civil Court. This Court, after considering the relevant provisions of that Act and the decisions on the subject, including that in Raleigh's case ((1947) L.R. 74 I.A. 50.), held that s. 20 of that Act was a bar to the suit. This Court held that the Sales tax Officer had jurisdiction to decide whether a sale was an inside sale or an outside sale; and, as the said officer held the sale to be an inside sale, it was subject to sales tax and if that finding was wrong, the Act provided an effective machinery for correcting the said mistake. On that reasoning this Court held that the assessment was made under the Act within the meaning of s. 20 of the Act and, therefore, the suit was not maintainable. This judgment followed the decision in Firm Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh ([1963] 1 S.C.R. 752.). This decisions does not touch the question whether a suit would lie in a case where the assessment was made on the basis of a provision which was ultra vires the Constitution. Presumably for that reason, this Court observed :

> "We would also like to make it clear that we do not think it is necessary in the present case to consider whether the majority opinion in the case of Bharat Kala Bhandar Ltd. [(1965) 2 S.C.R. 499] was justified in casting a doubt on certain observations made by the Privy Council in Raleigh Investment Co.'s case [L.R. 74IA. 50], or on the validity or the propriety of the conclusion in respect of the effect of s. 67 of the Income-tax Act."

We have considered these decisions in some detail as it was contended that the present question was finally decided by some of the decisions of this Court. But a perusal of the judgments discloses that the said question, namely, whether a suit would lie when an assessment was made on the basis of a provision which was ultra vires the Constitution, was left open and indeed in one of the decisions clear observations were made questioning the correctness of the decision of the Privy Council in so far as it held that a suit would not be maintainable even in such a case. The question left open directly calls for a decision in this appeal.

Let us now scrutinize the said machinery to ascertain its scope and ambit. Section 3 of the Income-tax Act is the charging section; it imposes a tax upon a person in respect of his income. As a learned author pithily puts it, "Section 3 charges total income; s. 4 defines its range; s. 6 qualifies it; and ss. 7 to 12B quantify it." Section 23 empowers the Income-tax Officer to assess the said total income in the manner prescribed thereunder. His jurisdiction is confined to the ascertainment of the total income of a person in accordance with the provisions of the Act. His duty is to assess the income of a person under the provisions of the Act and certainly not to ignore any of them for any reason whatsoever. Against the said assessment an appeal lies to the Appellate Assistant Commissioner, who also functions under the Act. Section 30 confers a right of appeal on an assessee in respect of specified orders of the Income-tax Officers. He can, by an appeal, object, inter alia, to the amount of income assessed, to the amount of tax determined and to his liability to be assessed under the Act. Section 31 provides the procedure to be followed and the powers to be exercised by the Appellate Assistant Commissioner in disposing of the appeal. Indeed, the appeal being in substance the

continuation of the assessment proceedings in regard to the specified subject-matter, he cannot outstep the jurisdiction conferred on the Income-tax Officer. An assessee objecting to an order passed by the Appellate Assistant Commissioner may appeal to the Appellate Tribunal; under s. 33 of the Act and the Appellate Tribunal can canvass the correctness of the order of the Assistant Appellate Commissioner and pass a suitable order, as it thinks fit.

Up to this stage all the three authorities are the creatures of the Act and they function thereunder. They cannot ignore any sources of income on the ground that the relevant provisions offend the fundamental rights or are bad for want of legislative competence. The Act does not confer any such right on them. Their jurisdiction is confined to the assessment of the income and tax under the provisions of the Act. Whether the provisions are good or bad is not their concern. But, it is said that s. 66 of the Act makes all the difference. Section 66 is in two parts. Under s. 66(1), within the prescribed time, on an application made by an assessee or the Commissioner, the Appellate Tribunal shall refer to the High Court any question of law arising out of such order; if the Appellate Tribunal refuses to state a case, on an application filed by either of them, the High Court may require the Appellate Tribunal to state the case and to refer the same to it accordingly. On a reference made by the Appellate Tribunal to the High Court, the High Court shall decide the questions of law raised thereby and pass its judgment thereon and thereafter the Appellate Tribunal may pass such orders as are necessary to dispose of the case conformably to such judgment. It has been held by this Court that the jurisdiction conferred upon the High Court by s. 66 of the Income-tax Act is a special advisory jurisdiction and its scope is strictly limited by the section conferring the jurisdiction. It can only decide questions of law that arise out of the order of the Tribunal and that are referred to it. Can it be said that a question whether a provision of the Act is ultra vires of the Legislature arises out of the Tribunal's order ? As the Tribunal is a creature of the statute, it can only decide the dispute between the assessee and the Commissioner in terms of the provisions of the Act. The question of ultra vires is foreign to the scope of its jurisdiction. If an assessee raises such a question, the Tribunal can only reject it on the ground that it has no jurisdiction to entertain the said objection or decide on it. As on such question can be raised or can arise on the Tribunal's order, the High Court cannot possibly give any decision on the question of the ultra vires of a provision. At the most the only question that it may be called upon to decide is whether the Tribunal has jurisdiction to decide the said question. On the express provision of the Act it can only hold that it has no such jurisdiction. The appeal under s. 66A(2) to the Supreme Court does not enlarge the scope of the said jurisdiction. This Court can only do what the High Court can.

The said machinery provisions cannot be construed in vacuum : they must be collated with the charging sections; that is to say, the Act provided for a machinery for deciding disputes that arise under the substantive provisions of the Act. To illustrate : suppose there is provision in the Act to the effect that the said Act does not apply to indivisible building contracts. Can the officer decide that the Act applies to such building contracts ? Such a decision, if given, will not be under but outside the Act. Take another illustration : suppose this Court has held that a provision authorising the taxing of an indivisible building contract is ultra vires the power of the State Legislature and, therefore, void; in that event, how can an authority functioning under the Act tax such a contract on the basis of a provision declared to be ultra vires and, therefore, non-existent ? If it does, it will be assessing not under the Act but outside it. The same legal position will flow though there is no such previous declaration by a competent court, but a charging provision is in fact and in law ultra vires the legislature. Any assessment made on the basis of such a void provision cannot be a decision under the provisions of the Act. Briefly stated, the procedural machinery under the Act can be utilized only to decide disputes the arise under the substantive provisions of the Act which are not ultra vires.

The proposition that an authority constituted under the Act cannot, unless expressly so authorised, question the validity of the Act or any provisions thereof, is sound and is also supported by authority.

Derbyshire C.J., who was one of the Judges who took part in Raleigh Investment Co.'s case ([1944] 1 Cal. 34, 56, 83.) in the Calcutta High Court, referring to the jurisdiction of the Appellate Assistant Commissioner, observed thus :

> "He was employed to administer the Act, and he had to take the Act as he found it."

Mitter J., in the same decision, adverting to the scope of the questions that can be raised by an assessee under s. 30 of the Income-tax Act, clearly stated the legal position thus :

> "He can object to the amount of his income as determined by the Income-tax Officer or to the amount of loss computed under s. 24 or the amount of the tax, etc. He can also deny his liability to be assessed under the Act. That phrase, to my mind, means that he can only urge before that Tribunal that the provisions as they stand in the Act do not make him liable, i.e., exempt his income or a part of his income from assessment. He cannot urge there that, though a provision of the Act makes his income or part thereof liable to be assessed, that provision is illegal, being ultra vires the Indian Legislature. The Appellate Assistant Commissioner also would not be competent to entertain or decide that question. On the principle that the scope of an appeal cannot be enlarged but must be limited to points which were open for adjudication by the Court or tribunal of first instance, the Appellate Tribunal functioning under the Act, to which an appeal is taken under s. 33, would have no power to entertain the said question and deal with it in its order. This Court on a reference being made to it under s. 66 cannot also deal with such a question, as the reference must be limited to points arising out of the order passed by the Appellate Tribunal."

