Dhulabhai and Others

Vs

The State of Madhya Pradesh and Another

Civil Appeals Nos. 260 to 263 of 1967

(R. S. Bachawat, C. A. Vaidialingam, K. S. Hegde JJ)

05.04.1968

JUDGMENT

HIDAYATULLAH, C.J.

These are four appeals by certificate against the common judgment of the High Court of Madhya Pradesh (Indore Bench), 16 December, 1964/5 January, 1965 dismissing four suits filed by the appellants to recover sales-tax alleged to be realized illegally from them by the State of Madhya Pradesh, the respondent in these appeals. The suits were earlier decreed by the District Judge, Ujjain. The facts in the suits are common and were as follows :

> The appellants are dealers in tobacco and have their places of business at Ujjain. They purchase and sell tobacco used for eating, smoking and for preparing bidis. They get their tobacco locally or import it from extra-state places. The former Madhya Bharat State enacted in 1950 the Madhya Bharat Sales Tax Act (Act 30 of 1950) which came into force on May 1, 1950. Under s. 3 of the Act every dealer whose business in the previous year in respect of sales or supplies of goods exceeded in the case of an importer and manufacturer Rs. 5,000 and in other cases Rs. 12,000 had to pay tax in respect of sales or supplies of goods effected in Madhya Bharat from 1st May 1950. Under s. 5, the tax was a single point tax and it was provided that the Government might by a notification specify the point of the sales at which the tax was payable. The section also fixed the minimum and maximum rates of tax leaving it to Government to notify the actual rate.

Government, in pursuance of this power, issued a number of notifications on April 30, 1950, May 22, 1950, October 24, 1953 and January 21, 1954. All these notifications imposed tax at different rates on tobacco above described on the importer, that is to say at the point of import. The tax was not levied on sale or purchase of tobacco of similar kind in Madhya Bharat. The tax was collected by the authorities in varying amounts from the appellants for different quarters. We are not concerned with the amounts. The appellants served notices under s. 80 of the Code of Civil Procedure and filed the present suits for refund of the tax on the ground that it was illegally collected from them being against the constitutional prohibition in Art. 301 and not saved under Art. 304(a) of the Constitution.

The State of Madhya Pradesh was formed on November 1, 1955. In Bhailal v. M.P. [1960 M.P.L.J. 601] the High Court of Madhya Pradesh declared the notifications to be offensive to Art. 301 of the Constitution on the ground that it was illegal to levy a tax on the importer when a equal tax was not levied on similar goods produced in the State. The decision was later confirmed on this point in

State of M. P. v. Bhailal Bhai [[1964] 6 S.C.R. 261]. The appellants did not take recourse to the provisions of Art. 226 of the Constitution but filed their suits on December 21, 1957.

The suits were opposed by the State on the main ground that such a suit was barred by the provisions of s. 17 of the Act which provides :

> "17. Bar to certain proceedings. - Save as is provided in s. 13, no assessment made and no order passed under this Act or the rules made thereunder by the assessing authority, appellate authority or the Commissioner shall be called in question in any Court, and save as is provided in sections 11 and 12 no appeal or application for revision shall lie against any such assessment or order."

The State also pleaded that as appeals against the assessment were pending before the Sales Tax Appeal Judge the plaintiffs were not entitled to file the suits. The District Judge, following State of Tripura v. The Province of East Bengal [A.I.R. 1951 S.C. 23] and Bhailal Bhai Gokal Bhai v. State of M.P. [1960 M.P.L.J. 601], held that such a suit lay when a declaration was sought that the provisions of law relating to an assessment were ultra vires, and demand was made for refund of amounts illegally collected under it. On the second point the District Judge held that s. 21 of the Act which allows the Commissioner or the appellate authority to order refund of tax wrongly paid did not apply since no such appeal was proved to have been filed and the tax was not wrongfully paid but wrongfully realised.

On appeal by the State the High Court reversed the decision. Before the High Court it was conceded (as it is conceded even now) that the tax could not be imposed in view of the bar of Art. 301. The short question thus was whether the suit was barred expressly by s. 17 of the Act or any implication arising from the Act. The contention on behalf of the appellants was that if it was a question of the correctness of the imposition within the valid framework of the statue, rules or notifications s. 17 might have operated but not when the imposition was under a void law. In the latter event the assessed was free to challenge the validity of the law in a civil suit and also to claim a refund.

