GUJARAT HIGH COURT

T.P. Kumaran

Vs.

R. Kothandaraman

Civil Application No. 340 of 1961

(J.M. Shelat and M.R. Mody, JJ.)

07.10.1961

JUDGMENT

Shelat, J.

12. The learned Advocate General raised three preliminary contentions :

> (1) that this Court has no jurisdiction to issue a writ of certiorari as against the Union of India;
> (2) that the order of the Commissioner merged in the final order of the President as the appellate authority, and, therefore, the order of the President rejecting the appeal of the petitioner and thereby confirming the order of the authority of the first instance was the only effective and outstanding order, and that being so, no writ can be issued even against the Commissioner or against his order of removal,
> (3) that assuming that there was no merger, there would be two outstanding orders and this Court would not issue a writ against the Commissioner as that would be putting the Commissioner in an embarrassing situation, in that, he would have to commit a breach of either the order of this Court or that of the appellate authority.

Mr. Vakil, on the other hand, urged that there was no merger of the order of the authority of the first instance into the order of the appellate authority, and that the only effective order was the order of the Commissioner, the appellate order being merely one of dismissal of the appeal and confirming the order of the Commissioner. He also urged that the order of the Commissioner was a nullity as it contravened the principles of natural justice; that there could be no effective order of an appellate tribunal over an order which was a nullity and, therefore, the order of the Commissioner being a nullity, this Court would have jurisdiction to set aside that original order.

13. There has been considerable controversy on the question as to the effect of an appellate order

upon the order passed by the authority of the first instance in a departmental inquiry. It was urged that when an appellate authority passes its order in an appeal against the order of the authority of the first instance dismissing the appeal and thereby confirming the original order, the original order merges or becomes incorporated in the order of the appellate authority, and in that event, it is the order of the appellate authority alone which is the effective and outstanding order. Unlike a tribunal exercising revisional jurisdiction, an appellate Court or authority has no discretion not to admit an appeal if an appeal ties, nor has it a discretion not to grant relief if the appellant is entitled to a relief in law. That would not be the position in the case of a Revisional Court. An appeal, besides, is a continuation of the suit or the original proceeding. An appellate Court can do any of the following three things :

(1) dismiss the appeal,
(2) allow the appeal and set aside the decree and pass its own decree, or
(3) alter or modify the decree.

Since an appeal is a continuation of a suit or an original proceeding, a decree passed in such a suit or proceeding gets merged in the appellate decree. When an appeal is dismissed, the appellate Court confirms the decree passed in the suit, and it is the decree passed by the appellate Court or the tribunal that becomes the subject matter of a further appeal, if any, or of an execution proceeding. When it allows an appeal, the original decree is set aside and the appellate Court passes its own decree or order. When it modifies or alters the original order or decree, the appellate Court again passes its own decree. On the other hand, the process is different when a Revisional Court passes its order. When a revision is rejected, all that it means is that the Revisional Court declines to interfere with the order passed by the lower Court or authority. When the Revisional Court interferes, it sets aside or modifies the order of the lower Court or authority but there is no merger of the original order in the order passed by the revisional authority. Therefore if it is found that the order passed by the Commissioner merged into the order passed by the President as the appellate authority, it would be the latter order that would be effective and enforceable. In that event, this Court would not have jurisdiction to issue a writ either against the Union of India or even against the Commissioner. Against the Commissioner no writ would be issued as his order would merge in the order of the President and against the Union of India, as this Court cannot issue a writ beyond its territorial jurisdiction.

14. As regards the first contention of the learned Advocate General, there is a line of decisions which accepts the proposition that a decree of the lower Court merges on appeal into the decree of the appellate Court. An examination of these decisions clearly shows that the argument that when an appeal Court dismisses an appeal and confirms the decree of the trial Court, the decree passed by the trial Court does not merge and it is that decree that remains outstanding, is not correct. As early as 1865 in *Bhanushankar Gopalram v. Raghunathram Mangairam*[1], the High Court of Bombay held that after a decree of a District Judge is confirmed by the High Court in appeal, no subordinate Court has the power of making any alteration whatever in it and the

proper course would be to apply to the High Court itself to review its decree. It would follow from this decision that after the appellate Court confirms the decree of the trial Court, the decree is no longer the decree of the trial Court but is of the appellate Court in which the original decree gets incorporated. Similarly, in *Shivlal Kalidas v. Jumaklal Nathiji Desai*[2], it was held that the only decree which existed for the purpose of execution after the High Court confirmed the decree of the Court below was the decree of the High Court into which that of the lower Court became incorporated. Again in *Nanchand v. Vithu*[3], Jardine and Ranade, JJ. held

