

Ponkunnam Traders Vs. Additional Income-tax Officer, Kottayam, and Another.

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Court : Kerala

Decided On : Feb-05-1971

Reported in : [1972]83ITR508(Ker); [1972]83ITR519(Ker)

Appeal No. : O.P. No. 3889 of 1968

Appellant : Ponkunnam Traders

Respondent : Additional Income-tax Officer, Kottayam, and Another.

Judgement :

MATHEW J. - In this proceeding the petitioner seeks to quash exhibit P-1, an order of assessment passed by the Income-tax Officer, the 1st respondent, on October 22, 1964, as well as the order passed by the Commissioner of Income-tax, the 2nd respondent, in revision, from the appellate order from exhibit P-1.

The petitioner was a dealer in hill produce. We are concerned in this case with the assessment of the petitioner to income-tax for the assessment year 1964-65 in respect of his income from transactions in dry ginger and proper. The petitioner in the return that he made a net profit of 5% on the turnover of dry ginger and 1 1/2% on the turnover of pepper. The Income-tax Officer was not satisfied with the correctness of the account produced by the assessee in support of the return in this respect and so he rejected the account and made a best judgment

assessment under section 143(3) of the Income-tax Act, 1961, hereinafter referred to as 'the Act', adding Rs. 10,000 to the income of the assessee in respect of his transactions in dry ginger and Rs. 1,000 in respect of his transaction in pepper, estimating the profit in dry ginger at 12% and in pepper at 2% of the turnover. From this order the petitioner filed an appeal before the Appellate Assistant Commissioner. That was dismissed. The petitioner then filed a revision before the 2nd respondent. He accepted the finding of the Income-tax Officer as regards the income of the petitioner from his transactions in dry ginger, but deleted the addition of Rs. 1,000 in respect of the alleged income from the pepper transactions.

In the order of assessment the Income-tax Officer said that after rejecting the accounts of the assessee he made enquiries and that he was satisfied from the materials gathered by him, namely, the profits made by other dealers carrying on similar businesses and from the profits disclosed in the return for the previous year by the petitioner himself that the profit of the petitioner from transaction in dry ginger is 10% of the turnover.

The contention of the assessee is that he was entitled to notice under section 142(3) of the Act of the materials gathered by the Income-tax Officer and to have his say about them, and as no such notice was given or his explanation heard, the order of assessment is void to the extent objected to by him. Section 142 reads :

'(1) For the purpose of making as assessment under this Act the Income-tax Officer may served on any person who has made a return under section 139 or upon whom a notice has been served under sub-section (2) of section 139 (whether a return has been made or not) a notice requiring him, on a date to be therein specified. -

(i) to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require, or

(ii) to furnish in writing and verified in the prescribed manner information in such form and on such points or matters (including a statement of all assets and liabilities of the assessee, whether included in the accounts or not) as the Income-

tax Officer may require :...

(2) For the purpose of obtaining full information in respect of the income or loss of any person, the Income-tax Officer may make such enquiry as he considers necessary.

(3) The assessee shall, except where the assessment is made under section 144, be given an opportunity of being heard in respect of any material gathered on the basis of any enquiry under sub-section (2) and proposed to be utilised for the purpose of the assessment.

Counsel for the revenue contended that it was only in respect of the materials gathered by the Income-tax Officer as a result of his enquiry under sub-section (2) of section 142 that he was bound to give the assessee an opportunity of being heard, that the knowledge of the Income-tax Officer of the previous return submitted by the assessee was sufficient material for a best judgment assessment and such knowledge cannot by any stretch of imagination be regarded as materials gathered on the basis of enquiry within the meaning of section 142(3), and, so, no opportunity of being heard in respect of that material was required. I think that when an Income-tax Officer gathers materials from a source other than the records relevant to the year of assessment, he has gathered materials on the basis of enquiry within the meaning of section 142(3), and, therefore, he will be bound to give an opportunity to the assessee in respect of the materials so gathered. In this case the assessee may have a thousand explanations to offer as to why he could not make the same profit in the year in question as in the previous year. An admission in the return of the percentage of profits from the transaction in dry ginger or pepper made by the assessee in the previous year would be relevant material for a best judgment assessment for the subsequent year provided that an opportunity of being heard on this material was given to the assessee. When an Income-tax Officer is making an assessment to the best of his judgment against a person in default he is entitled to use his own knowledge of the previous returns by the assessee and the assessments. In *Commissioner of Income-tax v. Laxminarain Badridas* Lord Russell of Killowen said :

'He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guess-work.'