The Judicial Committee did not take any serious notice of the legal position so clearly explained by Mitter J. Chagla C.J., in the Bombay High Court in United Motor (India) Ltd. v. State of Bombay ((1952) 55 B.L.R. 246, 254.) distinguishing the decision in Raleigh Investment Co.'s case ((1947) L.R. 74 I.A. 50.) observed :

> "They have come before us before any assessment could be made, contending that the authorities under the Act have no right to assess them because the Act is ultra vires of the Legislature. Therefore the petitioners are challenging the very authorities who are supposed to decide the assessment made against them, and it is difficult to understand how under the machinery provided under the Act it would be open to the various authorities to decide whether the very statute of which they are the creatures is a valid statue or not."

It is true that the decision was given in a proceeding that was taken before the assessment was made, but the learned Chief Justice accepted the principle that an authority which is a creature of a statute cannot decide whether the very statute of which he is a creature is a valid statute or not. In Bengal Immunity Company Limited v. The State of Bihar ([1955] 2 S.C.R. 603.) Venkatarama Ayar J., in the context of the maintainability of a writ of prohibition, observed thus at p. 765 :

> "Indeed, the contention that the Act is ultra vires is not one which the Tribunals constituted under the Act, whether original, appellate, or revisional, could entertain, their duty being merely to administer the Act."

A division Bench of the Madras High Court has, in M.S.M.M. Meyappa Chettiar v. Income-tax Officer, Karaikudi ((1964) 54 I.T.R. 151, 156-157.), elaborately considered the correctness of the decision in Raleigh Investment Co.'s case ((1947) L.R. I.A. 50.). Adverting to the question of machinery so much emphasized upon by the Judicial Committee is Raleigh's case ((1947) L.R. I.A. 50.), the Division Bench observed :

> "It is needless to point out that the jurisdiction under that provision is limited to answering the questions referred. Only the question that arises out of the order of the Tribunal can come within the scope of section 66. The assessee cannot, of course, raise the question, before the department or the Tribunal, of the vires of any of the provisions of the Indian Income-tax Act, either on the ground that the legislature was not competent to enact the measure or on the ground that it offended the fundamental rights guaranteed under the Constitution. The reason is simple, because neither the department nor the Tribunal can give relief to the assessee holding that the impugned provision is in any way bad in law. If such a contention were to be raised, it has necessarily to be ignored by the department and the Tribunal, though sometimes the Tribunal does refer to the question, if raised, and gives the only answer which it can, namely, that is not a matter within its competence to decide..... We wish to make it very clear that it is not the province of the department or even the statuary Tribunal, which is really the creation of the statute, to entertain any objection to a piece of legislation as being ultra vires or unconstitutional, and that it would be beyond the jurisdiction of this court, functioning under section 66 of the Act, which, as stated already, is narrow in its scope and reach, to consider and determine a question not properly within its sphere."

We agree with the said observation. There is, therefore, weighty authority for the proposition that a tribunal, which is a creature of a statute, cannot question the vires of the provisions under which it functions.

The legal position that emerges from the discussion may be summarized thus : If a statute imposes a liability and creates an effective machinery for deciding questions of law or fact arising in regard to that liability, it may, be necessary implication, bar the maintainability of a civil suit in respect of the said liability. A statute may also confer exclusive jurisdiction on the authorities constituting the said machinery to decide finally a jurisdictional fact thereby excluding by necessary implication the jurisdiction of a civil court in that regard. But an authority created by a statute cannot question the vires of that statute or any of the provisions thereof where under it functions. It must act under Act and not outside it. If it acts on the basis of a provision of the statute, which is ultra vires, to that extent it would be acting outside the Act. In that event, a suit to question the validity of such an order made outside the Act would certainly lie in a civil court.

On the said legal basis it follows that in the instant case the sales-tax authorities have acted outside the Act and not under it in making an assessment on the basis of the relevant part of the charging section which was declared to be ultra vires by this Court.

The next question is whether s. 18-A of the Act would be a bar to the maintainability of the suit.

Under s. 18-A of the Act, "No suit or other proceeding shall, except as expressly provided in this Act, be instituted in any Court to set aside or modify any assessment made under this Act." We do not see any justification for the contention of the learned counsel for the respondent that the expression "under this Act" refers only to the power of the officer to make an assessment and the procedure to be adopted by him and not to the content of the assessment. Any assessment made under the Act, that is, under the provisions of the Act, cannot be questioned. If the charging section is ultra vires, the assessment made thereunder cannot be said to be made under the Act; it is really an assessment outside the Act. Indeed, as we have held, the foundation laid by the Judicial Committee for giving a limited construction to the expression "under this Act" has no legal basis. We must give plain meaning to the words used in the section. If so construed, we must hold that "under this Act" refers both to procedural and substantive provisions of the Act. As the relevant part of the charging section was held to be ultra vires, we hold that s. 18-A is not a bar to the maintainability of the present suit.

The next argument of the learned counsel is that if we give a narrow construction to s. 18-A of the Act, which found favour with the Judicial Committee, the said section would be ultra vires of the powers of the State Legislature. As the State Legislature has no legislative power to impose a tax in respect of indivisible works contracts, the argument proceeds, it cannot indirectly confer on a sales-tax authority power to impose a tax on such a transaction and impose a bar against the maintainability of a suit to question its validity. This certainly raises an important question; but, in the view we have expressed on the construction of s. 18-A of the Act, this does not fall for our decision in the present appeal.

Lastly, it is contended that the suit is not barred by limitation. The City Civil Court Judge held that the suit was governed by Art. 62 of the Limitation Act and, on that basis, declared that the suit for the recovery of the amounts that were paid prior to three years from the date of the suit was barred by limitation. But the High Court, in the view it had taken on the question of the maintainability of the suit, did not express any opinion on the said question. Learned counsel for the appellants contends that the suit was for the recovery of the amounts paid to the respondents under a mistake of law and that such a suit is governed by Art. 96 of the Limitation Act. This Court in State of Kerala v. Aluminium Industries Ltd., Kundara, Quilon (C.A. No. 720 of 1963. Decided on April 21, 1965. (unreported)) accepted that contention and held that to such a suit Art. 96 of the Limitation Act would apply. Article 96 of the Limitation Act prescribes a period of limitation of 3 years for relief on the ground of mistake when the mistake became known to the plaintiff. When did the plaintiffs come to know of the mistake in the present case ? In the plaint it is alleged that the plaintiffs came to know of the mistake when the decision in Gannon Dunkerley's case (5 S.T.C. 216.) was pronounced by the High Court of Madras on April 5, 1954. The respondent in the written statement did not deny that fact. The suit was filed on March 23, 1955, which was within 3 years from the date of the said knowledge and, therefore, it was clearly within time under Art. 96 of the Limitation Act.

In the result, the appeal is allowed. There will be a decree in favour of the plaintiffs as prayed for with costs throughout.

SHAH, J. –

M/s. K. S. Venkataraman & Company Ltd. - appellants in this appeal, who carry on the business of building contractors, were assessed to sales-tax on the turnover from their trading receipts in the financial years 1948-49 to 1952-53 by the Deputy Commercial Tax Officer. For the years 1948-49

to 1950-51 returns filed by the appellants were accepted and orders of assessment were made and tax was paid by the appellants without objection. For the year 1951-52 the Deputy Commercial Tax Officer did not accept the return and assessed tax after disallowing certain exemptions claimed by the appellants. The matter was carried in appeal to the Commercial Tax Officer, Sales Tax Appellate Tribunal, and ultimately to the High Court of Madras. For the year 1952-53 on the turnover as determined by the Deputy Commercial Tax Officer, after disallowing certain deduction claimed by the appellants, the appellants paid tax.