The High Court considered the matter in the light of the decisions of the Judicial Committee in Raleigh Investment Co. v. Governor General Council [1947] L.R. 74 I.A. 50; A.I.R. 1947 P.C. 78], Secretary of State v. Mask [[1940] L.R. 67 I.A. 222; A.I.R. 1940 P.C. 105], Firm I. S. Chetty & Sons v. State of Andhra Pradesh [[1964] 1 S.C.R. 752; A.I.R. 1964 S.C. 322], State of Andhra Pradesh v. Firm Subbayya & Sons [A.I.R. 1958 Mad. 544 (F.B.)], and others, and came to the conclusion that the suit was incompetent. The High Court conceded that both aspects of the case were well supported by authority. It is not necessary to enter into the reasons which weighed with the High Court because our discussion of the authorities in this judgment will clearly expose the rival views and the one preferred in the High Court.

The question that arises in these appeals has been before this Court in relation to other statutes and has been answered in different ways. These appeals went before a Divisional Bench of this Court but in view of the difficulty presented by the earlier rulings of this Court, they were referred to the Constitution Bench and that is how they are before us. At the very start we may observe that the jurisdiction of the Civil Courts is all embracing except to the extent it is excluded by an express provision of law or by clear intendment arising from such law. This is the purport of s. 9 of the Code of Civil Procedure. How s. 9 operates is perhaps best illustrated by referring to the categories of cases, mentioned by Willes, J. in Wolverhampton New Waterworks co. v. Hawkesford [1859] 6 C.B. (NS) 336] - They are :

> "One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law : there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statue gives the right to sue merely, but provides, no particular form of remedy : there, the party can only proceed by action at common law. But there is a third class, viz., 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..... The remedy provided by the statute must be followed and it is not competent to the party to pursue the course applicable to cases of the second class."

This view of Willes, J. was accepted by the House of Lords in Neville v. London 'Express' Newspaper, Ltd. [[1919] A.C. 368].

To which category do such cases belong in India ? The controversy in India has revolved round the principles accepted in Secretary of State v. Mask [[1940] 67 I.A. 222] and in Raleigh Investment Co. v. Governor General in Council [[1947] 74 I.A. 50]. In the first case it was laid down by the Judicial Committee that the ouster of the jurisdiction of a Civil Court is not to be lightly inferred and can only be established if there is an express provision of law or is clearly implied. In the second case it was held that where a liability to tax is created by statute which gives special and particular remedies against illegal exactions the remedy contemplated by the statute must be followed and it is not open to the assessee to pursue the ordinary process of Civil Courts. To the latter case we shall refer in some detail presently. Opinion in the Court has, however, wavered as to how far to go with the dicta of the Privy Council in the two cases.

Before, however, we go into the question we may refer to State of M. P. v. Bhailal [[1964] 6 S.C.R. 261]. In that case the notifications were declared ultra vires Article 301 of the Constitution and not saved by Art. 304(a). It was therefore held that the portion of the tax already paid must be refunded by the Government. The question then posed was :

> "The question is whether the relief of repayment has to be sought by the tax-payer by an action in a civil court or whether such an order can be made by the High Court in the exercise of its jurisdiction conferred by Art. 226 of the Constitution ?"

This Court after examining the jurisdiction under Art. 226 concluded that the High Court had the power to order refund in proceedings for a writ since complete relief could not be said to be given if only a declaration were given. The Court, however, observed :

> "At the same time we cannot lose sight of the fact that the special remedy provided in Article 226 is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defences legitimately open in such actions."

Pointing out that where a defence of limitation could be raised or other issues of fact had to be tried, it was held that the Court should leave the party aggrieved to seek his remedy by the ordinary mode of a civil suit. Therefore in those cases (there were 31 appeals before this Court) where the writ was asked for within three years, this Court upheld the order of refund by the High Court in its writ

jurisdiction, but in those cases in which the parties had gone to the High Court after a lapse of 3 years, the order of refund was questioned and not approved observing that the petitioners would be at liberty to seek such relief as they might be entitled to in a Civil court if it was not barred by limitation.

It will appear from his analysis of the case that this Court accepted the proposition that a suit lay. This it did without adverting to the provisions of the Act there considered to see whether the jurisdiction of the Civil Courts was barred or not, either expressly or by necessary implication. This Court was, of course, not invited to express its opinion on the matter but only on whether the High Court in its extraordinary jurisdiction could order refund of tax paid under a mistake. Having held that in some cases the High Court should not order refund, this Court merely pointed out that the civil suit would be the only other remedy open to the party. The case cannot, therefore, be treated as an authority to hold that the Civil Courts had jurisdiction to entertain such suits.

We may now proceed to consider first the two cases of the Judicial Committee before examining the position under the rulings of this Court. In Secretary of State v. Mask [[1940] L.R. 67 I.A. 222] the sole question was the jurisdiction of the civil court to entertain a suit to recover an excess amount of customs duty collected from Mask and Co. The suit was filed after an appeal to the Collector of Customs and a revision taken to the Government of India under the Land Customs Act, 1924 was dismissed. The suit was dismissed by the trial Judge on the preliminary ground that the Civil Court had no jurisdiction. An appeal by Mask and Co. to the High Court succeeded and there was a remit. The appeal to the Judicial Committee followed. Section 188 of the Land Customs Act, 1924 provided inter alia :

> "Every order passed in appeal under this section shall, subject to the power of revision conferred by s. 191, be final."

