ANDHRA PRADESH HIGH COURT

State of A.P. Defendant

Vs.

Firm of Illur Subbavya Chetty

Appeal No. 397 of 19,57, Kurnool in O.S. No. 10 of 1956

(P. Chandra Reddy, C.J., Srinivasachari and Chandrasekhara Sastri, JJ.)

16.11.1960

JUDGMENT

Chandra Reddy, C.J.

1. The main question that falls for determination in this appeal directed against the judgment and decree of the Subordinate Judge. Kurnool, is whether a suit is barred by Section 18-A of the Madras General Sales Tax Act (IX of 1939) (hereinafter referred to as the Act). The matter has been placed before a Full Bench as it was felt that *State of Andhra Pradesh v. Sri Krishna Coconut and Co*[1]*.,* rendered by a Division Bench of this Court required reconsideration.

2. The material facts of the case are within a short compass and may be briefly set out. The respondent is a firm of merchants carrying on business in groundnuts. For the accounting years 1952-53, and 1953-54 it submitted returns in Form A and paid sales tax tentatively every month which was to be adjusted after looking into the accounts of the firm and after determining the total taxable turnover of the amount of tax payable by the firm. Finally, the balance of tax was paid for the two accounting years in September 1953 and June 1954 respectively. The return submitted by the firm for 1952-53 included an amount of Rs. 3,45,488-12-10 representing the purchase of groundnuts. More than a year after the last payment, the firm laid an action (O.S. No. 10 of 1956) for refund of Rs. 8,349 made up of Rs. 6,558 the amount paid by way of tax and Rs. 1,791 being the interest accrued thereon at twelve per cent per annum, the basis of the suit being that the Department included in the plaintiff's turnover spies of groundnuts which were exempted and collected taxes thereon, unauthorisedly. The answer of the defendant was that the suit was incompetent having regard to the provisions of Section 18-A of the Act and that, in any event, the turnover in question represented the purchase of groundnuts made by the plaintiff, that the assessment was made on the basis of the returns submitted in Form A and that consequently it was not open to the plaintiff to plead that he had furnished the Department with sales turnover and not purchase turnover.

3. The trial court entered judgment for the plaintiff in the view that the plaintiff included sales of groundnut in the turnover in ignorance of the rules relating to

[1](1960) 1 Andh WR 279

groundnut and that the Sales tax authorities must be deemed to have collected tax on the sales of groundnuts illegally. The trial Judge also over-ruled the objection relating to the maintainability of the suit being of opinion that the suit was maintainable because there was no express prohibition against filing of the suit. It is this judgment of the Subordinate Judge that is assailed before us.

4. The principal contention that is pressed upon by the learned Government Pleader is that a Civil Court has no jurisdiction to entertain the suit by reason of Section 18-A of the Act. The learned Government Pleader urges that the legislature introduced this provision of law in the year 1951 with the object of taking away the jurisdiction of a Civil Court, as the Act has created a machinery for the law and collection of tax and for dealing with the grievances of the assesses.

5. As the controversy centres round Section 18-A, it is necessary to look at the terms of that Section. It reads :

> "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."

6. We will first consider the scope and ambit of the section unhampered by any decided cases. It is manifest from the language of the section that no challenge to an assessment could be entertained in the shape of a suit or any proceeding except in the manner provided in the Act. There is no other provision in the Act which confers a right of suit on an assessee. But the Act has provided remedies by way of appeal to the Commercial Tax Officer or the Deputy Commissioner of Commercial Taxes, as the case may be, a further appeal to the Sales Tax Appellate Tribunal and a revision to the High Court. Obviously, the legislature wanted to oust the jurisdiction of Civil Courts to set aside or modify an assessment in view of the machinery expressly provided by the Act to impugn an assessment. The scheme of the Act seems to be that all questions relating to the validity of an assessment should be agitated before a hierarchy of Tribunals constituted for the purpose and they should not form the basis of proceedings in a Civil Court which are likely to delay the levy and collection of the sales tax. The section ex facie excludes the jurisdiction of a Civil Court to set aside or modify an assessment.