For the five years in question, the appellants paid between May 21, 1949, and February 2, 1954, Rs. 36,320/1/11 as tax. Thereafter the appellants came to learn that on April 4, 1954, the Madras High Court in Gannon Dunkerley & Co. v. State of Madras (I.L.R. [1955] Mad. 832.) had held that in a building contract there is no element of sale of the materials for a price stipulated, and the turnover received from building contracts was not taxable under the Madras General Sales Tax Act. They, therefore on March 23, 1956, instituted in the City Civil Court at Madras on its original side suit No. 2272 of 1955 for a decree for refund of tax levied and collected by the Sales-tax authorities for the years 1948-49 to 1952-53. The State of Madras resisted the claim contending that the suit was barred under s. 18-A of the Madras General Sales Tax Act and in any event by the law of limitation. The Trial Court dismissed the suit, and the High Court of Madras confirmed the decree. With certificate granted by the High Court of Madras, the appellants have appealed to this Court.

The orders of assessment made by the Deputy Commercial Tax Officer are not on the record, nor are the contracts which gave rise to the turnover. It was assumed in the Trial Court and the High Court that the appellants had entered into works contracts in which there was no sale of materials used in the construction of buildings independent of the contract for construction and we must proceed to deal with this appeal on the footing.

Three questions fall to be determined : (1) whether s. 2(h) and Explanation (1)(i) of s. 2(i) of the Madras General Sales Tax Act, 1939, read in the light of r. 4(3) of the Turnover and Assessment Rules, were ultra vires the Legislature of the Province of Madras; (2) whether a suit for refund of tax paid pursuant to order of assessment made by the Deputy Commercial Tax Officer was maintainable in view of the general scheme of the Act, and in particular of s. 18-A, which was added by Madras Act 6 of 1951; and (3) whether the suit was barred by the law of limitation.

Very little need be said on the third question. It is now settled by decisions of this Court that a suit for refund of tax paid under a mistaken belief that in law tax was payable, was at the material date governed by Art. 96 of the Indian Limitation Act, 1908, and the period prescribed by that article commenced to run from the date when the mistake became known : State of Madhya Pradesh v. Bhailal Bhai ((1964) 6 S.C.R. 261); State of Kerala v. Aluminium Industries Ltd. Kundara (C.A. 720 of 1963. Decided April 21, 1965 (unreported). The appellants' suit was instituted within three years from the date on which the appellants claim that they came to know about the decision of the Madras High Court in Gannon Dunkerley (I.L.R. [1955] Mad. 832.), and the claim was unquestionably within limitation.

The relevant provisions of the Madras General Sales Tax Act 1939 which have a bearing on the other two questions may be summarised. By s. 2(a-1) as introduced by Madras Act 25 of 1947 "assessing authority" was defined as meaning any person authorised by the State Government to make any assessment under the Act. The Madras Legislature by Madras Act 6 of 1951 renumbered s. 2(a-1) as s. 2(a-2) and added s. 2-B by which the State Government was authorised to appoint as many Deputy Commissioners of Commercial Taxes and Commercial Tax Officers as they thought

fit for the purpose performing the functions conferred upon them by or under the Act. "Sale", by s. 2(h), as amended by Madras Act 25 of 1947 was defined as follows :

> "'Sale' with all its grammatical variations and cognate expressions means very transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration and includes also a transfer of property in goods involved in the execution of a works contract, but does not include a mortgage, hypothecation, charge or pledge;

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Explanation

(1). - . . . . .

Explanation

(2). - . . . .

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Section 2(i) defined "turnover" as meaning the aggregate amount for which goods are either bought by or sold by a dealer, whether for cash or for deferred payment or other valuable consideration provided that the proceeds of the sale by a person of agricultural or horticultural produce grown by himself or grown on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover. Explanation (1)(i) to the definition of "turnover" provided :

> "Subject to such conditions and restrictions, if any, as may be prescribed in this behalf -
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> (i) the amount for which goods are sold shall, in relation to a works contract, be deemed to be the amount payable to the dealer for carrying out such contract, less such portion as may be prescribed of such amount, representing the usual proportion of the cost of labour to the cost of materials used in carrying out such contract;"
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> "Works contract" was defined by s. 2(i-i) as meaning any agreement for carrying out for cash or for deferred payment or other valuable consideration the construction, fitting out, improvement or repair of any building, road, bridge or other immovable property or the fitting out, improvement or repair of any movable property. Section 3 prescribed the rate of tax, and s. 9 prescribed the procedure to be followed by the assessing authority. Section 10 imposed liability upon the assessee to pay tax assessed, in such manner and in such instalments and within such time as may be specified in the notice of assessment. By s. 11 a right of appeal was given to an assessee objecting to an assessment made on him to the prescribed authority, and by s. 12 as originally enacted the Board of Revenue was authorised to exercise revisional powers in respect of any order passed or proceeding recorded by any authority under the provisions of the Act. By s. 9 of Madras Act 6 of 1951, s. 12 was modified and ss. 12-A, 12-B, 12-C and 12-D were added. By s. 12 so modified power to revise orders of subordinate authorities was conferred upon the Commercial Tax

Officer, the Deputy Commissioner and the Board of Revenue. Under s. 12-A an appeal lay to the Appellate Tribunal at the instance of the assessee objecting to an order relating to assessment passed by the Commercial Tax Officer. By s. 12-B the High Court of Madras was authorised to entertain a revision application against an order passed under s. 12-A, sub-ss. (4) or (6), against the order of the Appellate Tribunal. By s. 12-C an appeal lay to the High Court against the order of the Board of Revenue made suo motu under s. 12(3). By s. 18-A, which was added by Madras Act 6 of 1951, it was provided :

"No suit or other proceeding shall, except as expressly provided in this Act, be instituted in any court to set aside or modify any assessment made under this Act."

By s. 19 the State Government was authorised to make rules to carry out the purposes of the Act.

Section 22 was added by the President in exercise of the power under Art. 372(2) of the Constitution by an Adaptation Order, dated July 2, 1952, for bringing the provisions of the Act in conformity with Art. 286(1) and (2) of the Constitution. Sub-clause (3) of cl. 4 of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939, which dealt with computation of gross turnover, provided that the amount for which goods are sold by a dealer shall, in relation to a works contract, be deemed to be the amount payable to the dealer for carrying out such contract less a sum not exceeding such percentage of the amount payable as may be fixed by the Board of Revenue, from time to time for different areas, representing the usual proportion in such areas of the cost of labour to the cost of materials used in carrying out such contract, subject to the maximal set out therein in respect of different classes of building contracts.

Counsel for the appellants contended that this Court in The State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd. ([1959] S.C.R. 379.), while affirming the decision of the High Court of Madras in Gannon Dunkerley's case (I.L.R. [1955] Mad. 832.) has held that the provisions of the Madras General Sales Tax (Amendment) Act 25 of 1947 which incorporated in the definition in s. 2(h) the words "and includes also a transfer of property in goods involved in the execution of a works contract" and incidental changes in the definition of "turnover" were ultra vires the Legislature of the Province of Madras. But that plea does not seem, in our judgment, to be correct. The Madras High Court had in Gannon Dunkerley's case (I.L.R. [1955] Mad. 832.) held that the "works contracts" of the assessee in that case "were not contracts of sale of goods and the Provincial Legislature had no power to tax those contracts treating them as sale of goods", because the legislative power to levy tax on sales of goods was "confined to transaction of sales . . . as understood in the law relating to the sale of goods, and any attempt of the Legislature to tax under the guise of or under the pretense of such a power transactions which were wholly outside it, was ultra vires and must be declared invalid". This Court in confirming the order setting aside the orders of assessment, did not affirm the view of the Madras High Court that any part of the definition in s. 2(h) of the Madras General Sales Tax Act was ultra vires. In Gannon Dunkerley and Company's case (I.L.R. [1955] Mad. 832.) the High Court held that the expression "sale of goods" had the same meaning in Entry 48 which it had in the Indian Sale of Goods Act, 1930, and that the works contracts of the assessee were contracts to execute construction works to be paid for according to measurements at the rates specified in the schedule thereto, and were not contracts for sale of materials used therein, and being contracts entire and indivisible could not be broken up into contracts for sale of materials and contracts for payment for work done. This Court held, agreeing with the High Court, that ordinarily in a building contract, the agreement between the parties is that the contractor should execute a building contract according to the specifications in that behalf in the