The Judicial committee first made a general observation :

> "It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well-settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

Then it proceeded to quote s. 188 (as above) and observed :

> "By Ss. 188 and 191 a precise and self-contained code of appeal is provided in regard to obligations which are created by the statute itself, and it enables the appeal to be carried to the supreme head of the executive Government. It is difficult to conceive what further challenge of the order was intended to be excluded other than a challenge in the Civil Courts, ..."

and came to the conclusion that the jurisdiction of the Civil Courts was excluded. The decision of the High Court was reversed and that of the trial Judge restored.

The next case is the Raleigh Investment Co. Ltd. v. Governor General in Council [[1947] L.R. 74 I.A. 50]. This was an appeal to the Privy Council from a judgment of the Federal Court of India in civil appellate jurisdiction reversing a decree passed by a Special Bench of the Calcutta High Court

in its original civil jurisdiction. It arose from a suit filed for recovery of a sum paid under protest pursuant to an assessment to income-tax of the Investment Company on the ground that the computation was under a provision of the Income Tax Act which was ultra vires the Indian Legislature. One of the defences in the suit was that whether the said provision was ultra vires or not, the Civil Courts were excluded from exercising their jurisdiction by s. 226 of the Government of India Act, 1935 and s. 67 of the Indian Income Tax Act. The provision in question was held ultra vires by the High Court and it further held that neither of the two provisions was a bar to the civil courts jurisdiction. The Federal Court in disagreement held that s. 226 of the Government of India Act, 1935 barred the jurisdiction and that the provision impugned was not ultra vires. The bar of s. 67 of the Income Tax Act was not pressed before the Federal Court.

When the case reached the Judicial Committee, the case was considered under s. 67 but not under s. 226. The Judicial Committee was of the opinion that s. 67 barred the jurisdiction. The Investment Company had raised the question before the Income-tax authorities that Explanation 3 to para 4(1) of the Income-tax Act 1922 was ultra vires. This was not accepted and the assessment was made. The Investment Company filed an appeal but did not proceed with it and the assessment was confirmed. The appellate authority also said in its order that the constitutional question could not be raised before it. The suit was then instituted.

Section 67 of the Indian Income-tax Act in specific terms stated :

> "No suit shall be brought in any civil court to set aside or modify any assessment made under the Act..."

The result of the suit has already been stated. The Judicial Committee considered this section and observed that the suit in form did not profess to modify the assessment but in substance it did so. The declaration that a certain provision was ultra vires was but a step. According to the Judicial Committee the assessment made under an ultra vires statute was not a nullity and the assessment ought to be taken to proceed on a mistake of law in the course of assessment. Therefore, without going into the question whether the provision impugned was ultra vires or not the Judicial Committee considered the matter.

The argument was that the assessment was not one 'under the Act', if effect was given to an ultra vires provision since the provision would be a nullity and non-existent. To discover the force of the prohibition in s. 67 the following tests were applied :-

> (a) Does the Act contain machinery by which the assessee can raise the question of the vires of the provision before the special authorities ?
>
> (b) This test was not conclusive but one to be considered.
>
> (c) If there was no such machinery and yet the civil courts were barred the vires of s. 67 itself might come in for consideration.

The Judicial Committee, however, came to the conclusion that the Income-tax Act gave the assessee an opportunity to raise the question under the Income-tax Act. The provision for a case stated for the advisory opinion of the High Court was available and even if the authorities refused to state a case, the High Court could be directly approached. The decision of the High Court was also subject to further appeal. Thus there was adequate machinery in the Income-tax Act.

The words of s. 67 'under the Act' were construed as the activity of an assessing officer acting as such. That this activity took into consideration an ultra vires provision did not take the matter out of these words. That phrase meant the provenance of the assessment, and not the accuracy or correctness of the assessment or the machinery of the Income-tax Act or the result of the activity. There was no difference between an incorrect apprehension of the provisions of the Income-tax Act and the invalidity of a provision. The Judicial Committee explained that if this were not so all questions of the correctness of the assessment under the Income-tax Act could be brought before the Court and the section rendered otiose. The section made no distinction between an inquiry into the merits of the assessment and jurisdiction to embark on an enquiry at all. The Civil Courts' jurisdiction in either case was invoked as to the correctness of the assessment and the language of the section precluded consideration of jurisdiction in such circumstances. The Income-tax Act having a suitable and adequate machinery, jurisdiction to question the assessment otherwise than by that machinery was, therefore, held barred. The Judicial Committee even doubted whether a provision such as s. 67 was at all necessary in the circumstances.