[1] 2 Bom HCR 101 [3] ILR 19 Bom 258

[2] ILR 18 Bom 542

that where the High Court confirms, on appeal, the
decree of a subordinate Court, such confirmation has the same effect as an order of reversal would have had, in so far as it leaves the decree of the High Court as the only decree which exists for the purpose of execution, and the decree of the lower Court becomes, incorporated with it. In that case, the plaintiff obtained a decree for the redemption of certain lands on payment within three months of the amount due to the mortgagee, which was to be ascertained in execution proceedings. Against this decree, the defendant appealed to the High Court. Pending the appeal, the plaintiff presented a Darkhast for execution on the 4th of October 1888. This Darkhast was dismissed, as the plaintiff failed to produce a copy of the mortgage bond within the time allowed by the Court. The three months allowed by the decree for payment expired on the 23rd of October 1888. On the 11th of February 1890, the High Court confirmed the decree and on the nth of April 1890 the plaintiff presented a fresh Darkhast for execution. Both the lower Courts dismissed this Darkhast on the ground that the dismissal of the first Darkhast operated as res judicata. It was held that the plaintiff was entitled to execute the decree, and that his second Darkhast was not barred either by limitation or on the principle of res judicata. The principle upon which this decision was based was that where a decree of the lower Court was either confirmed or reversed, the effect of the decision of the appellate Court was that the decree of the Court below merged in it. Otherwise, it could not be said that the decree of the appellate Court held the field and that that alone was the subject matter of execution. It is on that principle again that it was said that limitation would begin to run from the date of the appellate decree and that the second application for execution was not barred either by limitation or by res judicata. In *Abdul Majid v. Jawahir Lal*[4], their Lordships of the Privy Council observed that an order of His Majesty in Council dismissing an appeal for want of prosecution was not an order adopting or affirming the decision appealed from, and therefore, when such an order was made, the only decree capable of execution was the decree appealed from. Answering a contention on behalf of the respondent, the Privy Council stated that the only decree for sale that existed was the decree dated the 8th of April, 1893, passed by the High Court of Allahabad. The operation of that decree was never stayed and there was no decree of His Majesty in Council in which it had become merged. It is true that in this decision, their Lordships of the Privy Council were concerned with the question of limitation but the proposition laid down there that limitation would commence from the date of the appellate decree must mean that it was because the decree of the trial Court

merged into the appellate decree that the period of limitation could be calculated from the date of the appellate decree. In that case the High Court of Allahabad had dismissed an appeal confirming the decree of the lower Court on the 8th of April, 1893. The decree that was outstanding and operative was the decree therefore of the High Court. The Privy Council had dismissed the appeal against the decree passed by the High Court on the ground of want of prosecution. On these facts it was held that the order of dismissal by the Privy. Council could not be considered to be an order adopting or affirming the decision appealed from and therefore the only decree which was capable of execution was the decree appealed from, that is to say, the decree passed by the High Court of Allahabad in appeal against the judgment and decree passed by the trial Court. As observed in *Mohamed Oomar v. S. M. Noorudin*[5], it is only

[4]16 Bom LR 395 : (AIR 1914 PC 66) [5]54 Bom LR 28 : AIR 1952 Bom 165

on a judicial determination that the order of the lower Court becomes merged in the decision of the Court of appeal. No merger takes place when the Court of appeal does not judicially determine the appeal but dismisses it oil a mere preliminary ground, such as limitation or maintainability. If the appellate Court dismisses an appeal on such preliminary ground, the order that would stand would be the order of the lower Court and not the order of the Court of appeal. This principle of merger was reiterated by Chagla, C. J., in *Hussain Sab v. Sitaram Vighneshwar*[6], where it is observed that when an appeal is summarily dismissed by the High Court under Order 41, Rule 11, of Civil Procedure Code, the original decree from which the appeal was preferred remains untouched and it is the original decree which is the substantive decree. If on the other hand, a decree of confirmation is passed by the appellate Court, the decree of the trial Court merges in the decree of the appellate Court. The decree which is in existence and which can be executed in such a case is the decree of the appellate Court, and not the decree of the trial Court. He also observed that the fact that the appellate Court does not vary the decree of the trial Court does not make any difference to the legal position that ultimately it is the decree of the appellate Court which is the substantive decree and which must be amended if an amendment is sought. This principle of merger in respect of decrees and orders passed in suits and proceedings filed under the Civil Procedure Code whether the original decrees are confirmed as a result of the dismissal of the appeals or whether they are reversed or modified is thus accepted in the authorities referred to above.

15. The next point is whether the principle of merger applies to other proceedings such as departmental inquiries and inquiries held under special statutes. Our attention was drawn to the decision of a Division Bench of the High Court of Bombay in *K. B. Sipahimalani v. Fidahussein Vallibhoy*[7], That was a case arising under the Administration of Evacuee Property Act, 1950. There the Custodian of Evacuee Property had passed on appeal an order confirming the order of the Assistant Custodian, Bombay, made under the aforesaid Act. A revision application to the Custodian-General, New Delhi, against the order of the Custodian was dismissed. A petition under Article 226 of the Constitution of India was presented to the High Court for a writ of certiorari challenging the order of the Custodian and it was contended that the order of the Custodian had come merged in the order of the Custodian-General, and as the Custodian-

General's office was in New Delhi, the High Court had no jurisdiction to issue a writ against the Custodian-General. It was held that what the petitioner was challenging was the order of the Custodian which was the effective and subsisting order, and not the order of the Custodian-General which merely in revision refused to interfere with the order passed by the Custodian, and that as the order of the Custodian was passed within jurisdiction, the petition was maintainable. The decision makes a distinction between an appellate jurisdiction and a revisional jurisdiction and on the basis of that distinction it was observed that when the revisional Court interferes with the order of the Court below, the result is not that the order of the lower Court is merged in the order passed by the revisional Court, but as the result is that the order of the revisional Court sets aside or modifies the order of the lower Court. In the case of an appeal, however, when an appeal is dismissed the appellate Court confirms the decree of the trial Court, whereas in the case of a revisional Court when it dismisses the petition in revision all that it does is that it does not interfere with the order of the Court below. Chagla, C. J., who delivered the