written agreement, and in consideration thereof receive payment stipulated : in such an agreement there is neither a contract to seed the material used in the construction, nor does property pass therein as movable. The Court also observed that the expression "sale of goods" was, at the time when the Government of India Act, 1935, was enacted, a term of well-recognised legal import in the general law relating to sale of goods and in the legislative practice relating to that topic and must be interpreted in Entry 48 in List II in Sch. VII of the Government of India Act, 1935, as having the same meaning as in the Sale of Goods Act, 1930. Therefore, in a building contract which is one, entire and indivisible, there is no sale of goods and the Provincial Legislature was incompetent under Entry 48 to impose a tax on the supply of materials used in such a contract treating the supply as a sale. In the very elaborate discussion, which Venkatarama Ayyar J., speaking for the Court, entered upon, at no stage did he express the opinion that any part of the definition of "sale" in s. 2(h) after it was amended by the Madras General Sales Tax (Amendment) Act 25 of 1947 was ultra vires the Legislature, and the observations made clearly indicate a contrary conclusion. The learned Judge, in summing up his conclusion observed at p. 425 :

> ". . . the expression "sale of goods" in Entry 48 is a nomen juris, its essential ingredients being an agreement to sell moveables for a price and property passing therein pursuant to that agreement. In a building contract, which is, as in the present case, one entire and indivisible - and that is its norm, there is no sale of goods, and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract treating it as a sale.", and at page 427 :
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> "To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building Contracts, at page 165.
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> "It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment."

In substance this Court held that the definition in s. 2(h) must be read in the light of and restricted by the legislative power of the province as contained in Entry 48 in List II in Sch. VII and on that view if a works contract is one, entire and indivisible, there will be no sale of goods and no part of the consideration received for executing such a contract would be included in the turnover.

It is true that in Pandit Banarsi Das Bhanot v. The State of Madhya Pradesh ((1959) S.C.R. 427.), which case was heard along with The State of Madras v. Gannon Dunkerley and Company (Madras) Ltd. ([1959] S.C.R. 379.) and decided on the same day, it was observed at page 437 :

> "But on our finding on the first question that the impugned provisions of the Act are ultra vires the powers of the Provincial Legislature under Entry 48 in List II in the Seventh Schedule, we should set aside the orders of the Court below."

It is clear from the observations made at p. 433 that the Court intended and did lay down that the Provincial Legislature had no power to impose a tax in respect of a building contract which is one, entire and indivisible, but there might be contracts consisting of two distinct agreements, one for the sale of materials, and another for work and labour, and that in such a case, it would be competent to the State to impose tax on the sale of materials even construing that word in its narrow sense. At p. 437 also the Court observed that "the prohibition against imposition of tax is only in respect of contracts which are single and indivisible and not of contracts which are a combination of distinct contracts for sale of materials and for work, and that noting . . . in this judgment shall bar the sales tax authorities from deciding whether a particular contract falls within one category or the other and imposing a tax on the agreement of sale of materials, where the contract belongs to the latter category."

In The State of Madras v. Gannon Dunkerley & Company (Madras) Ltd. ([1959] S.C.R. 379.) the Court declared that the taxing authority may not, in computing the turnover of a dealer, include any part of the receipts under a works contract which is one, entire and indivisible, because the State Legislature had no power to levy tax on transactions which are not transactions of sale of goods. But the Court did not declare the clause added by Act 25 of 1947 as ultra vires : it merely directed that in the assessment of turnover from building contracts, restriction on the legislative power inherent in Entry 48 of List II, Sch. VII, ought to be imported, and that the taxing authority must on that account determine whether the transaction of sale, turnover whereof is sought to be taxed, is of the nature of sale of goods within the meaning of the Sale of Goods Act. A transaction which does not involve sale of goods is not taxable, for the definition of the worked 'sale' in every case must be read subject to the constitutional restriction on the legislative power imposed upon the Provinces. Stated differently, power to levy tax in respect of a works contract is not wholly denied to Provinces or the States : in each case it has to be considered whether the transaction involves sale of goods strictly so-called, or it is a transaction which is a works contract "one, entire and indivisible". If it is the latter, it would not be taxable, because there is no element of sale of goods within that transaction : if it is the former, there element of sale of goods would be taxable. This approach conforms to a recognised rule of interpretation that it is always presumed that the Legislature did not intend to transgress restrictions upon its legislative powers, and it would be legitimate to read words used in a statute as subject to restrictions imposed by the Constitution upon legislative power so that the statute may harmonies with the constitutional restrictions. The rule applies unless the restricted meaning of the words makes the legislation incomplete, unintelligible or unmanning. In in re the Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938 ([1941] F.C.R. 12.) the Federal Court had to deal with the meaning of the word "property" - a word apparently of wide connotation and including agricultural land in the Governors' Provinces - in the Hindu Women's Rights to Property Act, 1937, Sir Maurice Gwyer C.J., speaking for the Court, observed :

> "No doubt if the Act does affect agricultural land in the Governor's Provinces, it was beyond the competence of the Legislature to enact it : and whether or not it does so must depend upon the meaning which is to be given to the word "property" in the Act. If that word necessarily and inevitably comprises all forms of property, including agricultural land, then clearly the Act went beyond the powers of the Legislature : but when a legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other. The question is thus one of construction and unless the Act is to be regarded as wholly meaningless and ineffective, the Court is bound to

> construe the word "property" as referring only to those forms of property with respect to which the Legislature which enacted the Act was competent to legislate : that is to say, property other than agricultural land. . . . The Court does not seek to divide the Act into two parts, viz., the part which the Legislature was competent, and the part which it was incompetent, to enact. It holds that, on the true construction of the Act and especially of the word "property" as used in it, no part of the Act was beyond the Legislature's powers.
>
> There is a general presumption that a Legislature does not intend to exceed its jurisdiction : ... and there is ample authority for the proposition that general words in a statute are to be construed with reference to the powers of the Legislature which enacts it."

After referring to a number of cases cited at the Bar, the learned Chief Justice observed :

> "If the restriction of the general words to purposes within the power of the Legislature would be to leave an Act with nothing or next to nothing in it, or an Act different in kind, and not merely in degree, from an Act in which the general words were given the wider meaning, then it is plain that the Act as a whole must be held invalid, because in such circumstances it is impossible to assert with any confidence that the Legislature intended the general words which it has used to be construed only in the narrower sense : . . . If the Act is to be upheld, it must remain, even when a narrower meaning is given to the general words, "an Act which is complete, intelligible, and valid and which can be executed by itself :"

This is precisely the approach this Court made in State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd. ([1959] S.C.R. 379.). They interpreted the expression "works contract" used in the Madras General Sales Tax Act, 1939, subject to the restrictions which inhered in the exercise of its power by the Madras Legislature and held that the right to assess tax on a worked contract which is "one, entire and indivisible" was not conferred by the Act. The Court thereby implied a restriction in the meaning of the expression "works contract" in s. 2(h) and s. 2(1)(i) so as to make it consistent with the legislative power of the Madras Legislature.

Application of this rule is often invoked in the interpretation of Indian statutes, because of the restrictions placed upon the power of the legislative bodies by the Constitution. In view of the federal structure of our Constitution, wide words used by the Legislature have, wherever necessary, to be read subject to the presumption that they were intended to be used by the Legislature so as to make the exercise of power consistent with the Constitutional scheme. For instance, Art. 286(1) of the Constitution, before it was amended by the Constitution, (Sixth Amendment) Act, imposed restrictions upon the power of the State Legislature to tax outside sales, sales in the course of import and export, inter-State sales and sales of commodities which are declared by Parliament to be essential to the life of the community. Even without the incorporation of s. 22 by the Adaptation Order, 1952, made by the President under Art. 372(2) as a matter of abundant caution, the word "sale" as defined in the Act had to be read subject to the constitutional limitations.