Both these cases thus appear to be decided on the basis of provisions in the relevant Acts for the correction, modification and setting aside of assessments and the express bar of the jurisdiction of the Civil Courts. The presence of a section barring the jurisdiction was the main reason and the existence of an adequate machinery for the same relief was the supplementary reason. The provision for a reference of a question to the High Court was considered adequate to raise the issue of the validity of any provision of law under which the taxing authorities acted. This follows from the Raleigh Investment Co.'s case [[1947] L.R. 74 I.A. 50]. Mask & Co.'s case [[1940] L.R. 67 I.A. 222] was more concerned with the finality to the orders given by the Land Customs Act. Even so in the Mask & Co.'s case [[1940] L.R. 67 I.A. 222] room was left for interference by the Civil Courts by observing that the Civil Courts had jurisdiction to examine into cases where the provisions of the Act had not been complied with, or the statutory tribunal had not acted in conformity with the fundamental principles of judicial procedures. These observations were accepted by this Court in Firm of Illuri Subbayya Chetty Sons v. The State of Andhra Pradesh [[1964] 1 S.C.R. 752] and in Kerala v. Ramaswami Iyer and Sons [[1966] 3 S.C.R. 582]. A passage from the latter case might be quoted here :

> "It is true that even if the jurisdiction of the civil court is excluded, where the provisions of the statute have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure, the civil courts have jurisdiction to examine these cases."

The observations of the Judicial Committee were thus completely accepted.

We may now examine how the matter was further viewed in this Court. In two other cases this Court laid down that the validity of the provisions under which the authorities act is not a matter for those authorities to decide. In Circo's Coffee Co. v. State of Mysore [19 S.T.C. 66] it was contended that s. 40(2) of the Mysore Sales Tax Act 1957 was ultra vires and beyond the competence of the State Legislature. This Court observed :

> "It is true that a question as to the vires of section 40(2) of the Sales Tax Act was raised, but it is now settled by decisions of this Court that the question as to the vires of a statute which a taxing officer has to administer cannot be raised before him."

The same was again reiterated in C. T. Santhulnathan Chettiar v. Madras [C.A. 1045 of 1966

decided on 20th July, 1967] in the following words :

> "..... this Court has held, in Venkataraman and Co. v. State of Madras (60 I.T.R. 112) that the authorities under a taxing statute are not concerned with the validity of the taxing provisions and the questions of ultra vires is foreign to the scope of their jurisdiction. As no such point could be raised before Income-tax authorities, neither the High Court nor the Supreme Court can go into these questions in a revision or reference from the decision of those authorities. This case was followed in Commissioner of Income-tax v. Straw Products [1966, 2 S.C.R. 881]; (60 I.T.R. 156)."

The party was left to 'appropriate proceedings' without specifying what they would be. Perhaps a suit was meant.

It follows that the question of validity of the taxing laws is always open to the Civil Courts for it cannot be the implication of any provision to make such a decision final or that even void or invalid laws must be enforced without any remedy. Therefore, in Pabbojan Tea Co. Ltd. v. Dy. Commissioner, Lakhimpur [A.I.R. 1968 S.C. 271] after, quoting the observations of Viscount Simonds (Pyx Granite Co. Ltd. v. Ministry of Housing and Local Govt.) (1960 A.C. 260 at p. 286) :

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for determination of his rights is not to be excluded except by clear words.";

our brother Mitter added that the extreme proposition in Raleigh Investment Co.'s case [[1947] L.R. 74 I.A. 50] had not found favour with this Court. Our learned brother observed :

> "This Court was not prepared to accept the dictum in the judgment (Raleigh Investment Co.) to the effect that even the constitutional validity of the taxing provisions would have to be challenged by adopting the procedure prescribed by the Income-tax Act - See Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh [1964] 1 S.C.R. 752 at 760."