Although the Income-tax Officer was entitled to use his knowledge of the previous return by the assessee, that must have been put to the assessee and his explanation asked for.

The revenue then contended that the petitioner did not raise the failure to comply with the principle of natural justice as embodied in section 142(3) as a ground in his appeal before the appellate authority or in his revision before the Commissioner, and, therefore, he should not be allowed to raise the contention in this court and, relied upon the ruling of Govindan Nair J. in *Mariyan v. State of Kerala* in support of it. In that case the learned judge following the decision in *Ramnath Goenka v. Amarchand & Mangaldas* said that failure to raise a question of jurisdiction whether inherent or not would normally preclude a person from relying on it as a ground for attacking the order before a court exercising jurisdiction under article 226, and that a court in exercise of its discretionary power would normally decline to issue the writ at the instance of a person who sat upon the fence before the authorities below.

The failure to conform to the principle of natural justice of *audi alteram partem* would make a judicial or quasi-judicial order void. In *Spaceman v. Plumstead District Board of Works* Lord Selborne said :

'There could be no decision within the meaning of the statute if there is anything done contrary to the essence of justice.'

In *Ridge v. Baldwin* the Brighton Watch Committee dismissed its chief constable on grounds of misconduct but did not give him a hearing as required by the principles of natural justice. The House of Lords by a majority held that the dismissal was

void and so had no effect in law.

It does not mean that the dismissal has no effect that any third party can take advantage of the irregularity. If for instance the chief constable had taken proceedings to challenge the order, an order passed by his successor appointed by the Watch Committee could not have been by his successor appointed by the Watch Committee could not have been challenged by a third party on the ground that the dismissal was void. Though the order might be void if the dismissed constable had taken proceedings to declare it bad, a third party cannot take advantage of the void character of the order. This, I think, is the principle laid down by the Privy Council in *Durayappah of Chandikuly, Mayor of Jaffna v. W.J. Fernando*. In that case a minister of local government in Ceylon exercised his power under an Ordinance and dissolved the Jaffna Municipal Council on the ground that it was incompetent to perform its duties. No notice or opportunity to meet the charges against the council was given to the council. The order was, therefore, void as between the minister and the council. Then the question arose whether the appellant who was the mayor of Jaffna and who automatically lost his office was entitled to challenge the ministers order. Lord Upjohn, speaking for the Privy Council, said :

'Lord Morris of Borth-y-Gest also considered this question and reached the conclusion that the order of the watch committee was voidable and not a nullity. He examined the question as to the nature of the relief that the party aggrieved (Ridge) would apply for, which would be that the decision was invalid and of no effect and null and void. There Lordships entirely agree with that and with the conclusions which he drew from it, namely, that if the decision is challenged by the person aggrieved on the grounds that the principle has not been obeyed he is entitled to claim that as against him it is void ab initio and has never been of any effect. But it cannot possibly be right in the type of case which their Lordships are considering to suppose that if challenged successfully by the person entitled to avoid the order it nevertheless has come limited effect even against him until set aside by a court of competent jurisdiction. While in this case their Lordships have no doubt that in action by the council the court should have held that the order was void ab initio and never has any effect, that is quite a different matter saying that

the order was nullity of which advantage could be taken by any other person having a legitimate interest in the matter.

These Lordships, therefore, are clearly of opinion that the order of the minister on May 29, 1966, was voidable and not a nullity. Being voidable it was voidable only at the instance of the person against whom the order was made, that is the council.'

In *President, Commonwealth Cooperative Society Limited v. Joint Register (General) of the Co-operative Societies* I said :

'In *Ridge v. Baldwin* Lord Reid and Lord Hodson held that a decision rendered contrary to the principle of natural justice of *audi alteram partem* was void and that in *Wood v. Woad* it was expressly so decided.

As between the parties to an order, the proposition that failure to follow the principle of a natural justice of *audi alteram partem* would render the order void, was assumed to lay down the correct law, by the Privy Council in *Durayappah v. Fernando*. The Privy Council there, said that the action is voidable only at the instance of the person aggrieved but yet it void *ab initio* if he elected to challenge it. This is a confusing use of void or voidable. (See H.W.R. Wade, *Administrative Law*, II edition, page 95).'