7. The next question is, does a suit for refund of sales tax alleged to have been illegally collected fail outside the purview of Section 18-A of the Act ? In our considered judgment Section 18-A applies to suits of that nature as well. Although the suit as framed is for recovery of amounts illegally collected by way of tax, it involves a question as to the validity of the assessments. In the assessment is not open to exception, the levy could not be characterized as illegal. If the impost could not be questioned as being illegal, the assesses could not get a refund of the amount. In other words, so long as the assessment stands, the tax collected on the basis of it could not be refunded. It is not so much the form as the substance of it that determines the nature of the suit. In a suit for re-payment of the money paid by an assessee, any Court or Tribunal has necessarily to adjudicate upon the legality of the assessment. On the language of that section, we are inclined to the view that Section 18-A governs also a suit for refund of tax alleged to have been illegally collected from an assessee.
To hold it otherwise, would be to deprive the section of its practical content. Further, the acceptance of the opposite view will produce startling results. Even after objections to an

assessment were disallowed by a tier of tribunal and the High Court to which a revision lies against the order of the Sales Tax Appellate Tribunal or even by the Supreme Court on appeal there from, it would be open to the assesses to invite a District Munsiff to adjudicate upon the same question already settled by the highest tribunal in the land. It is open to a Civil Court even of the lowest cadre in such an event to come to a contrary conclusion. We do not think that such an anomalous position was contemplated by the legislature. In our considered opinion, not only suits to set aside or modify an assessment but suits for recovery of money collected by way of sales tax which involves the consideration of the legality of the assessment fall within the prohibition enacted in Section 18-A.

8. We will now turn to the decisions bearing on this topic. In (1960) 1 Andh WR 279 which led to the reference of the matter to the Full Bench, the suit was brought for refund of the sales tax on the ground that the turnover was not exigible to sales tax as it was covered by Article 286(1)(a) of the Constitution. One of the points that arose for decision in that case was whether the Civil Court's jurisdiction to entertain the suit was excluded by virtue of Section 18-A of the Act. The learned Judges answered the question in the negative holding that Section 18-A does not apply inasmuch as the suits were not to set aside or modify the assessment as contemplated by that section and that such suits were cognizable by Civil Courts, as laid down in *Secy. of State v. Mask and Co*[2]*.,*

9. We shall see whether 1940-2 Mad LJ 140 (supra) lends any countenance to the proposition contained, in (1960) 1 Andh WR 279. In that case, a firm of merchants with their head-office in the province of Madras imported betel nuts from Java into British India. The Customs authorities assessed these consignments as boiled betel-nuts subject to duty and tariff value. The importers appealed to the Collector of Customs contending that the goods should be assessed at a lower rate, namely, as raw betel-nuts subject to duty as valorem.
The appeal was dismissed and the matter was taken in revision to the Government of India. The Government of India confirmed the order of the Collector. Thereupon, the merchants sought to recover the excess amount collected from them by levying duty upon the tariff value. Various issues were raised, one of which was whether the court had jurisdiction to entertain the suit and whether it was barred by the provisions of the Sea Customs Act (Act VIII of 1878).

10. Section 188 of the Sea Customs Act recites :

> "Any person deeming himself aggrieved by any decision or order passed by an officer of Customs under this Act may within three months from the date of such decision or order, appeal therefrom to the Chief Customs Authority, or, in such cases as the Local Government directs, to any officer of Customs not inferior in rank to a Customs-Collector and empowered in that behalf by name

[2]1940-2 Mad LJ 140

> or in virtue of his office by the Local Government."
>
> * * * * * * * * *
>
> "Every order passed in appeal under this section shall, subject to the power of revision conferred by Section 191, be final."

11. Having held that the decision of the Assistant Collector fell within the words of Section 188 of that Act in view of the terms thereof, their Lordships proceeded to consider whether the order of the Collector dismissing the appeal under Section 188 and affirmed by the Governor General in Council on an application under Section 191, excluded the jurisdiction of the Civil Courts to entertain the suit. Their Lordships ruled that such a suit was incompetent as "the jurisdiction of Civil Courts is excluded by the order of the Collector of Customs on the appeal under Section 188." It was observed by their Lordships that the Sea Customs Act contained a "precise and self-contained Code of Appeal" in regard to obligations created by the Act itself and as respects remedies to the aggrieved, parties. They referred the following principle with approval laid down by Willes, J. in *Wolverhampton New Waterworks Co. v. Hawkesford*[3]

> "Where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it..... With respect to that clause it has always been held, that the party must adopt the form of remedy given by the statute."