[6]54 Bom LR 947 : AIR 1953 Bom 122

[7]58 Bom LR 344

judgment of the Division Bench, stated that the distinction between the appellate jurisdiction and revisional jurisdiction was vital and it did not follow that the principles which apply to an appeal must necessarily apply to a revision. He observed that the basis of the decisions that the order of the trial Court becomes merged in the order of the appellate Court is that there is a continuation of the suit and a rehearing of the suit by the appellate Court. The appellate Court has no discretion not to admit an appeal if an appeal lies or not to give relief to the appellant if he is entitled to it in law. This principle was accepted in *Humayun Abdullali v. M. G. Abrol*[8], which was a case arising under the Sea Customs Act, 1878. In *A. Thangal Kunju Musaliar v. M. Venkatachalam Potti*[9], Bhagwati, J., delivering the judgment for the Bench observed at page 255 of the Report while dealing with certain decisions of the Allahabad, Nagpur and Pepsu High Courts as follows :-

> "These decisions, however, are clearly not in point for in each of them, the order passed by the authority within the territories and accordingly within the jurisdiction of the High Court concerned had merged in the order of the superior authority which was located outside the territories and was, therefore, beyond the jurisdiction of that High Court. In that situation, a writ against the inferior authority within the territories could be of no avail to the petitioner concerned and could give him no relief for the order of the superior authority outside the territories would remain outstanding and operative against him".

It is true that these observations did not strictly arise from the questions arising in that case and were, therefore, obiter but as they are clearly, and specifically made and accept the principle of merger, they are binding upon us. Mr. Vakil however urged that their Lordships of the Supreme Court in this passage were not laying down the principle of merger but merely recited what the three High Courts had laid down in their respective decisions. That contention, however, does not appear to be correct for in the passage quoted above, their Lordships were clearly confirming the

position adopted in the decisions referred to therein, namely, that the order passed by the authority within the jurisdiction of the High Court concerned had merged in the order of the superior authority which was located beyond the jurisdiction of the High Court. Our reading of these observations of the Supreme Court is supported by the fact that the High Court of Rajasthan as also of Madras regarded in *Dungardas v. Custodian Rajasthan*[10], and *Collector of Customs, Madras v. A. H. A. Rahiman*[11], at page 503 these observations as specific clarification of the principle of merger. In AIR 1956 Rajasthan 163, Wanchoo, C. J., as he then was, regarded these observations as specific clarification of the effect of an appellate order on the original order and the original order getting incorporated or merged in the appellate order and considered his earlier view expressed in *Har Prasad v. Union of India*[12], as no longer good law. Similarly, in *East India Commercial Ltd. v. Collector of Customs*[13], Das Gupta, C. J., (as he then was) stated that the observations of the Supreme Court in Musaliar's case, AIR 1956 Supreme Court 246, must be taken to say that original order of the inferior authority ceases to have an independent existence once the appeal or revision is disposed of and that it merges in the order of the superior authority. In view of the weight of judicial opinion, the argument

[8] AIR 1960 Bom 329 [10] AIR 1956 Raj 163 [12] AIR 1954 Raj189
[9] AIR 1956 SC 246 [11] AIR 1957 Mad 496 [13] AIR 1960 Cal 1 (SB)

of Mr. Vakil that Musaliar's case, AIR 1956 Supreme Court 246, did not lay down the principle of merger cannot be accepted and it must be held that that case is an authority for the proposition that an original order of the inferior authority ceases to be an outstanding order once an appeal there from is disposed of. It must also be held that the same result would follow whether the appellate Court confirms the original order or reverses it or modifies it.

16. Mr. Vakil, however, argued that even if the Supreme Court expressed its opinion in Musaliar's case, AIR 1956 Supreme Court 246, that there would be a merger of the order of the authority of the first instance in the order of the superior authority on appeal, it has recently expressed a contrary view in the decision in *State of U. P. v. Mohammad Nooh*[14], Reliance was particularly placed on the observations made at page 95 of the Report, where their Lordships have observed that an order of dismissal passed in a departmental inquiry by an officer in the department and an order passed by another officer next higher in rank dismissing an appeal therefrom and an order rejecting an application for revision by the head of the department can hardly be equated with any propriety with decrees passed in a civil suit under the Code of Civil Procedure by the Court of first instance and the decree dismissing the appeal therefrom by an appeal Court and the order dismissing the revision petition by a yet higher Court, as was sought to be done by the High Court in that case. The reason given is that departmental tribunals of the first instance or on appeal or revision are not regular Courts manned by persons trained in law although they may have the trappings of Courts of law. It is next observed that while it is true that a decree of a Court of first instance may be said to merge in the decree passed on appeal therefrom or even in the order passed in revision, it does so only for certain purposes, namely, for the purpose of computing the period of limitation for execution of the decree as in *Batuk Nath v. Munni Dei*[15], or for computing the period of limitation for an application for final decree in a mortgage suit as in *Jowad Hussain v. Gendan Singh*[16], Their Lordships have then observed that the filing of an