The judicial Committee thought in *Durayappa v. Fernando* that if they were to hold that breach of natural justice rendered the minister's order void in any sense, it would be an absolute nullity of which any interested party could take advantage. In *Ridge v. Baldwin* no third party was involved. The whole question there was whether the order of dismissal was void against the constable. The underlying difficulty is to perceive how it can be held that an act of a public authority which is void, can be turned by the acquiescence of the party affected into a valid one. If the act is *ultra vires* and void, how can anyone's subsequent inaction validate it. In 1945, Mr. Rubinstein in his *Jurisdiction and illegality*, at page 221 has observed :

'Furthermore, the decision arrived at in breach of this duty should not operate under any circumstances against him, otherwise the very purpose underlying this rule

would be defeated. Hence, a purported dismissal or expulsion arrived at in breach of the rule cannot be operative as against the person concerned. But there is no justification for holding that there is no jurisdiction or that the decision is a nullity. Not only can this right be waived but it also seems clear that, in litigated proceedings, the other party, i.e., the party who has been heard, cannot impeach the proceedings on this ground. Yet, if this defect negatives jurisdiction and renders the proceedings a nullity, should not the other party be able to disregard the purported decision ?'

In 1969, in *Anisminic Ltd. v. Foreign Compensation Commission* Lord Reid said :

'It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word jurisdiction has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend the list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.'

Lord Pearce, Lord Pearson and Lord Wilberforce expressed similar views.

It would seem that unless the validity of the act is challenged within the time allowed by law and by one entitled in law, it will be accepted as valid not only by those affected but by the rest of the world. This does not mean that the act or

order has any initial validity. The technique employed by the law of limitation has always been to turn a wrongful act into a rightful one. If property is wrongfully taken, a bad title is turned into a good one by eliminating the former owners remedy. A title which was void against the former owner becomes valid when the remedy is taken away. There is no need to assume that the wrongful act was in any way valid against the former owner at the outset. The crux of the matter is that there is no such thing as voidness in an absolute sense, the only question is void as against whom. The principle was explained by Lord Morris in *Ridge v. Baldwin*;

'It was submitted that the decision of the watch committee was voidable but not void. But this involves the inquiry as to the sense in which the word voidable, a word deriving from the law of contract, is in this connection used. If the appellant had bowed to the decision of the watch committee and had not asserted that it was void, then no occasion to use either word would have arisen. When the appellant in fact at once repudiated and challenged the decision, so claiming that it was invalid, and when in fact the watch committee adhered to their decision, so claiming that it was valid, only the court could decide who was right. If in that situation it was said that the decision was voidable, that was only to say that the decision of the court was awaited. But if and when the court decides that the decision of the court was awaited. But if and when the court decides that the appellant was right, the court is deciding that the decision of the watch committee was invalid and of no effect and null and void. The word voidable is therefore apposite in the sense that it became necessary for the appellant to take his stand : he was obliged to take action, for unless he did, the view of the watch committee, who were in authority, would prevail. In that sense the decision of the watch committee could be said to be voidable.'

If as suggested by Lord Morris the decision could be said to be voidable up to the point when the court decided the dispute, then any void act or decision could be said to be voidable in this sense. So, according to him the watch committees act, however void in the eyes of a court, will prevail unless the chief constable challenges it successfully. The transformation of a void act into a valid one is not an unusual occurrence in law. If in *Ridge v. Baldwin* the chief constable had not contested the validity of his dismissal, the order of dismissal of the watch

committee would have had legal consequences. The chief constable would have ceased to hold the office and a successor could validly have been appointed. But, if after the successor had been appointed, the former chief constable had taken proceedings and established that his dismissal was void, it would then be determined that the successor does not validly hold the office since it is still validly held by the predecessor.

'Unless it is so established by a judicial decision, the old constable is out of office and the new one is in it. The position of the successor could be compared to that of a squatter in someone's land and as against whole world except the true owner he has a good title and if the true owner brings an action he must vacate the land.' (See Unlawful Administrative Action : Void or Voidable by H.W.R. Wade).