Their Lordships added :

> "It is difficult to conceive what further challenge of the order was intended to be excluded other than a challenge in the Civil Courts."

12. Thus, it is plain that these remarks of the Judicial Committee are consistent only with the theory that when the legislature created obligations and provided an exclusive code for determination and also gave remedies, the party must avail himself of the remedies so provided and cannot have resort to an alternative jurisdiction.

13. Presumably, it is the following passage that was the basis for the conclusion of the learned Judges in (1960) 1 Andh WR 279 that suits of this description are cognizable by a Civil Court :

> "It is settled law that the exclusion of 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...."

14. We do not feel that this passage could give rise to the argument that if an assessment is contrary to law a suit could be entertained in a Civil Court. The

[3](1859) 6 CB (NS) 336 at p. 358 : 141 ER 486

sentence that "where the provisions of the Act have not been complied with" etc. may only mean that a suit is cognisable where the provisions leading up to the assessment have been disregarded, in other words, where the procedure laid down by the statute has not been complied with. Their Lordships would not have intended to lay down that every order of the Tribunal not in conformity with law would furnish a basis for instituting a suit or a proceeding in a Civil Court.

In that very case, the order of the Customs Collector passed on appeal was challenged as being illegal. We are not persuaded that this pronouncement of the Privy Council establishes the proposition enunciated in (1960) 1 Andh WR 279.

15. *Collector of Customs v. Lala Gopikissen*[4], relied on by the learned Counsel for the respondent which also dealt with the provisions of the Sea Customs Act, does not carry the matter any further. It is to the same effect as (1940) 2 Mad LJ 140 .

16. The same could be said of *Ganesh Mahadev v. Secy. of State*[5] called in aid by the respondent. The subject matter of the appeal before a Bench of the Bombay High Court was an order of confiscation under the provisions of Section 182 and of fine under Section 167 of the Sea Customs Act. The Collector, without taking, any evidence himself and without hearing the plaintiff, passed the order. The plaintiff instituted a suit to recover the value of the silver confiscated and the amount of fine imposed. The trial court dismissed the claim in the opinion that it had no jurisdiction to hear the suit and that the Collector's decision was final. On appeal, the High Court held that the jurisdiction of the Civil Court to try the suit was not excluded, if it appeared that there was no legal adjudication of the matter by the Collector in accordance with the provisions of the Sea Customs Act. The basis of the suit was that there was no adjudication as contemplated by the Sea Customs Act and it was as if that Act was not put into operation. It is in that context that the learned Judges of the Bombay High Court remarked that the question whether there had been a legal adjudication in accordance with the provisions of the Act was not a question excluded from the cognisance of the ordinary Civil Courts. The learned Judges said :

> "The case, therefore, must be remanded to have it determined in the first instance whether there has or has not been an adjudication. If there has been an adjudication, I think the Civil Court has no jurisdiction."

Even this test does not seem to be correct, having regard to the pronouncement of the Privy Council in *Raleigh Investment Co. Ltd. v. Governor-General in Council*[6], That apart this case does not lend much assistance to the respondent.

17. We will now turn to AIR 1947 PC 78 which dealt with a provision of the Indian Income Tax Act and which is in pari materia with Section 18-A of the Act. The facts of that case were these : Raleigh Investment Co. Ltd. brought an action on the original side of the High Court of Calcutta claiming a declaration that certain provisions of the Indian Income Tax Act, 1922 as amended in 1933 on which the assessment was based were ultra vires and as such the assessment was illegal, for repayment of the amount

[4]AIR 1955 Mad 187 [6] AIR 1947 PC 78
[5]ILR 43 Bom 221

paid under protest and for an injunction restraining the Income Tax Department from making the assessment in future.

One of the issues raised related to the competency of the suit. The High Court of Calcutta decreed the suit disallowing the objection as to the maintainability of the suit. But this was reversed by the Federal Court on appeal. The Judicial Committee confirmed the decision of the Federal Court. The decision of their Lordships was founded mainly on Section 67 Of the Indian

Income Tax Act which runs as follows :

> "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 proceeding shall lie against any officer of the Government for anything in good faith done or intended to be done under this Act."