appeal or revision may put the decree or order in jeopardy but until it is reversed or modified it remains effective. On this basis it was held that the original order of dismissal passed on April 20, 1948, was not suspended by the presentation of appeal, by the respondent nor was its operation interrupted when the Deputy Inspector General of Police simply dismissed the appeal from that order or the Inspector-General simply dismissed the application for revision. The original order of dismissal, was operative on its own strength and it did not gain any greater efficacy from the subsequent orders of dismissal of the appeal or the revision except for the specific purposes mentioned above. It was held that the order of dismissal having been passed before the Constitution and rights having accrued to the appellant State and liabilities having attached to the respondent before the Constitution came into force, the subsequent conferment of jurisdiction and powers on the High Court could have so retrospective operation on such rights and liabilities. In that case a departmental inquiry was held against a police constable by the District Superintendent of Police. He passed his order of dismissal on December 20, 1948. There was an appeal by the respondent against that order of dismissal but the appeal was dismissed on June 7, 1949. Both these orders were passed prior to the coming into force of the Constitution. A revision application was filed before the Inspector General of Police on April 22, 1950, and it was contended that the High Court of Allahabad had jurisdiction to entertain a writ petition against the order of

[14] AIR 1958 SC 86 [16] AIR 1926 PC 93

[15] AIR 1914 PC 65

dismissal as the order of

dismissal became final long after the Constitution came into force at which day the High Court of Allahabad had the power to issue a writ of Certiorari. It was in answer to this contention that their Lordships remarked at page 95 of the report that the only effect of the filing of the appeal or revision against the original order would be to put the decree or the order in jeopardy but that until such order was reversed or modified it would remain effective and therefrom the original order of dismissal passed on April 20, 1948, was neither suspended nor interrupted when an appeal from that order was dismissed or when the revision application was rejected by the Inspector-General of Police. That being so, and the order of dismissal having been passed before the Constitution came into force and rights having accrued to the appellant State and liabilities having attached to the respondent as a result of the original order, the High Court has no jurisdiction to interfere with such rights and liabilities and such interfering would amount to giving the provisions of Article 226 a retroactive operation. Strictly speaking, their Lordships were not dealing in that case with the principle of merger but were dealing with the question as to when the order of dismissal passed by the Inquiry Officer in that case acquired finality. As we have observed, the contention raised was that when an order is made and that order has been a subject-matter of an appeal and thereafter a revision, it did not become final and operative until the last stage of revision has been gone through and if the revisional order is passed after the Constitution came into force, the High Court would have jurisdiction to interfere with it under Article 226. It was in answer to this contention that their Lordships expressed that merely

because an appeal was preferred against an order, the order could not be said to have been either suspended or its operation interrupted. It was again in answer to that contention that observations were made that when the order of dismissal was passed certain rights accrued to the State and certain liabilities were incurred by the officer dismissed and these rights and liabilities having accrued to and incurred by, before the Constitution came into force, the High Court was not entitled to use its writ powers acquired subsequently to interfere with those rights and liabilities. As we have remarked, the observations made by the Supreme Court in Musaliar's case AIR 1956 Supreme Court 246, have been followed by Rajasthan and Madras High Courts as also other High Courts as laying down the principle that when an appeal or a revision is disposed, the original order is incorporated or gets merged in the order passed by the appellate or the revisional authority. Neither the observations made in Musaliar's case nor the decisions in AIR 1956 Rajasthan 163 and AIR 1957 Madras 496, were either challenged or sought to be corrected in AIR 1958 Supreme Court 86. If the Supreme Court intended to express a view contrary to that expressed in Musaliar's case, AIR 1956 Supreme Court 246 it is hardly possible that these decisions would not be considered or dealt with.

17. There is, however, the recent decision of the Special Bench of the Calcutta High Court reported in AIR 1960 Calcutta 1, where it has been held that where the Collector of Customs, whose office is situated within the jurisdiction of the Calcutta High Court passes an order under the Sea Customs Act, levying duty and penalty against the petitioner and that order is confirmed by the appellate authority, namely, the Central Board of Revenue, whose office is located outside the jurisdiction, the original order made by the Collector of Customs is the order continuing to be operative of its own force after the appeal has been dismissed and it is on the strength of this order that the duty is payable, and the appellate authority adds nothing to the force of the original order. This decision was given on the basis that the Supreme Court had in AIR 1958 Supreme Court 86, laid down a principle contrary to the one expressed in Musaliar's case AIR 1956 Supreme Court 246. At page 4 of the Report, Das Gupta, C. J., (as he then was) in clear terms has stated that he would have been bound by the observations of the Supreme Court in Musaliar's case, AIR 1956 Supreme Court 246 to hold that even where the original order has been confirmed in appeal and the appeal has been dismissed, the original order has ceased to exist and the operative order is the order by the appellate authority, but that the later pronouncement of the Supreme Court in AIR 1958 Supreme Court 86, compelled him to leave out of account the observations of the Supreme Court in Musaliar's case, AIR 1956 Supreme Court 246 as regards merger of an original order in the order made by the superior authority. We read that decision with considerable care, but with great respect, it is not possible for us to accept the view taken by that High Court. In the first place, it is not correct to say that the Supreme Court changed its mind and expressed an opinion contrary to the one expressed in Musaliar's case, AIR 1956 Supreme Court 246. Two of the learned Judges, namely S. R. Das, C. J. and Bose, J., were parties to the earlier judgment and if a contrary view was intended to be taken, it is hardly conceivable that the earlier decision would not even be referred to or commented upon especially as the view expressed in Musaliar's case, AIR 1936 Supreme Court 246 was followed not only by Madras