As the Judicial Committee said in *Durayappah's case* since the Jaffna council took no proceedings to contest the validity of the minister's order the council stood dissolved and so all the legal consequences from that fact followed. It would be idle for a councillor or ratepayer to argue that the council is still legally in office. To say that the dissolution was void would be to make a prediction as to what a court would hold if the question were brought before a court. But the court would not hold the dissolution to be void unless the matter is agitated by the right person in the right sort of proceedings. That is why the Judicial Committee refused relief in that case. If an act is void, for the reason that it is done by a person not 'in authority', the act might have no legal or factual existence. If, for instance, a minister in England had purported to dissolve the Jaffna Municipal Council, nobody would take notice of his act because the minister in England was not in authority. But where the author of a void act is 'in authority' it might produce legal consequences unless and until it is invalidated with retrospective or prospective effect. In his *General Theory of Law and State* Hans Kelsen observed :

'The decision made by the competent authority that something that presents itself as a norm is null ab initio because it fulfils the conditions of nullity determined by the legal order, is a constitutive act; it has a definite legal effect; without and prior to this act the phenomenon in question cannot be considered to be null. Hence the decision is not declaratory, that is to say, it is not, as it presents itself, a declaration

of nullity; it is a true annulment, an annulment with retroactive force. There must be something legally existing to which this decision refers. Hence, the phenomenon in question cannot be something nul ab initio, that is to say, legally nothing. It has to be considered as a norm annulled with retroactive force by the decision declaring it nul ab initio. Just as everything King Midas touched turned into gold, everything to which the law refers becomes law, i.e., something legally existing. The case of absolute nullity lies beyond the law.' (See page 161).

This passage would show that an act or order, however void, is still capable of legal consequences, if it is not successfully challenged in a court of law. It is sometimes said that a voidable act of a public authority, as contrasted with a void one, has legal effect until it is avoided in a court and its illegality waived. A void act, it is said, cannot have any interim effect and cannot be validated by waiver. This is a doubtful proposition. Both these are founded on the assumption that a void act is incapable of producing any legal effect, and there are many dicta to that effect. In *R. v. Paddington Valuation Officer*, Lord Denning said :

'It is necessary to distinguish between two kinds of invalidity. The one kind is where the invalidity is so grave that the list is a nullity altogether. In which case there is no need for an order to quash it. It is automatically null and void without more ado. The other kind is when the validity does not make the list void altogether, but only voidable. In that case it stands unless and until it is set aside.'

To say that an act is automatically null and void without more ado and that there is no need to quash it, if it means that it can be invalidated without recourse to law would conflict with what Lord Morris and Hans Kelsen said in the passages already quoted. All acts of public authorities are either lawful and valid or unlawful and void. That is why voidable has never played a part in administrative law; and it is erroneous to suppose that an unlawful administrative act can have legal effect only if it is called voidable as opposed to void. If a void act is not challenged in law, it would have legal effect as a valid act.

In *Hounslow London Borough Council v. Twickenham Garden Developments Ltd.*, Megarry J., after a careful consideration of the matter, has said :

'If the principles of natural justice apply, then I think the result is that the decision impugned is a nullity : see per Lord Reid, at pages 80, 81, per Lord Morris of Borth-y-Gest, at pages 117, 119, 125 and per Lord Hodson, at page 135. Lord Devlin, however, agreed with Lord Evershed, that the decision was only voidable : see at page 141. It is true that in *Durayappah v. Fernando*, Lord Upjohn, speaking for the Judicial Committee, said that Lord Morris reached the conclusion that the order of the watch committee was voidable and not a nullity : and the foot-note refers to page 119 of *Ridge v. Baldwin*. On that page, Lord Morris twice said that it should be declared that the termination of the appellants appointment was void and Speight J., in *Denton v. Auckland City*, flatly says that this passage in the Judicial Committee's decision is erroneous. However, the next few sentences indicate that the Judicial Committee must have had in mind a further passage in Lord Morris's speech, at page 125, where he makes it clear that although the court will declare the decision to be invalid and of no effect and null and void, this would be done only if the appellant took the necessary action, so that in this limited sense the decision could be said to be avoidable. A decision reached by a Tribunal wholly outside its jurisdiction and in complete defiance of natural justice is about as void as anything can be; but if nobody who is entitled to challenge or question it chooses to do so, it remains in being. Yet to describe such a decision as being voidable is to use that word in a sense that is not only very special but also liable to mislead. It seems to me that despite what was said in the *Durayappah's* case both the language used by Lord Morris and the ratio of his speech show that he was holding that the decision reached in defiance of natural justice was void and that this was accordingly the majority view in the House of Lords.'