The definition of "sale" in the Act cannot be read divorced from the scheme of the Act, and the restrictions upon the power of the Legislature which enacted it. There are diverse provisions in the Act which restrict the power of the taxing authorities to levy tax on sale or purchase of goods. For instance, s. 4 expressly enacts that the provisions of the Act shall not apply to the sale of electrical

energy, motor spirit and manufactured tobacco and of any other goods on which duty is or may be levied under the Madras Abkari Act, 1886, the Madras Prohibition, Act, 1937, or the Opium Act, 1878. Exemption is also granted in certain cases by s. 5 of the Act and authority is conferred by the Act upon the executive Government to make exemptions from or reductions in rates in respect of tax payable on the sale of any specified classes of goods or by any specified classes of persons in regard to the whole or any part of their turnover. These restrictions upon the power of the taxing authorities are imposed expressly by the statute itself : the other restrictions, to which we have already referred, are restrictions which are implied by the constitutional limitations. But on that account there is no real difference between the quality of the restrictions. The definition clause and the charging section operate only on sales which may appropriately be called sales of goods, under the general law, of goods which are not exempted by the Act, and are not taken out of the taxing power of the State by the constitutional or other provisions. Apparently wide words of the definition clause and the charging section will not on account of these restrictions be rendered ultra vires or invalid : the words will be constructed so as to confer power upon the taxing authorities in assessing tax only within the limited field.

Ordinarily a taxing authority has power to ascertain whether the transaction before him is taxable, and for that purpose he may determine facts which have a bearing on the taxability of the transaction : He has also the power to interpret the provisions of the taxing statute as well as of other statute which has a bearing on that question. Within the limits assigned to him, the authority of the taxing officer is complete. He is not a court of summary jurisdiction whose jurisdiction depends upon existence of some fat collateral to the actual matter which is liable to be challenged in independent proceedings, nor does his jurisdiction depend upon the fulfillment of some condition precedent. Within his jurisdiction is included the power to decide finally whether the transaction submitted to his scrutiny is taxable. His decision is open to challenge by appropriate proceedings in the hierarchy of tribunals set up for that purpose, but not outside the Act. In dealing with the authority of the Sales Tax Officer appointed under the Bombay Sales Tax Act 5 of 1946 in M/s. Kamala Mills Ltd. v. The State of Bombay ([1966] 1 S.C.R. 64.) this Court observed :

> "It would . . . be seen that the appropriate authorities have been given power in express terms to examine the returns submitted by the dealers and to deal with the questions as to whether the transactions entered into by the dealers are liable to be assessed under the relevant provisions of the Act or not. . . . it is plain that the very object of constituting "appropriate authorities under the Act is to create a hierarchy of special tribunals to deal with the problem of levying assessment of sales tax as contemplated by the Act. If we examine the relevant provisions which confer jurisdiction on the appropriate authorities to levy assessment on the dealers in respect of transactions to which the charging section applies, it is impossible to escape the conclusion that all questions pertaining to the liability of the dealers to pay assessment (tax) in respect of their transactions are expressly left to be decided by the appropriate authorities under the Act as matters falling within their jurisdiction. Whether or not a return is correct; whether or not transactions which are not mentioned in the return, but about which the appropriate authority has knowledge, fall within the mischief of the charging section; what is the true and real extent of the transactions which are assessable; all these and other allied questions have to be determined by the appropriate authorities themselves; . . . . The whole activity of assessment beginning with the filing of the return and ending with an order of assessment, fall within the jurisdiction of the appropriate authority and no part of it can be said to constitute a collateral activity not specifically and expressly included

in the jurisdiction of the appropriate authority as such."

The Deputy Commercial Tax Officer had therefore jurisdiction to determine whether the particular transactions in respect of which tax was sought to be levied were assessable under the Act. He may have committed a mistake, even a grievous mistake, but he had jurisdiction to decide the question arising before him in the manner he did. Exercise of his jurisdiction is not conditioned by the correctness of his conclusion.

The Act contains a complete machinery for levying, assessing and collecting tax : it also contains machinery for rectification of mistakes. The rules framed under the Act contain machinery for making refund of tax collected in excess of the amount legitimately due. The entire machinery for levy, assessment, collection and refund is within the Act and has to be administered by the authorities entrusted with power in that behalf. To expose this machinery and the adjudications laboriously made under the Act by authorities competent in that behalf to collateral attacks in civil suits would make the statute in practice unworkable. It is true that exclusion of the jurisdiction of the civil courts is not to be lightly inferred : such exclusion must either be explicitly expressed or clearly implied. But where the scheme of the Act implies such exclusion, the Courts will give effect to it. In Secretary of State v. Mask and Company (L.R. 67 I.A. 222.) on the import of betelnuts, the Assistant Collector of Customs assessed duty at rates applicable to boiled betelnuts. After the appeals filed by the importer to the Collector of Customs and the Government of India failed, the importer filed a suit for refund of the amount collected from him in excess of the invoice value. In appeal by the Secretary of State before the Judicial Committee it was contended that the decision of the Assistant Collector of Customs confirmed in appeal to the Collector of Customs and in revision to the Government of India was final and the civil court had no jurisdiction to entertain the suit. The Judicial Committee examined the scheme of the Sea Customs Act, 1878, and observed :

> " . . in this case the jurisdiction of the civil courts is excluded by the order of the Collector of Customs on the appeal under s. 188. . . . . The main principles to be observed in the present case are to be found in the well known judgment of Wiles J., in Wolverhampton New Waterworks Co. v. Hawkesford - (1859) 6 C.B. (N.S.) 336 - which was approved of in the House of Lords in Neville v. London "Express" Newspaper Ltd. - (1919) A.C. 368. The question is whether the present case falls under the third class stated by Wiles J. : "Where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it."

In Firm of Illuri Subbayya Chetty & Sons v. The State of Andhra Pradesh ([1964] 1 S.C.R. 752.) a person who had paid tax under the Madras General Sales Tax Act, 1939, for the years 1952-54, under voluntary returns on the assumption that certain transactions of purchase of groundnuts were taxable, filed a suit in the civil court for recovery of the tax paid. The Trial Court decreed the suit, but the High Court reversed the decree and dismissed the suit, holding that it was not maintainable. It was observed by this Court in appeal by the taxpayer at p. 760 :

> "The fact that the order passed by the assessing authority may in fact be incorrect or wrong does not affect the position that, in law, the said order has been passed by an appropriate authority and the assessment made by it must be treated as made under this Act. Whether or not an assessment has been made under this Act will not depend on the correctness or the accuracy of the order passed by the assessing authority.", and

at p. 761 :

> ". . . there can be no doubt that where an order of assessment has been made by the appropriate authority (under) the provisions of this Act, any challenge to its correctness and any attempt either to have it set aside or modified must be made before the appellate or the revisional forum prescribed by the relevant provisions of the Act."

A question which is closely analogous to the question raised in this appeal fell to be determined in M/s. Kamala Mills' case ([1966] 1 S.C.R. 64.). The assessee sold goods inside and outside the then State of Bombay. On the turnover of the assessee, general sales tax and special sales tax were levied by the Sales-tax authorities exercising power under the Bombay Sales Tax Act, 1946. After learning about the decision of this Court in Bengal Immunity Company. Ltd. v. The State of Bihar and Ors. ([1955] 2 S.C.R. 603.) the assessee commenced an action in the High Court of Bombay for a decree for refund of the tax paid on outside sales. The High Court held on a preliminary issue that the suit was not maintainable and in appeal the decision was confirmed. Before this Court it was contended that the action of the sales-tax authorities was without jurisdiction and on that account the suit was maintainable notwithstanding s. 20 of the Bombay Sales Tax Act by which the jurisdiction of the civil courts is barred. This Court held that the appropriate authority was invested with jurisdiction to determine the nature of the transaction and to levy tax in accordance with its decision. The Court also held that the finding of the authority that a particular transaction is taxable under the charging section is a finding not on a collateral fact upon the correct determination of which the jurisdiction of the taxing authority depends, and observed :

> " . . . if the appropriate authority, while exercising its jurisdiction and powers under the relevant provisions of the Act, holds erroneously that a transaction, which is an outside sale, is not an outside sale and proceeds to levy sales-tax on it, can it be said that the decision of the appropriate authority is without jurisdiction ? In our opinion, this question cannot be answered in favour of Mr. Sastri's contention."