and Rajasthan High Courts but also other High Courts. In the second place, the view taken by the Calcutta High Court is contrary to the view taken by the High Court of Bombay in a series of decisions commencing from 2 Bom HCR 101 to 58 Bom LR 344 to which we consider ourselves bound. Thirdly, the view adopted by the High Court of Calcutta, as the learned Judges have themselves said, assumes the existence of two valid orders at the same time, one of the authority of the first instance and the other of the appellate authority in one and the same proceedings. It does not take into account the principle followed in execution proceedings that it is the order of the appellate Court or the tribunal which alone can be the subject matter of execution by the executing Court, as stated in 2 Bom HR 101, and 54 Bom LR 947 : AIR 1953 Bombay 122. Lastly, the principle as to the effect of an order of an appellate Court over the order of the authority of the first instance can be one and uniform and it cannot vary according to the nature of the order of the appellate authority. In our view, the principle of merger is, therefore, more logical than the other principle whose result would be that in case of dismissal of an appeal there would be two outstanding orders and in case of an appeal, where it is allowed or where the original order is modified or altered, there would be only one order which would be operative and enforceable. In our view, the decision in AIR 1958 Supreme Court 86, does not seek to lay down anything contrary to the principle of merger or anything contrary to what has been observed in Musaliar's case AIR 1956 Supreme Court 246. Therefore, when the President as the appellate authority dismissed the appeal of the petitioner, the order of dismissal passeel by the authority of the first instance merged in the order of the President, and, that being so, this Court would have no jurisdiction to issue a writ against the appellate authority. If we are right on this question, this Court would not issue a writ against the Commissioner though he would be amenable to the jurisdiction of this Court. The order that remains effective and operative is that of the appellate authority, and, therefore, it would be infructuous to issue a writ in respect of an order which has merged in the order of the appellate authority.

18. It was urged, however, that even assuming that the order of the Commissioner merged in the order passed by the appellate authority, the original order of the Commissioner was a nullity, in that, it infringed the principle of natural justice, and that it being a nullity, it can be quashed. It made no difference that in appeal it was confirmed by the appellate authority as the appellate authority could not pass an effective order on the basis of an order which was a nullity, that is to say, it could not pass a positive order on something which never existed. The contention no doubt assumes that the order was a nullity and in. reality never existed. We may remark at this stage that the jurisdiction to pass such an order in the inquiry officer, namely, the Commissioner, was not disputed. What has been contended is that that officer violated the principles of natural justice i. e., he did not hold an inquiry, and, therefore, his order was a nullity.

19. Mr. Vakil leaned very heavily on certain observations made in AIR 1958 Supreme Court 86, at p. 94 where it has been observed that there may conceivably be cases where the error, irregularity or illegality touching jurisdiction or procedure committed by an inferior Court or tribunal of first instance is so patent and loudly obtrusive that it leaves on its decision an indelible

stamp of infirmity or vice which cannot be obliterated or cured on appeal or revision. If an inferior Court or tribunal of first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly misconducts the proceedings before it in a manner which is contrary to the rules of natural justice and all accepted rules of procedure and which offends the Superior Court's sense of fair play, the Superior Court may quite properly exercise its power to issue the prerogative writ of certiorari to correct the error of the Court or tribunal of first instance, even if an appeal to another inferior Court or tribunal was available and recourse was not had to it or if recourse was had to it, it confirmed what ex facie was a nullity aforementioned. The principle laid down here is that if a Court or tribunal of first instance has acted either without jurisdiction or in excess of jurisdiction or has conducted the proceedings before it in a manner contrary to principles of natural justice or accepted rules of procedure and which offends the superior Court's sense of fair play, it would be the duty of the superior Court to interfere and correct the error of the Court or tribunal of the first instance irrespective of the fact that an appeal was not resorted to or even if it had been resorted to, the order was confirmed. It may be noted that in that very same para, their Lordships added :

> "The superior Court will ordinarily decline to interfere by issuing certiorari and all we say is that in a proper case of the kind mentioned above, it has the power to do so and may and should exercise it. We say no more than that".