The ratio decidendi of that case applies with full vigour to cases under Section 18-A which, as we have already said, is analogous to Section 67 of the other Act. While affirming the judgment of the Federal Court, their Lordships observed :

> "In construing the section it is pertinent in their Lordships' opinion, to ascertain whether the Act contains machinery which enables the assessee effectively to raise in the Courts the questions whether a particular provision of the Income Tax Act bearing on the assessment made is or is not ultra vires. The presence of such machinery, though by no means conclusive, marches with a construction of the section which denies an alternative jurisdiction to enquire into the same subject-matter. 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 questioning 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.

In their Lordships' view, it is clear that the Income Tax Act, 1922, as it stood at the relevant date, did give the assessee the right effectively to raise in relation to an assessment made upon him the question whether or not a provision in that Act was ultra vires. Under Section 30, an assessee whose only ground of complaint was that effect had been given in the assessment to a provision which he contended was ultra vires might appeal against the assessment. If he were dissatisfied with the decision on appeal the details relating to the procedure are immaterial the assessee could ask for a case to be stated on any question of law for the opinion of the High Court and if his request were refused, he might apply to the High Court for an order requiring a case to be stated and to be referred to the High Court (See section 30 and *Secy. of State v. Meyyappa Chettiar*[7], It cannot be doubted that included in the questions of law which might be raised by a case stated is any question as to the validity of any taxing provision in the Income Tax Act to which effect has been given in the assessment under review. Any decision of the High Court upon that question of law can be

[7]4 ITR 341 : ILR (1937) Mad 211

reviewed on appeal. Effective and appropriate machinery is therefore provided by the Act itself for the review on grounds of law of any assessment. It is in that setting that Section 67 has to be construed." Their Lordships seem to have been of opinion that an express provision might not be necessary to oust the jurisdiction of a Civil Court to set aside or modify an assessment having regard to the scheme of the Act seating up a machinery for the levy and collection of taxes and for the enforcement of remedies available to an aggrieved assessee. Their Lordships added :

> "The only doubt, indeed, in their Lordships' mind, is whether an express provision was

necessary in order to exclude jurisdiction in a Civil Court to set aside or modify an assessment."

18. This reasoning of their Lordships is equally applicable to the Madras General Sales Tax Act. It contains provisions parallel to those to be found in the Indian Income Tax Act enabling the assessee to raise objections to the assessment by means of an appeal to the Commercial Tax Officer or the Deputy Commissioner of Commercial Taxes, as the case may be a further appeal to the Sales Tax Appellate Tribunal and a revision to the High Court. Any decision of the High Court on a question of law could also be reviewed in appeal by the Supreme Court. As under the Income Tax Act, there is a hierarchy of Tribunals created by the Sales Tax Act before which the legality or the validity of an assessment could be agitated.

19. The following observations of their Lordships of the Privy Council in AIR 1947 PC 78 at p. 81 under (render ?) the test as to the competence of a suit propounded in ILR 43 Bom 221 at page 228 : (AIR 1919 Bombay 30 at p. 32) which has already been adverted to unsound.

> "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 enquiry into the merits of the assessment is, on the appellant's construction, to determine whether jurisdiction existed to embark on the enquiry 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."

After this pronouncement, it is difficult to posit that the jurisdiction of a Civil Court to entertain a suit is left intact in cases of invalid or illegal assessments.

20. The statement of law contained in *Commissioner of Income Tax v. Tribune Trust*[8], is to a similar effect. This is what their Lordships say :

[8] AIR 1948 PC 102 at p. 107

> "Their Lordships are of opinion that the only remedies open to tax payer, whether in regard to appeal against assessment or to claim for refund are to be found within the four corners of the Act. This view of his rights harmonies with the provisions of Section 67, to which reference has already been made, that no suit shall be brought in any Civil Court to set aside or modify any assessment made under the Act. It is the Act which prescribes both the remedy and the manner in which it may be enforced."