In M/s. Kamala Mills' case ([1966] 1 S.C.R. 64.) it was the case of the taxpayer that tax was levied in violation of the prohibitions contained in Art. 286 of the Constitution as it then stood. The sales-tax authorities were of the view that the sales were taxable - a view which was later found, according to the opinion of this Court in the Bengal Immunity Company's case ([1955] 2 S.C.R. 603.), to be erroneous. But on that account it could not be said that the order passed by the Sales-tax Officer was without jurisdiction. The suit for recovery of the tax already paid, pursuant to an order of assessment which had become final, was therefore held not maintainable.

The principle of M/s. Kamala Mills' case ([1966] 1 S.C.R. 64.) in our judgment governs this case. In the present case the validity of the orders of assessment is challenged on the ground that the transactions which were held taxable were not such works contracts as would be within the taxing power of the Province under Entry 48 in list II of Schedule VII to the Government of India Act, 1935. The taxing authority being of the view that they were taxable charged the turnover to tax. Appeals lay against the decisions of the taxing authority, but they were not filed in respect of four out of the five years and in the remaining only the question as to the quanum of turnover was raised was pending before the High Court. In the case of M/s. Kamala Mills ([1966] 1 S.C.R. 64.) the transactions were, it was apparently claimed, sales falling within the meaning of Art. 286(1)(a), Explanation, and not taxable by the State in view of a constitutional prohibition. This Court held that a plea that tax levied pursuant to an erroneous decision as to the applicability of the Sales Tax

Act to transactions which, if the true position were appreciated, were not liable to be taxed could not be raised in a suit for refund of tax paid. Ratio of that decision applies to the present case in which tax was levied in respect of transactions which the taxing authority erroneously regarded as works contracts and taxable on the footing that they involved sale of goods strictly so-called. An erroneous decision of the taxing authority that they are taxable transactions, when on a correct view of the law they would not have been, did not affect the power entrusted to him by the Act nor render his decision without jurisdiction.

It is true that s. 18-A was incorporated in the Madras General Sales Tax Act, 1939 by Madras Act 6 of 1951. There was before Act 6 of 1951 was enacted no express provision in the Act barring the jurisdiction of civil court to set aside or modify any assessment made under the Act. But s. 18-A did not incorporate a new concept : it merely enunciated what patently underlines the scheme of the Act. Special authorities have been constituted under the Act for the purpose of assessing and collecting tax : these authorities have the power to entertain or ask for returns and to assess and collect tax. Against the orders of assessment, appeals are provided for and the proceedings of the taxing authorities are liable to be corrected by the High Court or the Board of Revenue in exercise of jurisdiction conferred by the Act. The Act is a complete code, setting up machinery for the levy, assessment, collection and refund of tax : by the clearest implication it excludes the jurisdiction of the civil courts to modify or set aside assessments made under the Act by authorities invested with power in that behalf. By enacting s. 18-A the Legislature did no more than enact what was clearly implicit in the scheme of the Act. Absence of s. 18-A on the statute book for the first two years out of the five years of assessment is therefore of no materiality.

Even on the assumption that the clause "and includes also a transfer of property in goods involved in the execution of a works contract" added by Act 25 of 1947, in the definition of 'sale', was subsequently declared ultra vires by this Court in The State of Madras v. Gannon Dunkerley Company (Madras) Ltd. ([1959] S.C.R. 379.) in our view the suit to set aside or modify an assessment made on the assumption that the definition was wholly valid was not maintainable.

Two grounds are urged in support of the plea that the suit was maintainable : (a) the taxing authority acting in exercise of powers conferred by a statute cannot entertain a plea that a part of the statute is invalid : he must take the statute as he finds it; and (b) that the authority conferred by the Act is to levy tax on transactions which are made taxable by the Act, and if the charging provision or a part thereof is ultra vires the Legislature which enacted it, the decision of the taxing authority to tax transactions under that ultra vires provision is outside the Act.

A taxing authority is undoubtedly a creature of the statute under which he is appointed but ordinarily by the statute he is invested with authority to decide all questions which have a bearing on the taxability of a transaction. He is entitled to decide that the transactions submitted to his scrutiny are taxable. When the taxing authority levies tax on a transaction, he holds either expressly or by the clearest implication that the transaction is in his opinion taxable. Investment of authority to tax involves authority to tax transactions which in exercise of his authority, the taxing officer regards as taxable, and not merely authority to tax only those transactions which are on a true view of the facts and the law, taxable. The taxing officer in exercising his power may err : but he has authority to err in exercise of his jurisdiction. It matters little that the error he commits is in the interpretation of a constitutional prohibition and not a statutory prohibition applying to the transaction submitted to his scrutiny. It would be confusing the issue to press into aid illustration of cases in which the taxing authority seeks to tax a transaction which he holds is not taxable. In such a case he is not exercising the power entrusted by the statute : he acts outside the law. But that cannot

be said of a decision in which by an erroneous interpretation of the law he holds a transaction taxable. There is nothing in the Act which prohibits the taxing authority from entertaining the plea that a transaction is not taxable because it is in respect of an exempted commodity or is an exempted sale, or because it is not a transaction of sale, and there are ample indications of an implication to the contrary.

We are not considering a case in which the statute in its entirely or insofar as it relates to the appointment of the authority invested with power by the statute to assess tax is challenged as ultra vires. That may raise problems which do not arise here. We are dealing with a case in which the entrustment of power to assess is not in dispute, and the authority within the limits of his power is a tribunal of exclusive jurisdiction. Such an authority is invested for the purpose of determining questions entrusted to him, with power to determine all questions of fact and law, and of his own jurisdiction as well. Being a tribunal of exclusive jurisdiction, there is no other authority which can decide the questions raised before him. If by an erroneous decision, he can clothe himself with jurisdiction, which on a true view of the facts or law he does not possess, it is difficult to appreciate the ground on which it can be asserted that he must decline to adjudicate when the vires of a part of the statute which he has to administer fall to be determined. There is no special sanctity in that question, that the taxing authority cannot determine it. It could not be intended that when a question about the vires of a statute, which the taxing authority has to administer arises, he must deliberately adjudicate upon the taxability of a transaction contrary to his own conviction. There is nothing in our view, certain contrary casual observations in cases referred to at the Bar notwithstanding, which compels him to adopt an unjudicial attitude.

A quasi-judicial authority is within the definition of "State" in Art. 12 of the Constitution. That is so held in Parbhani Transport Co-operative Society Ltd. v. Regional Transport Authority, Aurangabad and Others (A.I.R. 1960 S.C. 801.) : and assumed in Basheshar Nath v. Commissioner of Income-tax, Delhi & Rajasthan and Another (A.I.R. 1959 S.C. 149.) and K. S. Ramamurthy Reddiar v. Chief Commissioner, Pondicherry and Another (A.I.R. 1963 S.C. 1464.) and in other cases. Is a quasi-judicial authority deliberately to violate fundamental rights of a citizen who is subjected to his jurisdiction and to act in a manner transparently unjust because for some vague reason it is said that within the amplitude of his jurisdiction is not included the right to determine whether a part of the statute he is called upon to administer is ultra vires ? What one may ask is the principle underlying such a rule ?