It is clear that the principle laid down in this decision is not that every irregularity in the exercise of jurisdiction renders the order of an authority a nullity. In the decision quoted by their Lordships of the Supreme Court in *In re Authers*[17], Hawkins, J., places the principle on the foundation of absence of jurisdiction. The facts in that case as set out by their Lordships in that decision were that the manager of a club was convicted under a certain statute for selling beer by retail without an excise retail license. Subsequently he was convicted for selling intoxicating liquor, namely, beer without a license under another statute. Upon hearing of the later charge the Magistrate treated it as a second offence and imposed a full penalty authorized in the case of a second offence by the latter

[17](1889) 22 QBD 345

statute. His appeal to the quarter sessions having been dismissed, he applied for a writ of habeas corpus and it was granted by the Queen's Bench Division on the ground that the Magistrate could not treat the later offence as a second offence, because it was not a second offence under the Act under which he was convicted for the second offence. But the contention raised there was that if there had been any error, irregularity or illegality committed by the Magistrate, the quarter sessions could have on appeal corrected the same and that the quarter sessions having dismissed the appeal, the Court of Queen's Bench Division could not issue the writ of habeas corpus. Hawkins, J., observed that if the Magistrate had no power to give himself jurisdiction by finding that there had been a first offence where there had been none, the Justices could not give it to him. Therefore, when an order of a Court or tribunal of first instance suffers from such a fundamental defect as want of jurisdiction, the mere fact that such an order is confirmed in

appeal does not preclude the superior Court from interfering by issue of a writ of certiorari. Similarly, in *Andrews v. Mitchell*[18], a condition precedent to the assumption of jurisdiction was not performed and the order was held null and void. *Cooper v. Wilson*[19], is yet another case where it was held that if a statutory body acts without jurisdiction, its decision can properly be questioned in an action for a declaration that the decision is null and void. Reference can also be usefully made to *Barnard v. National Dock Labour Board*[20] where the order impugned was declared null and void on the ground of want of jurisdiction. In Wharton's Law of Lexicon, 14th edition, page 706, the meaning of 'nullity' has been given as want of force or efficacy; an error in litigation which is incurable, and thus differs from an irregularity which is amendable. The decision in AIR 1957 Madras 496 is yet one more case where an order of an inferior tribunal was held to be a nullity. There was an appeal therefrom which was dismissed confirming the order of the authority of the first instance. It was held that where the order of the inferior tribunal was a nullity such an order would fall outside the scope of the rule of merger. That was a case where the Collector of Customs passed an order of confiscation and penalty without giving a show cause notice to the petitioner and without holding any inquiry at all. It was consequently held that the order contravened every principle of natural justice and must be deemed to be a nullity. The High Court of Madras in that case was dealing with several writ appeals in one of which there was no such fundamental defect by way of contravention of principles of natural justice such as the absence of notice or inquiry. In that case the learned Judges observed that where the proceedings of the Collector of Customs were properly initiated after notice to the respondent, the mere circumstance that the order was vitiated by a wrong assumption that the respondent had a branch within the jurisdiction of the High Court would not make the order a nullity. It is clear, therefore, that every defect in a proceeding does not make the order of the authority of the first instance a nullity. The defect must be concerning either want of jurisdiction or excess of jurisdiction or a patent violation of the principles of natural justice, such as want of notice or inquiry. It is such a defect which would render an order null and void and which would take the case out of the principle of merger. But where an order is passed after due notice of charges and after an inquiry, where the delinquent has been given an opportunity to be heard and where he files a detailed statement, even if there is some defect in the course of the proceedings, there would be no question of a nullity. In order to succeed, Mr. Vakil, therefore, has to establish that there was anyone of these infirmities rendering the order of the Commissioner a nullity.

[18]1905 AC 78 [20] (1953) 2 QB 18

[19](1937) 2 KB 309

20. Reliance was placed on Rule 15 of the Central Civil Services Rules, 1957, in order to establish that the Commissioner committed a breach thereof in the sense that contrary to express provision contained in it, he failed to hold an inquiry. It was urged that such a failure was a fundamental one which would strike the impugned order as a nullity. Sub-rule (1) of Rule 15 provides that no order imposing on a Government servant any of the penalties specified in Rule 13 shall be passed except after an inquiry, held as far as may be in the manner therein provided. Sub-rule (2) provides that the Disciplinary Authority shall frame definite charges on the basis of the allegations on which the inquiry is proposed to be held and such charges together with a statement of allegations on which they are based, shall be communicated in writing to the

Government servant, and he shall be required to submit, within such time as may be specified by the Disciplinary Authority, to such Authority or where a Board of Inquiry or Inquiring Officer has been appointed to that Board or Officer, a written statement of his defence and also to state whether he desires to be heard in person. Sub-rule (2a) provides that the Disciplinary Authority may inquire into the charges itself or, if it considers necessary so to do, it may, appoint a Board of Inquiry or Inquiring Officer for the purpose. Sub-rule (3) gives a right to the Government servant to inspect and take extracts from such official record as he may specify. Sub-rule (4) upon which considerable stress was laid by Mr. Vakil provides :-

> "On receipt of the written statement of defense, or if no such statement is received within the time specified, the Disciplinary Authority or, as the case may be, the Board of Inquiry or the Inquiring Officer may inquire into such of the charges as are not admitted".