21. The judgment of the Madras High Court in *Public Prosecutor v. Ramalingam*[9], also supports the view indicated by us. That case had to deal with Section 16-A of the Madras General Sales Tax Act, which is very much similar to Section 18-A, which runs as follows :

"The validity of the assessment of any tax, or of the levy of any fee or other amount, made under this Act, or the liability of any person to pay any tax, fee or other amount so assessed or levied shall not be questioned in any Criminal Court in any prosecution or other proceeding, whether under this Act or otherwise."

22. It was laid down by the Full Bench that it was not open to a person prosecuted under Section 15(b) of that Act for failure to pay the tax to raise any objection which could have been raised before the Tribunal created by the state by virtue of Section 16-A of the Act. The doctrine of *Public Prosecutor v. Thimmiah*[10], rendered by a Full Bench of this Court is in consonance with the principle of AIR 1958 Madras 544 (FB). It was decided in that case that when once the impost was finally determined as laid down in the Act, it was not competent for any Tribunal or Court to reopen that question in any proceeding, any mode of challenging the assessment otherwise than by the use of the machinery set up in the Act being inconsistent with the intention of the legislature.

23. In *Palanisami v. State of Madras*[11], Ramaswami, J. of the Madras High Court expressed the opinion that Section 18-A of the Madras General Salts Tax Act withdrew from the purview of Civil Courts suits for setting aside or modifying assessments made under that Act.

24. The learned counsel for the respondent cited to us some decisions of the Madras High Court which construed the provisions of Section 354 of the Madras District Municipalities Act which laid down that a suit could be filed in a Civil Court notwithstanding the fact that the provisions of that Act were violated. Those cases are not in point because that very section required the provisions of the Act to be, in effect, complied with. The other rulings relied on by the learned counsel for the respondent do not have much bearing on the present enquiry and, therefore, they need not be adverted to in this context.

25. It was then contended by Sri Ramamohana Rao that Section 18-A would come into operation only when the assessment could be justified with reference to the

[9] AIR 19581 Mad 544 (FB)
[10] ILR (1959) Andh Pra 121 : AIR 1959 And Prad 207 (FB)
[11] 1959-10 STC 207

provisions of the Act. According to the learned counsel, this consequence flows from the expression "made under this Act." The argument presented is that under the relevant rules, groundnut could be subject to tax only at the purchase point and not at the sale point and that it was not within the jurisdiction of the Sales Tax Officer to tax the turnover in dispute as it represented the sales of groundnut. We do not think that that expression has the effect attributed to it. That only has relation to the actual existence of the assessment and not to the accuracy of the assessment in point of law. It could not be posited that there is any lack of inherent jurisdiction in the Commercial Tax Officer in levying this tax. It is for the Department to determine whether the turnover consisted of purchases or sales. It would not, therefore, be said that there is want of initial jurisdiction and the assessment is a nullity. At the most, such an assessment could be regarded as an illegal one.

26. While interpreting the expression "made under the Act" in AIR 1947 PC 78 at p. 81 their

Lordships said :

> "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 the result of that use, is the test."

These remarks of their Lordships contain the answer to the contention of the respondents. The mere fact that tax was levied wrongly or without justification would not take it out of the sweep of Section 18-A of the Act. The alleged illegality of an assessment does not go to the root of the jurisdiction of the Tribunals which under the Act are invested with jurisdiction in that behalf. The Bench decision in 1960-1 Andh WR 279 winch gives some support to the stand taken by the respondent did not pay sufficient regard to the language of that section or to the reasoning of the Privy Council in 1940-2 Mad LJ 140 . Further, the attention of the learned Judges does not seem to have been drawn to the Privy Council ruling in AIR 1947 PC 78 or to the Full Bench decision of this Court in ILR (1959) Andh Pra 121 : AIR 1959 Andhra Pradesh 207 (FB). In the circumstances, we feel that (1960) 1 Andh WR 279 does not contain sound law and we express cur dissent therefrom.

27. Lastly, it was maintained by Sri Ramamohana Rao, learned counsel for the respondent, that as the disputed transactions were comprised in the turnover under a mistake of law, the respondent could claim the benefit of Section 72 of the Indian Contract Act. It is urged that Section 72 does not confine to mistakes of fact but takes in mistakes of law also within its scope. To support this proposition, reliance is placed on *Sales Tax Officer v. Kanhaiya Lal*[12], That position is now incontestable. However, that does not in any way concern the present controversy, since the question here is not whether any payment made by mistake could be recovered by virtue of Section 72 of the Contract Act. That section does not prescribe the procedure or the forum for enforcing that right. That section is not in any way inconsistent with the concept of exclusion of jurisdiction of Civil Courts in certain contingencies. Even in such cases, resort could be had to the Tribunals set up under the Act for repayment of money paid by mistake.