It is common ground that a High Court entertaining an appeal or revision against the decision of a tribunal exercising quasi-judicial authority with exclusive jurisdiction, or entertaining a reference made by that tribunal, is subject to the same restrictions to which the original tribunal was subject. In a large number of cases in which proceedings relating to taxation have reached the High Courts by way of a reference, appeal or revision, the question of vires of the statute under which the authority functioned was raised, entertained and decided, and in some cases statutory provisions were declared ultra vires. The first case to which attention may be invited is Gannon Dunkerley and Company v. State of Madras (I.L.R. [1955] Mad. 832.). In that case the proceeding reached the High Court of Madras in a revision petition under s. 12-B of the Madras General Sales Tax Act, 1939. The High Court entertained the plea of ultra vires, and decided it in favour of the taxpayer, and if the assumption we have made in dealing with this part of the case as to the true effect of the judgment reported in (1959) S.C.R. 379 be correct, this Court also considered that argument. In Navinchandra Mafatlal v. The Commissioner of Income-tax, Bombay City ([1955] 1 S.C.R. 829.) in a reference under s. 66(1) of the Indian Income-tax Act, 1922, a question as to the vires of s. 12-B of the Indian Income-tax Act was raised before the Income-tax Appellate Tribunal and was referred

to the Bombay High Court. This Court in appeal from the opinion expressed by the High Court on the reference also considered that question. In Sardar Baldev Singh v. Commissioner of Income-tax, Delhi & Ajmer ([1961] 1 S.C.R. 482.) in an appeal from the order of the Income-tax Appellate Tribunal with special leave, the constitutional validity of s. 23-A of the Indian Income-tax, 1922 was permitted to be challenged. In Tata Iron & Steel Company Ltd. v. State of Bihar ([1958] S.C.R. 135.) a reference was made by the Board of Revenue raising questions as to the vires of certain provisions of the Bihar Sales Tax Act and decided by the High Court, and ultimately by this Court. In Ram Krishna Ramnath Agarwal of Kamptee v. Secretary, Municipal Committee, Kamptee, ([1950] S.C.R. 15.) the High Court of Nagpur dealt with a case on a reference made by the Extra Assistant Commissioner, Nagpur before whom the vires of provisions relating to levy of octroi duty under the Central Provinces Municipalities Act was raised. Other cases which support the jurisdiction of the High Court and therefore of the taxing authorities to entertain and consider the plea that a part of the statute is ultra vires are Administrator-General Lahore Municipality v. Daulat Ram Kapur ([1942] F.C.R. 31.), Chatturam & Others v. Commissioner of Income-tax ([1947] F.C.R. 116.), Kamakhya Narain Singh v. Commissioner of Income-tax ([1947] F.C.R. 130.).

We do not propose to refer to other cases (and they are many) except one in which the Judicial Committee considered the argument whether in a reference under the Income-tax Act, a plea of the vires of a statute which the taxing authority has to administer may be considered. In Raleigh Investment Company Ltd. v. Governor-General in Council (L.R. 74 I.A. 50.) the basic facts were closely parallel to the facts of this case. A joint stock company having its main office in England was assessed to income-tax and super-tax as a non-resident on income which included dividend income received from companies some of which were incorporated in England and others in the Isle of Man, and carrying on business in British India. The Company paid the tax assessed, and instituted a suit in the High Court of Calcutta claiming a declaration that Explanation 3 and other provisions of s. 4 of the Indian Income-tax Act, 1922 which purported to authorise assessment of and charging to tax, a non-resident on dividends declared or paid outside British India but not brought into British India, were ultra vires the legislative power of the federal legislature, and that the assessment was "illegal and wrongful", and for an injunction restraining the income-tax authorities from making future assessments in respect of such dividends. The High Court of Calcutta held that the impugned provisions were ultra vires and the jurisdiction of the civil courts to entertain a suit was not excluded, either by s. 67 of the Income-tax Act or by s. 226 of the Government of India Act, 1935. Derbyshire C.J., in the High Court in Raleigh Investment Co. Ltd. v. Governor-General of India [I.L.R. (1944) 1 Cal 34] observed "the Appellate Tribunal . . must take the Act as they find it, and not call it in question", and Mitter J. observed "He (the assessee) cannot urge there (in appeal under s. 30 of the Income-tax Act) that, though a provision of the Act makes his income or part thereof liable to be assessed, that provision is illegal, being ultra vires the Indian Legislature." In appeal the Federal Court held in Governor-General-in-Council v. The Raleigh Investment Company Ltd. ([1944] F.C.R. 229.) that the impugned provisions were not ultra vires the Indian Legislature, but the suit was not maintainable because of the bar contained in s. 226 of the Government of India Act, 1935. The Judicial Committee, without deciding whether the provisions of the Income-tax Act pursuant to which the dividends received from the foreign companies were brought into computation were ultra vires held that under the general scheme of the Act and s. 67 of the Income-tax Act, 1922, the suit was not maintainable. The Judicial Committee held that the Indian Income-tax Act, 1922, contained effective machinery for the review of the assessment on grounds of law including the question whether a provision of the Act was ultra vires. They observed :

> "Under the Act the income tax officer is charged with the duty of assessing the total income of the assessee. The obvious meaning, and in their Lordship's opinion, the

> correct meaning, of the phrase "assessment made under this Act" is an assessment finding its origin in an activity of the assessing officer acting as such. The circumstance that the assessing officer has taken into account an ultra vires provision of the Act is in this view immaterial in determining whether the assessment is "made under this Act". The phrase describes the provenance of the assessment : it does not relate to its accuracy in point of law. The use of the machinery provided by the Act, not result of that use, is the test."

Their Lordships then examined the consequences which would ensue if the contentions raised by the appellants were accepted, and proceeded to state :

> "All questions of law affecting the accuracy of an assessment might thereof be raised in proceedings in any civil court where reliance was sought to be placed on the assessment. The section on the appellant's construction is robbed of all practical content. Second, on the appellant's construction, in order to ascertain whether a civil court is barred by the section from reviewing an assessment brought before it, the legal merits of the assessment have first to be considered and decided. For if the assessment is determined to be right in law the jurisdiction of the civil court to entertain the suit is excluded. The assessment is, on the appellant's construction, made under the Act. If, on the other hand, the assessment is determined to be wrong the jurisdiction of the civil court to entertain the suit arises. The result of an inquiry into the merits of the assessment is on the appellant's construction, to determine whether jurisdiction existed to embark on the inquiry at all. Jurisdiction is made to depend not on subject-matter, but on the correctness of the suitor's contention as respects subject-matter. The language of the section is inapt to justify any such capricious method of determining jurisdiction."

This is weighty authority in support of the view that the taxing officer is competent to entertain a plea about the vires of a provision under which he may assess tax, and that if the Act provides a complete machinery for adjudicating upon the disputes relating to liability of tax, the jurisdiction of the civil court to entertain a suit to set aside an assessment even based upon a provision ultra vires the legislature is barred. But it was said that the Judicial Committee erred in so holding. It was urged that a provision ultra vires the Legislature has no existence in point of law in the statute book and if the taxing authority relies upon that provision for levying tax, the order has no support from the Act, and may be set aside in a collateral proceeding.