The position was rather strengthened in K. S. Venkataraman & Co. v. State of Madras [[1966] 2 S.C.R. 229]. The question then was whether a suit was not maintainable under s. 18-A of the Madras General Sales Tax Act 1939 (corresponding to s. 67 of the Indian Income-tax Act 1922). The suit followed the decision of this Court in Gannon Dunkerley and Co. v. State of Madras [[1959] S.C.R. 379] in which 'works contracts' of an indivisible nature were held not to fall within the taxing provisions of the Madras General Sales Tax Act, 1939. Section 18-A was pleaded as a bar. It was held that since the provisions of the Madras General Sales Tax Act, 1939 were declared ultra vires in their application to 'indivisible works contracts' the action of the authorities was outside the said Act and not under the Act for the purposes of s. 18-A. The suit was held not barred. Subbarao, J. (as he then was) speaking for the majority distinguished both the Raleigh Investment Co.'s case [[1947] L.R. 74 I.A. 50] and the Commissioner of I. T. Punjab, North West Frontier & Delhi Provinces, Lahore v. Tribune Trust, Lahore [[1947] L.R. 74 I.A. 306] on the ground that no question of the vires of the law was raised in them. Referring of Raja Bahadur Kamakshya Narain Singh of Ramgarh v. C.I.T. [[1947] F.C.R. 130] and State of Tripura v. The Province of East Bengal [[1951] S.C.R. 1], Subbarao J. pointed out that the suit was held maintainable in the latter and there was nothing in the former to support the contention that the question of ultra vires of a statutory

provision could be canvassed only through the machinery provided under the statute. Referring next to the case of Firm of Illuri Subbayya Chetty and Sons case [[1964] 1 S.C.R. 752] the learned Judge said that the question whether s. 18-A of the Madras General Sales Tax Act, 1939 could apply where a particular provision of the Sales Tax Act was ultra vires was left open (see p. 243). The learned Judge next quoted the opinion of the majority in Bharat Kala Bhandar Ltd. v. M. C. Dhamangaon [[1965] 3 S.C.R. 499] to the following effect :

> "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."

The learned Judge next considered whether these observations, although obiter, were departed from in M/s. Kamla Mills Ltd. v. The State of Bombay [[1966] 1 S.C.R. 64] and came to the conclusion that that decision did not touch upon the question whether a suit would lie in a case where the assessment was made on the basis of provision which was ultra vires the Constitution (see p. 246)

Having considered these rulings the learned Judge examined the remedies provided by the Indian Income-tax Act and found that all authorities were creatures of the statute and functioned under it and could not ignore its provisions since the said Act conferred no such 'right' on them. Whether the provisions were good or bad was not their concern. Pointing out that the reference to the High Court under the Indian Income-tax Act was confined to questions arising from the order of the Appellate Tribunal, the learned Judge observed that 'the question of ultra vires is foreign to the scope of the Tribunals' jurisdiction' and that if such a question were raised the Tribunal could only reject it on the ground that it had no jurisdiction to decide it, and the High Court and the Supreme Court would be equally incompetent on appeal to go into the question. The learned Judge next considered the decisions of the High Courts into which it is not necessary to go here an on the strength of some observations which supported his view, stated his view in the following words :

> "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, by 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 whereunder it functions. It must act under the 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."

As the head note correctly states the effect of the decision was that the foundation laid by the Judicial Committee in Raleigh Investment Co.'s case [(1947) L.R. 74 I.A. 50] for construing the expression 'under the Act' had no legal basis.

It may be mentioned that in Bharat Kala Bhandar [[1965] 3 S.C.R. 499] case also it was held that there was no machinery provided in the Central Provinces and Berar Municipal Act for refund of tax assessed and recovered in excess of constitutional limits and that the remedy furnished by that Act was inadequate for enabling the assessee to challenge effectively the constitutionality or legality of assessment or levy of tax by a municipality or to recover from it what was realised under an invalid law (see the judgment of Mitter, J. also in Pabbojan case [A.I.R. 1968 S.C. 271] at page 276). In Bharat Kala Bhandar case [[1965] 3 S.C.R. 499] it was pointed out that :

> "..... one of the corollaries flowing from the principle that the Constitution is the fundamental law of the land is that the normal remedy of a suit will be available for obtaining redress against the violation of a constitutional provision. The Court must, therefore, lean in favour of construing a law in such a way as not to take away this right and render illusory the protection afforded by the Constitution."

Again in Deputy Commercial Tax Officer, Madras v. Rayalaseema Constructions [17 S.T.C. 505] the problem was the same as was dealt with in Venkataraman's Co. Ltd. case [[1966] 2 S.C.R. 229]. The earlier case was followed and it was held that the sales tax authorities having given effect to an ultra vires provision section 18-A of the Madras General Sales Tax Act, 1939 was no bar to the maintainability of the suit to recover tax paid under such an assessment since the authorities must be taken to have acted outside and not under the Madras General Sales Tax Act.

This brings us to the case of Provincial Government v. J. S. Basappa. [[1964] 5 S.C.R. 517] There too three suits were filed alleging that the goods had passed to extra state points while they were still in the possession and ownership of the seller. Since the property in the goods remained in the seller till the goods had entered into other provinces, the sales could not be subjected to a tax in Madras Presidency. Section 11(4) of the Madras General Sales Tax Act, 1939 made orders of the taxing authorities final but the Act applied only to sales within the Presidency of Madras and not outside it. There was at that time no provision to oust the jurisdiction of the civil courts.