[12] AIR 1959 SC 135

28. Moreover, there is no scope for invoking Section 72 of the Contract Act in this case, having regard to the fact that no such case is set up in the plaint.

29. The trial Judge relied on some rulings of the Madras High Court in support of his conclusions that Section 18-A of the Act did not relate to refund of taxes illegally collected. The learned Judge erred in relying upon these cases, as they dealt with Section 18 of the Act which enacts :

> "No suit shall be instituted against the State Government and no suit, prosecution or other proceeding shall be instituted against any officer or servant of the State Government in respect of any act done or purporting to be done under this Act, unless the suit, prosecution or other proceeding is instituted within six months the date, of the act complained of.
> ....."

30. It is seen that Section 18 does not enact any prohibition against institution of suits or proceedings in a Civil Court. It prescribes only certain limitations. In fact, that section denotes that suits could be instituted within a limited period. Therefore, the decisions rendered with reference to that section can have no material bearing on the enquiry relating to Section 18-A of the Act. Finally, we hold that suits of all description which impugn an assessment are hit at by Section 18-A of the Act. That is sufficient to dispose of the appeal. We will not proceed to adjudicate on the merits of the appeal, as it was argued at length.

31. The judgment of the trial court is equally unsubstantial on the merits. The Subordinate Judge remarked that the Sales Tax authorities must be deemed to have collected the tax on the sales of groundnut illegally. We do not know what scope there is for introducing a fiction into this matter. At the outset, it must be remembered that the plaintiff included the transaction in question in the return submitted by it in form A and that it was making payments tentatively every month to be adjusted after the final assessment and the plaintiff made the final payment in September 1953 for the accounting year 1952-53 and in June 1954 for the accounting year 1953-54. Thus, the firm voluntarily made the return and paid the taxes and had not preferred an appeal either to the Deputy Commissioner of Commercial Taxes or to the Sales Tax Appellate Tribunal. In other words, the firm had not availed itself of any of the remedies provided under the Sales Tax Act and no action was taken by it till February 1956, when the suit was filed. In fact, the plaint proceeds on the assumption that the Sales Tax authorities collected the taxes unauthorisedly, and makes no reference to the plaintiff firm itself haying submitted returns and the tax having been computed on the basis of such returns. The plaint does not advert to any mistake alleged to be responsible for making the payments. The averments therein are that the transactions in dispute represent sales of groundnuts for two years and that the plaintiff firm merely acted as a commission agent for their principals and the transactions were not entered into on their own behalf.

32. Thus, it is seen that the plaint is silent as to any mistake committed by the firm either in including the transactions in the return submitted by it or in the payments of tax between 1952 and 1954.

33. We shall now go into the question as to whether the transactions in question constitute sales or purchases subject to tax under the relevant rules. In the witness box the plaintiff described the business relating to these transactions thus :

> "The person who brings the goods to our shop for sale will be sitting in the shop. The intending purchaser will be sent for. The transaction is settled as soon as the seller agrees to the price offered by the purchaser. Aterwards, the goods will be weighed. Hence the sales will be effected in the presence of the sellers."

The import of this evidence is that the growers brought the groundnut to the plaintiff's shop and the plaintiff merely acted as a commission agent in effecting the transactions. It may be incidentally mentioned that it was not the plaintiff's case that it acted as a broker. The definite case sought to be made out in the plaint was that it was a commission agent. On this evidence, there can be little doubt that it was the purchases made by the firm either on its own behalf or on behalf of some one else that was included in his return.

34. Having regard to the proviso to the definition of 'turnover' contained in Section 2(i) of the Madras General Sales Act, 1939, sales of agricultural or horticultural produce grown by the seller himself are exempt from tax and that is the reason, why the purchasers of such commodity from the growers are made exigible to tax. Therefore, whoever has purchased the groundnut, which is the agricultural produce whether it be the plaintiff firm or its principal is liable to pay the tax as buyer thereof in view of the relevant turnover and assessment rules. It is significant that the evidence of P.W. 1 as extracted in the judgment also establishes that the firm treated it as purchase tax. "P.W. 1 denies having collected any sales tax from his vendors in respect of those transactions."