Sub-rule (5) provides that the Disciplinary Authority may nominate any person to present the case in support of the charges before the authority inquiring into the charges and the Government servant may present his case with the assistance of any other Government servant approved by the Disciplinary Authority. Under sub-rule (6) the Inquiring Authority has to consider such documentary evidence and take such oral evidence as may be relevant or material in regard to the charges and the Government servant shall be entitled to cross-examine witnesses examined in support of the charges and to give evidence in person. Sub-rule (8) provides that the record of the inquiry shall include the charges and the statement of allegations, the written statement of the defense, if any, the oral evidence taken in the course of the inquiry, the documentary evidence considered in the course of the inquiry, the orders, if any, made by the Disciplinary Authority in regard to the inquiry, and lastly, a report setting out the findings on each charge and the reasons therefor. Sub-rule (10) lays down that if the Disciplinary Authority, having regard to its findings on the charges, is of the opinion that any of the penalties specified in Rule 13 should be imposed, it shall furnish to the Government servant a copy of the report of the Inquiring Authority, a statement of its findings, and give him a notice stating the action proposed to be taken in regard to him and calling upon him to submit within a specified time such representation as he may wish to make against the proposed action.

21. In the instant case, the Commissioner, who is the Disciplinary Authority, himself held the inquiry and made his report containing his findings on each of the six charges. It cannot be disputed that the Disciplinary Authority had served upon the petitioner a show cause notice and had furnished to him a copy of the charges as also the statement of allegations. Equally it cannot be disputed that the Commissioner had given an opportunity to the petitioner to have a personal hearing and to adduce such evidence and examine such witnesses as he thought proper, but the petitioner did not avail of that opportunity. It cannot also be disputed that the Commissioner after he finished the inquiry furnished to the petitioner a copy of his report containing his findings and served upon the petitioner a notice stating therein the action proposed to be taken in regard to him and calling upon him to submit such representation as he wished to make against the

proposed action.
22. The principal ground of attack by Mr. Vakil, however, was that

> (1) no inquiry was held as contemplated by sub-rule (4) of Rule 15, and
> (2) that after notice under sub-rule (10) of rule 15 was given and the petitioner filed his representation giving his reasons as to why the findings were not correct, the Commissioner again went into facts while passing his order of penalty in which he came to certain fresh conclusions of which he was not given an opportunity to explain.

Mr. Vakil conceded that he had no grievance in view of the letters of the petitioner on record that an opportunity to a personal hearing and to lead evidence was not given. But he urged strenuously that the inquiry, if any, did not end with the report of the Commissioner Mr. Jain who held the inquiry, but with the report of his successor, Mr. Noor. Therefore, Mr. Noor ought to have issued a fresh notice to show cause against the penalty he proposed to impose and if that had been done, the petitioner would have had a chance to urge that the penalty proposed was not a proper one and a lighter penalty should be imposed.

23. In order to appreciate this contention, it is necessary to mention a few facts. The memorandum of charges and the statement of allegations were furnished to the petitioner on the 15th of April, 1958. On the 5th of August, 1958, the petitioner filed his written statement at the end of which he stated that in view of the explanations in his written statement and the evidence tendered therewith, he hoped that the Commissioner would be able to see that the charges against him had been made without any basis, perhaps due to misunderstanding and that, therefore, the proposed inquiry should be dropped. In that written statement though called upon to do so, in the show cause notice, the petitioner did not ask for a personal hearing or for an opportunity to lead evidence. Therefore, the Commissioner by his letter, dated the 25th of August, 1958, called upon the petitioner to state if he desired to be heard in person and to furnish the names and addresses of the witnesses, if any, whom he wished to call in support of his defense and to furnish a. list of documents, if any, which he might wish to produce in the inquiry. He also stated that as his written statement did not state that he desired to be heard in person and as he had not given the names and the addresses of his witnesses or a list of documents, he would presume that the petitioner had no desire to be heard in person or to produce any witnesses. He also stated that the petitioner should confirm that he did not wish to have a personal hearing and did not wish to lead any evidence so that he would proceed with the case on the basis of the explanations offered by the petitioner and the evidence available to the department. By his reply, dated the 9th of September, 1958, the petitioner wrote that he had submitted :

> "Complete documentary evidence in support of my reply to the various allegations. I do not therefore see why it is necessary for me again to produce witnesses or documents. If you are not satisfied with the evidence tendered, you may summon any witness or documents". In spite of this letter, the Commissioner, on the 1st of October, 1958,

requested the petitioner to see him in connection with this case on the 10th of October, 1958. On the 10th of October, 1958, the Commissioner by his letter called upon the petitioner to furnish to him certain further information in regard to his wife's account as a partner in a cashewnut factory at Quilon, an account of her share in the property inherited by her on the death of her father and an account in respect of the coconut and paddy fields in the name of the petitioner and his wife. He also referred to the statements earlier made by the petitioner before the Deputy Directors of Investigations and asked the petitioner to confirm that he had already in his possession copies of those statements and, therefore, no other copies need be supplied to him. By that letter he sent copies of three statements given by K. K. Shridharan before the I. T. O. Alwaye and asked the petitioner to make his statement if he had anything to say in reference to those statements. On the 3rd of November, 1958, the petitioner wrote to the Commissioner giving certain explanations with regard to the accounts called for and confirmed of his being in possession of copies of statements made by him before the Deputy Directors of Investigations. He also gave an explanation with regard to the statements of Shridharan referred to in the Commissioner's previous letters. It was contended in connection with these statements of Shridharan that they were taken behind the back of the petitioner and, therefore, the Commissioner acted improperly in relying upon them. We may, however, observe that the copies of these statements were in possession of the petitioner as admitted by him in the correspondence. If the petitioner wanted to challenge these statements, he had been given sufficient opportunity to call upon the Commissioner to examine Shridharan. No such demand was made. On the other hand, a statement made by Shridharan was actually relied upon by the petitioner and annexed to his written statement. It was not as if Shridharan was either hostile to. the petitioner or was a witness on behalf of the department. Since copies of Shridharan's statements were with the petitioner and had been explained by him in his letter of the 3rd of November, 1958, and the petitioner not having demanded that Shridharan should be examined, we must hold that there is no substance in this complaint.