Section 18-A of which we have spoken earlier and on which most of the cases turned, was added much later. Many of the remedies such as were considered in Raleigh Investment Co.'s case [[1947] L.R. 74 I.A. 50] and Venkataraman's case [[1966] 2 S.C.R. 229] were also added at the same time as s. 18-A. The question thus had to be decided without an express provision ousting the jurisdiction of the Civil Courts and without the existence of an adequate machinery for raising such an issue before the authorities. The only provision which had to be considered was s. 11(4) which provided 'every order passed in appeal under this section, shall, subject to the powers of revision conferred by s. 12, be final.' The fundamental provisions of the Madras General Sales Tax Act, 1939 (as it then stood) were that the sales must be within the Presidency of Madras. The authorities ignoring these provisions held that 'outside sales' were taxable. Relying upon the dictum of the Judicial Committee

in Mask & Co.'s case [(1940) L.R. 67 I.A. 222], as applied in Firm of Illuri Subbayya Chetty's case [[1964] 1 S.C.R. 752], this Court held that the suits were competent. In the case of this Court last cited the following observation was made :

> "It is necessary to add that these observations, though made in somewhat wide terms, do not justify the assumption that if a decision has been made by a taxing authority under the provisions of the relevant taxing statute, its validity can be challenged by suit on the ground that it is incorrect on the merits and as such, it can be claimed that the provisions of the said statute have not been complied with. Non-compliance with the provisions of the statute to which reference is made by the Privy Council must, we think, be non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. Similarly, if an appropriate authority has acted in violation of the fundamental principles of judicial procedure, that may also tend to make the proceedings illegal and void and this infirmity may effect the validity of the order passed by the authority in question."

The Divisional Bench relying upon this observation pointed out :

> "It was thus held that the civil court's jurisdiction may not be taken away by making the decision of a tribunal final, because the civil court's jurisdiction to examine the order, with reference to fundamental provisions of the statute, non-compliance with which would make the proceedings illegal and without jurisdiction, still remains, unless the statute goes further and states either expressly or by necessary implication that the civil court's jurisdiction is completely taken away.
>
> Applying these tests, it is clear that without a provision like s. 18A in the Act, the jurisdiction of the civil court would not be taken away at least where the action of the authorities is wholly outside the law and is not a mere error in the exercise of jurisdiction. Mr. Sastri says that we must interpret the Act in the same way as if s. 18A was implicit in it and that s. 18A was added to make explicit what was already implied. We cannot agree. The finality that statute conferred upon orders, of assessment, subject, however, to appeal and revision, was a finality for the purpose of the Act. It did not make valid an action which was not warranted by the Act, as for example, the levy of tax on a commodity which was not taxed at all or was exempt. In the present case, the taxing of sales which did not take place within the State was a matter wholly outside the jurisdiction of the taxing authorities and in respect of such illegal action the jurisdiction of the civil court continued to subsist. In our judgment the suits were competent."

This case was, therefore, stronger than any so far noticed because of the absence of s. 18-A and the elaborate machinery for adequate remedy was introduced later and the tax was illegally collected ignoring the fundamental provisions of the Madras General Sales Tax Act, 1939.

However, in Kerala v. Ramaswami Iyer and Sons [[1966] 3 S.C.R. 582] (although it was pointed out what express provision or clear intendment in he Madras General Sales Tax Act, 1939 as it then stood, barred a civil suit) Basappa's [[1964] 5 S.C.R. 517] case was declared to be wrongly decided. In that very case the learned Judges considered a rule which gave exemption but held that it did not give protection because it was enacted after the account period. What if it had been enacted before ?

The observations in Basappa's case [[1964] 5 S.C.R. 517] that if a commodity was not taxable at all or was exempt the civil Court would have jurisdiction were, however, not accepted. It was sufficient to have said in Ramaswami Iyer's case [[1966] 3 S.C.R. 582] that exemption or no exemption that was for the authorities to decide and not a matter for the Civil Courts. The argument of exemption was rejected by observing :

> "There was in the Travancore-Cochin General Sales Tax Act at the material time no express provision which obliged the taxing authority to exclude from the computation of taxable turnover the amount of sales-tax collected by the dealers."

This reasoning shows that if it had been, the suit might have been held competent. It is not necessary for us to pursue this matter further than to say that the observation that Basappa's case was wrongly decided is open to serious doubt.