35. We have next to consider whether the plaintiff-firm can escape liability by alleging that it acted only as a commission agent. In the decision of this question, we will have to take into account the definition of 'dealer' in Section 2(b) of the Madras General Sales Tax Act (IX of 1939), which is as under :

> "dealer" means any person who carried on fee business of buying, selling, supplying or distributing goods, directly, or otherwise, whether for cash or for deferred payment, or for other valuable consideration, and includes -
> (i) xx xx xx xx xx
> (ii) xx xx xx xx xx
> (iii) any commission agent, a broker, a Del Credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carried on the business of buying, selling, supplying or distributing goods on behalf of disclosed or undisclosed principal;"

36. It is manifest that this definition comprehends a commission agent and he is, therefore, subject to tax. It is true that this definition embracing a commission agent was amended only in the year 1955. But that does not materially alter the situation because even independently of the amendment that definition was construed to have included a commission agent.

37. In *Radhakrishna Rao v. Province of Madras*[13], a Full Bench of the Madras High Court held that a commission agent entrusted with the goods by his principal to transfer property in the goods to the buyer who obtains delivery from such agent himself even without being aware of the identity of the principal, will come within the words of 'dealer' under the Madras General Sales Tax Act liable to sales tax under Section 3 but for the exemptions mentioned in Section 8. Presumably, the amendment was introduced to give legislative recognition to the Full Bench ruling.

38. Thus, the assessee will be regarded as a 'dealer' for purposes of the Act unless otherwise exempted. That exemption is available to the assessee by reason of Section 8 which enacts :

> "The State Government may, on application and on payment of such fee as may be prescribed in that behalf, license any person under this section who for an agreed commission or brokerage buys or sells on behalf of known principals specified in his accounts in respect of each transaction and may exempt from the tax or taxes payable under Section 3 such of his transactions as are carried out in accordance with the terms

and conditions of his license :
* * * * * * *

39. Advantage could be taken of this section by a commission agent by obtaining a license. Further, the benefit of this section will be available only to agents who act on behalf of known principals specified in their accounts. It is also essential that he should fulfill the terms and conditions of such a license. In this case, admittedly, the respondent firm had not taken a license for doing commission business. Nor do their accounts disclose that they had acted only as commission agents. Therefore, Section 8 is inapplicable and the plaintiff-firm cannot claim any exemption. That being so, its turnover is liable to be taxed.

40. Curiously enough, the Subordinate Judge gets over this difficulty by remarking :

> "One of the contentions of the defendant it that the plaintiff has not taken out a license under Section 8 of the Act for doing business as commission Agent. But that cannot be taken into account in this suit. If the plaintiff has not taken any license and has done commission business without taking a license from the Government, the Government can proceed against the plaintiff by taking suitable action."

The Subordinate Judge has overlooked the fact that but for the exemption under Section 8 every commission agent will be considered to be a 'dealer' within the words of Section 2(b) of the Act and his turnover is exigible to tax. In this case, all those requirements are absent. That being so, the Plaintiff-firm cannot escape liability to pay tax on its turnover. It is surprising that the Subordinate Judge should have thought that even if license is not obtained by a commission agent he would be exempt from payment of tax in the teeth of Section 2(b) and Section 8 of the Madras General Sales

[13]1952-3 STC 121 (FB)

Tax Act.

Again he did not have any regard to the fact that the plaintiff had included the disputed turnover in the returns submitted by the firm and paid taxes voluntarily and that there was no cogent evidence in support of the theory that these were done under any mistake. The Subordinate Judge disposed of the whole matter by remarking that the authorities must be deemed to have collected the tax on sales of groundnut illegally. To say the least, the judgment under appeal is very unsatisfactory and discloses a straining of every circumstance in favour of the plaintiff. We have, therefore, no option but to reverse it and allow the appeal.

41. In the result, the appeal is allowed with costs and the suit is dismissed with costs. The memorandum of cross-objections claiming 12 per cent per annum is also dismissed with costs.
Appeal allowed.