It was contended by counsel for the revenue that even assuming that the order of the Income-tax Officer was void, it had merged in the appellate order and that in turn has merged in Commissioner's order; and as these orders were passed after giving the petitioner an opportunity of being heard, the contention of the petitioner is without any substance. Counsel relied on the observations in *Somnath Sahu v. State of Orissa* to support his contention. In that case, the court said :

'There can be no doubt that if an appeal is provided by a statutory rule against an order passed by a tribunal the decision of the appellate authority is the operative decision in law if the appellate authority modifies or reverses it. In law the position would be just the same even if the appellate decision merely confirms the decision of the Tribunal.

In other words, the question is, should the court dismiss the writ petition for the reason that the order of the Income-tax Officer has merged in the orders passed by the appellate and revisional authorities, as those orders did not suffer from any infirmity for the reason that they were passed after giving the petitioner an opportunity of being heard. In *President, Commonwealth Co-operative Society Ltd. v. Joint Registrar (General) of Co-operative Societies*, I had occasion to refer to this question and I said, after quoting the observations of Denning L. J. in *Barnard v. National Dock Labour Board*, as follows : 'So where a decision is null by reason of want of jurisdiction, it cannot be cured by any appellate proceedings : failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal but he is not bound to do so, because he is at liberty to treat the act as void. (See *Jurisdiction and Illegality* by Amnon Rubinstein).'

Megarry J. said in *Leary v. National Union of Vehicle Builders* that a decision made by an appellate court in such circumstances would equally be void. He asked the question 'if a man has never had a fair trial by the appropriate trial body, is it open to an appellate body to discard its appellate functions and itself give the man the fair trial that he has never had ?' and answered it by saying that no such doctrine exists. One of the reasons given by him for his conclusion was :

'If one accepts the contention that a defect of natural justice in the trial body can be cured by the presence of natural justice in the appellate from the expelling body. If the rules and the law combine to give the member the right to a fair trial and the right of appeal, why should he be told that he ought to be satisfied with an unjust trial and a fair appeal Even if the appeal is treated as a hearing do novo, the member is being stripped of his right to appeal to another body from the effective decision to expel him. I cannot think that natural justice is satisfied by a process

whereby an unfair trial, though not resulting in a valid expulsion, will nevertheless have the effect of depriving the member of his right of appeal when a valid decision to expel him is subsequently made. Such a deprivation would be powerful result to be achieved by what in law is a mere nullity; and it is no mere triviality that might be justified on the ground that natural justice does not mean perfect justice. As a general rule, at all events, I hold that a failure of natural justice in the trial body cannot be cured by a sufficiency of natural justice in an appellate body.'

It is asked that if a decision is a nullity on the score that the principles of natural justice have not been observed, how has it come about that such an illegality can be waived by a consenting party. In other words, how is it possible to reconcile the proposition that an order is a nullity for the reason that the principle of natural justice of *audi alteram partem* has not been observed with the proposition that a nullity can be waived by the party directly affected. Here, the whole question is what is the condition, to be implied in section 142(3) There is surely no reason for implying an absolute condition, such as 'no order shall be passed unless notice is given'. It would be more reasonable to imply a qualified condition, namely, that a fair hearing must be given, except in so far as waived by the person concerned. In construing section 142 of the Act the court can legitimately assume that Parliament intend that the power under the section shall be exercised in accordance with the accepted legal rules of fair play. The operation of the section is always subject to any effective waiver, and the principle of waiver ought surely to be implied as part and parcel of the law governing the exercise of the discretionary jurisdiction under article 226. Even if we assume that an unqualified condition is implied in the section, it does not follow that the voidness which it may produce cannot be waived. There are a number of reason why a court may withhold a remedy in respect of a void act; the remedy may be barred by statute, or the court may withhold it in its discretion, and then, as we have seen, the void act must be accepted as a valid act, unless there is some other remedy still open. Waiver is, therefore, no more incongruous in this context than is the Limitation Act.

Where a complainant was precluded from objecting to a magistrates disqualification because he did not object in time and the disqualification was expressly imposed by the statute as an unqualified condition, Channel J. pointed

out how the right to object could be lost, 'no matter whether the proceedings are void or voidable, since that did not affect the courts practice in granting or withholding a remedy'. (See *Ramnath Goenka v. Amarchand and Mangaldas*).