This leaves for consideration only the cases Firm of Illuri Subbayya Chetty and Sons v. State of Andhra Pradesh [[1964] 1 S.C.R. 752] and Kamla Mills Ltd. v. State of Bombay [[1966] 1 S.C.R. 64]. The case of Firm of Illuri Subayya Chetty [[1964] 1 S.C.R. 752] arose under the Madras General Sales Tax Act, 1939 and s. 18-A was pleaded to make the suit incompetent. The transactions in respect of which tax was recovered were said to be of sales and not purchases and the latter only were to be taxed. It was held that s. 18-A barred the suit because the attempt was to set aside or modify an assessment made under the said Act. It was pointed out that any challenge to the correctness of the assessment must be made before the appellate or revisional forums under the same Act since the character of the transaction was a matter into which the appellate and revisional authorities could go. A litigant who accepted the assessment when he could call it in question by other proceedings under the same Act could not begin a suit. The expression 'under the Act' was sufficient to cover even an incorrect assessment. The assessee firm succeeded in the suit but the High Court held it barred under s. 18-A and also held against the assessee firm on the nature of the transaction.

This Court first held that there was no provision in the said Act for bringing a civil suit to question the assessment. Therefore the matter must fall in s. 18-A. This Court analysed the provisions of the said Act which provided by s. 12-A, 12-B, 12-C and 12-D for special appeals, including an appeal to the High Court, the highest Civil Court in the State, laying down further that the appeal should be heard by a Division Bench. In the light of this elaborate machinery the question of alternative remedy was approached. It was also pointed out that the assessee firm had itself included these transactions in its returns. Having conceded that the tax was payable and not having raised the issue before the appellate authorities constituted under the said Act, it was held that the firm could not be allowed to raise the issue in a suit. This was enough to dispose of the appeal to this Court.

The Constitution Bench, however, went on to examine the rulings of the Judicial Committee in Mask & Co.'s [(1940) L.R. 67 I.A. 222] and Raleigh Investment Co.'s [(1947) L.R. 74 I.A. 50] cases. Dealing with the former case, this Court pointed out that non-compliance with the provisions of the statute meant non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. The defect of procedure must also be fundamental. In either case the defect must make the order invalid in law and void. The Court went on to observe :

> ".... In what cases such a plea would succeed it is unnecessary for us to decide in the present appeal because we have no doubt that the contention of the appellant that on

> the merits, the decision of the assessing authority was wrong, cannot be the subject-matter of a suit because s. 18-A clearly bars such a claim in the civil courts."

Referring next to the Raleigh Investment Co.'s case [[1947] L.R. 74 I.A. 50] this Court pointed out that under the scheme of the Income-tax Act, the Judicial Committee thought that a question of vires of the provisions could also be considered, but this Court did not think it necessary to pronounce any opinion whether this assumption was well-founded or not. This point was later considered in Venkataraman's case [[1966] 2 S.C.R. 229] by Subbarao, J. (as he then was) and we have sufficiently analysed the views of this Court. The case of Firm of Illuri Subbayya [[1964] 1 S.C.R. 752] may be said to be decided on special facts with additional reference to the addition of s. 18-A excluding the jurisdiction of civil court and the special remedies provided in ss. 12-A to 12-D by which the matter could be taken to the highest civil court in the State.

This brings us to the last case on the subject. That is the Kamla Mills case [[1966] 1 S.C.R. 64]. That case was heard by a special Bench of 7 Judges and is of more binding value than the others. Kamla Mills Ltd. was assessed to certain sales effected between 26 January 1950 and 31 March 1951 which the taxing authorities treated as 'inside sales' and the company claimed to be 'outside sales' as determined under the Bengal Immunity Co. Ltd. v. State of Bihar and others [[1955] 2 S.C.R. 603]. The judgment in the last cited case was delivered on September 6, 1955. The period for invoking remedies under the Bombay Sales Tax Act, 1946 under which the assessment was made had expired. A suit was, therefore, filed to claim refund. The Bombay Act contained s. 20 which read :

> "20. Save as is provided in s. 23, no assessment made and no order passed under this Act or the rules made thereunder by the Commissioner or any person appointed under s. 3 to assist him shall be called into question in any Civil Court, and save as it provided in sections 21 and 22, no appeal or application for revision shall lie against any such assessment or order."

The suit was dismissed on the preliminary point arising from this bar. A Letter Patent appeal in the High Court of Bombay also failed. The case came before this Court on a certificate. It was referred to a Special Bench because s. 20 was challenged as unconstitutional. This Court held that as there was adequate remedy to raise the question before the authorities by asking for rectification of the assessment, the section could not be said to deprive him of remedy in such a way as to render the section itself unconstitutional as was hinted in Raleigh Investment Co.'s case [[1947] L.R. 74 I.A. 50] about s. 67 of the Indian Income-tax Act. We are not concerned with that question.