On this line of reasoning attempts have been made in this Court to challenge the correctness of the decision of the Judicial Committee in two decisions of this Court : Firm of Illuri Subbayya Chetty & Sons' case ([1964] 1 S.C.R. 752.) and M/s. Kamala Mills' case ([1966] 1 S.C.R. 64.), but the question was left open. The majority judgment of this Court in Bharat Kala Bhandar Ltd. v. Municipal Committee, Dhamangaon ([1965] 3 S.C.R. 499.) contains observations which appear to throw doubt on the correctness of the decision in the Raleigh Investment Company's case (L.R. 74 I.A. 50.). If it were a decision on a question arising in that appeal, the decision would undoubtedly be blinding upon us, but, as we will presently point out, the question did not arise for decision in that case and the observations are dicta, the correctness of which is open to challenge, and has been challenged by counsel for the State of Madras in this case. In Bharat Kala Bhandar's case ([1965] 3 S.C.R. 499.) a ginning factory sued to recover cotton cess paid to the local Municipal Committee contending that the amount in excess of the maximum amount prescribed by s. 142-A of the Government of India Act, 1935, was illegally levied. The Municipal Committee pleaded that the suit

was barred by s. 48 of the Central Provinces Municipalities Act, 1922. It was held by this Court that the tax recovered could be ordered to be refunded because it was in excess of the limit prescribed by the Constitution. Counsel for the Municipal Committee urged for the first time in this Court, relying upon Raleigh Investment Company's case (L.R. 74 I.A. 50.) that the Central Provinces Municipalities Act contains adequate machinery dealing with refund of taxes and that the provisions of s. 85(2) barred an action for recovery of tax wrongfully recovered by the Municipal Committee. It was held by this Court that the Act does not set up machinery for entertaining a claim for refund or repayment in cases of the nature before the Court, and that no finally was apparently given to the decision rendered by an authority under s. 83 refusing to refund a tax improperly or illegally assessed or recovered. Dealing with Raleigh Investment Company's case (L.R. 74 I.A. 50.) it was observed :

> "But, with respect, we find it difficult to appreciate how taking into account an ultra vires provision which in law must be regarded as not being a part of the Act at all, will make the assessment as one 'under the Act'. No doubt the power to make an assessment is conferred by the Act and, therefore, making an assessment would be within the jurisdiction of the assessing authority. But the jurisdiction can be exercised only according, as well as with reference, to the valid provisions of the Act. When, however, the authority travels beyond the valid provisions it must be regarded as acting in excess of its jurisdiction."

On the view taken by the Court that there was no machinery for granting refund of tax unlawfully levied, and on that account the suit was not barred under s. 85 of the Central Provinces Municipalities Act, the observations were unnecessary.

Jurisdiction of the civil court to grant relief is undoubtedly excluded if the statute contains adequate and effective machinery for granting relief against the alleged wrong and not otherwise. However application of a statute which has not been declared ultra vires by a court competent in that behalf, at best amounts to misinterpretation of law which is in the statute book. If an erroneous interpretation of law to make a transaction taxable is not open to collateral attack, failure to apply a constitutional restriction on legislative power cannot be raised to a higher pedestal so as to make the decision open to such attack. In both cases the error arises in misinterpretation of the law.

We do not desire to deal in detail with the observations of Derbyshire C.J. and Mitter J., in Raleigh Investment Company v. Governor-General in Council (I.L.R. [1944] 1 Cal 34.) of Venkatarama Ayyar J., in The Bengal Immunity Company's case ([1955] 2 S.C.R. 603.) and of Jagadisan J., in M.S.M.M. Meyappa Chettiar v. Income-tax Officer, Karaikudi ([1964] 54 I.T.R. 151.) on which reliance was placed by counsel for the appellants. In the first case the observations were not supported by any reasons, and were dissented from by the Judicial Committee. The observations of Venkatarama Ayyar, J., in the second case are in the nature of dicta; and in the third case the Madras High Court expressed the view that the bar created by s. 67 of the Income-tax Act did not prevent a High Court in a petition under Art. 226 of the Constitution from investigating the validity of a complaint that the fundamental rights of the applicant were infringed by the action of a taxing authority. In proceedings for assessment of tax, the applicant raised no question of vires of s. 3 of the Income-tax Act, and a reference under s. 66 of the Act was answered by the High Court. Thereafter in a petition under Art. 226 of the Constitution he challenged the validity of the assessment on the ground that the discretion given to Income-tax Department to assess members of an association separately or collectively as an association infringed the guarantee of equal protection of laws. The High Court of Madras in considering the plea that there was a bar of res judicata

observed that the Income-tax Tribunal was incompetent to entertain a plea about the vires of the statute under which it functioned. But beyond observing at page 157 "We wish to make it very clear that it is not the provision (within the province ?) of the department or even the statutory Tribunal, which is really the creation of the statute (statue ?) to entertain any objection to a piece of legislation, as being ultra vires or unconstitutional . . . . ", nothing else was stated.

It was submitted that this Court in State of Tripura v. The Province of East Bengal Union of India ([1951] S.C.R. 1.) has refused to accept Raleigh Investment Company's case (L.R. 74 I.A. 50.) as correctly decided. In The State of Tripura's case ([1951] S.C.R. 1.), the Income-tax Officer, Dacca, served a notice upon the Manager of an Estate belonging to the Tripura State but situate in Bengal, calling upon the latter to furnish a return of the agricultural income under the Bengal Agricultural Income-tax Act, 1944. The State by its Ruler sued the Province of Bengal and the Income-tax Officer in the court of the Subordinate Judge of Dacca for a declaration that the Act, insofar as it purported to impose liability to pay agricultural income-tax on the plaintiff was ultra vires and void, and for a perpetual injunction restraining the defendants from taking any steps to assess the plaintiff. After the partition of India the suit was tried by the Subordinate Judge, Alipore, in the State of West Bengal. The High Court of Calcutta held that the Court of Alipore had no jurisdiction to proceed with the suit. This Court in appeal held that the suit did lie in the Court of the Subordinate Judge, Alipore, and that a suit for injunction being not one to set aside or modify any assessment made under the Act, s. 65 of the Bengal Agricultural Income-tax Act, 1944, did not bar the suit; which was one in respect of an actionable wrong. Patanjali Sastri J., delivering the majority judgment of this Court observed at p. 14 :

> " . . . that the suit in question is not a suit "to set aside or modify an assessment" made under the Act, as no assessment had yet been made when it was instituted, and the subsequent completion of the assessment was made by the Pakistan income-tax authorities on terms agreed to between the parties and sanctioned by the Court. . . .
>
> The gist of the wrongful act complained of in the present case is subjecting the plaintiff to the harassment and trouble by commencing against him an illegal and unauthorised assessment proceeding which may eventually result in an unlawful imposition and levy of tax."

Mukherjea J., who delivered a supplementary judgment agreed with Patanjali Sastri, J. It is expressly recorded in the judgment that the correctness of the decision in Raleigh Investment Company's case (L.R. 74 I.A. 50.) was not challenged before the Court. Fazl Ali J. took a different view relying upon the principle of Raleigh Investment Company's case (L.R. 74 I.A. 50.), observing that it could not have been the intention of the Legislature that though the officer is not liable to be restrained from proceeding with an assessment, the provision which ensures such a result may be rendered nugatory by permitting an injunction to be claimed against the Provincial Government or the State. The question whether a suit to obtain refund of tax based on a provision of a statute alleged to be ultra vires was maintainable did not fall to be determined in State of Tripura's case, and was not decided.

In our view, the authority of the taxing officer is derived from the investment of power under the Act which he is authorized to administer. If there is no defect in the enactment of a taxing statute, insofar as it authorises the constitution of a Tribunal, the Tribunal invested with authority in the matter of assessment and collection of tax, would in our judgment have power to entertain an objection and to decide whether a provision of the Act which it is called upon to administer is ultra

vires and hence unenforceable.

The Deputy Commercial Tax Officer had therefore power to assess the transaction of sale in works contract. Assuming that he erred in the interpretation of the contract or the relevant statutory provision, the order was on that account not without jurisdiction. It could only bet set aside by appropriate proceedings under the Madras General Sales Tax Act, 1939, and not otherwise. The suit was therefore barred by the scheme of the Act and s. 18-A which was later incorporated by Act 6 of 1951.

This appeal must therefore fail and is dismissed with costs.

ORDER

In accordance with the opinion of the Majority the appeal is allowed. There will be a decree in favour of the plaintiffs as prayed for with costs throughout.

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