24. As we have pointed out, on the 31st of January, 1959, two additional charges were framed and the petitioner on being supplied with a copy thereof together with the statement of allegations, he filed his written reply on the 27th of February, 1959. In that reply also the petitioner took up the same attitude as before and stated that from his reply it would be seen that there was no question of producing any witnesses or documents and as regards personal hearing, "it may be given only if the C. I. T. is not satisfied with the written reply". In our view, a conditional demand for a personal hearing is not contemplated by law. On the 24th of March, 1959, the Commissioner informed the petitioner that the inquiry report was complete and sent a copy thereof to the petitioner informing him that all the six charges stood proved. He also informed the petitioner that he had come to a tentative conclusion that the penalty to be imposed upon him should be removal from service and asked the petitioner to send a representation, if he wanted to make one, with regard to the proposed penalty. Accordingly, the petitioner sent a detailed representation on the 6th of April, 1959, in which amongst other things he complained

that the Commissioner had not given him a personal hearing. That allegation obviously was incorrect as can be seen from the correspondence referred to earlier. In this representation the petitioner gave certain further explanations with a view to discountenance the conclusions arrived at by the Commissioner. It would seem that at about this time Mr. S. P. Jain who held the inquiry was transferred and Mr. Syed Noor came in his place as the Commissioner of Income-tax, Bombay North, Ahmedabad. It would seem that as the petitioner had complained that he was not given any personal hearing, Mr. Noor by his letter, dated the 15th of May, 1959, presumably ex major cautela offered a personal hearing to the petitioner on the 28th of May, 1959. In his reply, dated the 25th of May, 1959, the petitioner wrote :

> "As you have written 'may' it is presumed that you are granting me an opportunity of being heard in person. I wish to submit that I have not myself asked for a personal hearing in my representation dated 6-4-59. So this personal hearing can only be to comply with formalities enjoined by the rules. As I have nothing special to represent in person apart from what I have already stated, in writing I waive the right to a personal hearing. It may be treated as having been availed of. However, if the C. I. T. desires a personal discussion or clarification of any issue I am ready for the same".

On the 9th of December, 1959, the order of removal from service was passed by Mr. Noor in his capacity as the Commissioner of Income-tax and as the Disciplinary Authority.

25. These facts and the correspondence referred to above clearly show that

> (1) though opportunities were given, the petitioner did not care to have a personal hearing, nor did he adduce any evidence or appear to challenge the data relied upon by the department;
> (2) his attitude all throughout was that if the Commissioner was not satisfied with his explanations and the documents annexed with his written statement, he could call him for a further explanation.

In other words, tie petitioner wanted the Commissioner before he completed the inquiry to disclose to him whether he was going to believe his word or not. The petitioner was not entitled to adopt that course. As the petitioner failed to appear or challenge the data before the Commissioner or lead any evidence in support of his written statement, the Commissioner was constrained to proceed with such data and materials that were before him. These materials were :

> (a) the statements made by the petitioner before the Deputy Directors of Intelligence,
> (b) the statements made by Shridharan in respect of the account of the petitioner and his wife before I. T. O. Alwaye, copies of which statements were offered to be furnished but as they were with the petitioner as confirmed by him, there was no question of again furnishing them to him,

(c) written statement of the petitioner and the annexures attached thereto, and
(d) the evidence as to the salary earned by the petitioner from the beginning of his career, the admitted purchases of immoveable properties and other assets acquired by him, and his banking account.

It is obvious that it is from these documentary materials that the Commissioner made his report and came to his findings. It is not necessary that in such a departmental inquiry oral evidence must always be adduced; if documentary evidence is sufficient to show that the charges are satisfactorily made out, that would be enough.

26. Though the petitioner did not take the opportunity to have a personal hearing and all along declined to lead any evidence he has persisted in his allegation that the Commissioner held no inquiry. As the petitioner from the start adopted an attitude that there was no necessity for him to appear in person or to call any witnesses, there was no occasion nor any necessity for the Commissioner to inform him as to when next he would hold the inquiry. In the return filed on behalf of the department it has been specifically averred that an inquiry was in fact held by the Commissioner. In the circumstances of the case such an inquiry would be the consideration of the materials and data before the Commissioner including the written statement of the petitioner and the annextures thereto, the history of his service, his previous statements, accounts with his bankers and Shridharan etc. In these circumstances, it is impossible to come to a conclusion that there was no inquiry as submitted by Mr. Vakil.

27-30. x x x x

Petition dismissed.