The next question which was considered was whether the jurisdiction conferred on the taxing authorities included the jurisdiction to determine the nature of the transaction or was the decision about the character of the transaction, a decision on a collateral fact ? This Court held that it was the former and not the letter. Therefore the decision was held to be merely an error in assessment which was capable of correction by the usual procedure of appeals etc. The bar of s. 20 was, therefore, held to apply. During the course of the arguments the Special Bench considered Basappa's case [[1964] 5 S.C.R. 517] and distinguished it from the Firm of Illuri Subayya Chetty's case [[1964] 1 S.C.R. 572] on the ground that the former was not barred by s. 18-A as it did not exist. The Special Bench, however, made an observation to the following effect :

> "In cases where the exclusion of the civil court's jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or

> the sufficiency of the remedies provided for by it may be relevant but cannot be decisive. But where exclusion is pleaded as a matter of necessary implication, such consideration would be very important, and in conceivable circumstances, might even become decisive. If it appears that a statute creates a special right or a liability and provides for the determination of the right and liability to be dealt with by tribunals specially constituted in that behalf, and it further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, it becomes pertinent to enquire whether remedies normally associated with actions in civil courts are prescribed by the said statute or not."

The Special Bench refrained from either accepting the dictum of Mask & Co.'s case [[1940] L.R. 67 I.A. 222] or rejecting it, to the effect that even if jurisdiction is excluded by a provision making the decision of the authorities final, the Civil Courts have jurisdiction to examine into cases where the provisions of the particular Act are not complied with.

Neither of the two cases of Firm of Illuri Subayya [[1964] 1 S.C.R. 752] or Kamla Mills [[1966] 1 S.C.R. 64] can be said to run counter to the series of cases earlier noticed. The result of this inquiry into the diverse views expressed in this Court may be stated as follows :-

> (1) Where the statute gives a finality to the orders of the special tribunals the Civil Court's jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.
>
> (2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.
>
> Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statue or not.
>
> (3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.
>
> (4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.
>
> (5) Where the particular Act contains no machinery for refund of tax collected in

excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit dies not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply.

In the light of these conclusions we have to see how the present case stands. Section 3 was the charging section. It spoke of the incidence of the tax. In consisted of several sub-sections. These sub-sections laid the tax on dealer according to their taxable turnover and in the case of a dealer who imported goods in to Madhya Bharat the taxable turnover was Rs. 5,000/-. Section 4 made certain exclusions and exemptions, and section 5 prescribed the rate of tax. That section read :

"5(1) The tax payable by a dealer under this Act shall be at a single point and shall not be less than Rs. 1-9-0 per cent, or more than 6 1/4 per cent of the taxable turnover, as noticed from to time to time by the Government by publication in the official gazette.

Provided that Government may in respect of special class of goods charge tax up to 12 1/2 per cent. on the taxable turnover.

(2) The Government while notifying the tax payable by a dealer may also notify the goods and the point of their sale at which the tax is payable."

In notifying the rate provision was made for rates in respect of importers, the point of time being the import. As the import itself postulated movement of goods, the matter fell within Article 301 and as trade and commerce is declared to be free throughout the territory of India, it became unfree by reason of the tax. The tax would therefore have ex facie offended Article 301. This could however be avoided if the tax was saved by Article 304(a). That required that similar goods manufactured or produced in Madhya Bharat had to bear an equal tax. Such equal tax was not imposed hence the notifications were struck down as making discrimination and rendering trade and commerce unfree. This was the effect of Bhailal's case [[1964] 6 S.C.R. 261].

No doubt the Madhya Bharat Sales-tax Act contained provisions for appeal, revision, rectification and reference to the High Court, the notifications being declared void the party could take advantage of the fact that tax was levied without a complete charging section. This affected the jurisdiction of the tax authorities because they could not even proceed to assess the party. The question was one falling in category Nos. 3 and 4 rather than in category No. 2 above. It was directly covered by the decision of this Court in Venkataraman's case [[1966] 2 S.C.R. 229] read with Circo's Coffee Co. [[19 S.T.C. 66 (S.C.)] and Senthulnathan Chettiar's case [C.A. 1045 of 1966, dated 20-7-1967] already referred to we would have considered this matter again if Venkataraman's case [[1966] 2 S.C.R. 229] had been doubted before but it seems to have been followed in the last mentioned case and Pabbojan Tea Company' case [A.I.R. 1968 S.C. 271]. If Kamla Mills Ltd. case [[1966] 1 S.C.R. 64] had not expressly left the question open we would have applied the earlier case of the Special Bench but as it is we are bound not by the Special Bench

decision but by Venkataraman's case [[1966] 2 S.C.R. 229]. We must therefore allow these appeals with costs. The judgment of the High Court is set aside and suits are decreed. The order for costs shall be as in the suit. The costs in the High Court shall be borne as incurred.

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Appeal allowed.

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