Judicial discretion plays an indispensable part in the law. But it ought not to be allowed to undermine constitutional fundamentals. One of these, surely, is that the citizen may resist unlawful governmental action as of right. If this were made a matter of discretion, the court would be taking upon itself the power to dispense public authorities from observance of the law.

Counsel for the revenue contended that since there has been no miscarriage of justice as the petitioner had full opportunity of canvassing the correctness of the order of the Income-tax Officer before the appellate as well as the revisional authorities, no interference under article 226 is called for. But it would be inconsistent with all the decisions, if I were to say that after a breach of natural justice has been found there must then be a further enquiry to ascertain whether there has been a miscarriage of justice. The breach of natural justice is itself the miscarriage of justice which enables the applicant to succeed, and never before has it been held that the court is entitled to refuse him relief. The discretion that would be introduced by the requirement of 'a real substantial miscarriage of justice' is quite a different thing from the discretion which is a normal element in many legal remedies, including remedies against public authorities. For, discretionary remedies are withheld only for recognised reasons and with the greatest caution. The principle of *ultra vires* has in reality never been discretionary in any substantial sense. The whole basis of civil liberty is that the acts of public authorities are lawful or unlawful, valid or void. A large area of grey, where no one could be sure of his rights, would be a dangerous innovation. The minority opinion expressed in *Ridge v. Baldwin* that the court will relieve against a breach of natural justice only where it also considers that there has been a substantial miscarriage of justice, is against the decision of the Privy Council in *Annamunthodo v. Oilfield Workers Trade Union*, where Lord Denning said :

'Counsel for the respondent union did suggest that a man could not complain of a failure of natural justice unless he could show that he had been prejudiced by it.

Their Lordships cannot accept this suggestion. If a domestic tribunal fails to act in accordance with natural justice the person affected by their decision can always seek redress in the courts. It is a prejudice to any man to be denied justice. He will not, of course, be entitled to damages if he suffered none. But he can always ask for the decision against him to be set aside.'

There is serious danger in making the ultra vires principle, or any part of it, discretionary. Administrative inconvenience should not normally be allowed to distort the law.

The petitioner had no opportunity before the Income-tax Officer to raise the objection that the officer can proceed to assess the petitioner only after giving notice of the materials gathered by him on the basis of the enquiry conducted by him under section 142(2). He cannot, therefore, be said to have acquiesced in or waived his objection to it. The basis of the decision of Channel J. is that a party who did not raise the objection at the hearing of a case by a person who had a bias should not be allowed to raise it in a proceeding in certiorari. That principle cannot apply here because the petitioner had no notice that the Income-tax Officer would proceed to make a best judgment assessment, and so had no opportunity to raise the objection before him. Even if the petitioner had raised his objection before the appellate authority, it is very doubtful that the appellate authority could have passed a valid order even after complying with natural justice. Normally, as already indicated, neither the appellate authority nor the Commissioner could have passed a valid order, even after complying with natural justice. Assuming that the appellate or the revisional authority could have passed an original order of assessment after giving a preassessment notice, the right of appeal vested in a party to an Appellate Assistant Commissioner against an original order of assessment would become otiose. Even if no appeal or revision had been filed by the petitioner, it would have been open to the petitioner to approach this court and challenge the order of the Income-tax Officer on the ground of noncompliance with the principles of natural justice. If the order of the Income-tax Officer was a nullity and if the petitioner had no opportunity to object to the procedure which made the order a nullity, I do not think the fact that he did not raise the objection in the appeal or in the revision should be a ground for exercising my discretion against

the petitioner. By the appeal and the revision the petitioner has chosen to disaffirm the order. How then can it be said that he has acquiesced in it. Although there is a discretion in this court to decline to issue a writ if the circumstances warrant the same, it is only in exceptional circumstances that the court will decline to issue the writ when it is found that an order of an administrative authority performing a quasi-judicial function is a nullity for the failure to conform to the principle of natural justice of audi alteram partem. In *Sheik Hussain v. State of A.P.*, the court observed :

'The only question then is whether the Tribunal has or has not jurisdiction : and immediately this court is satisfied that the Tribunal has exceeded its jurisdiction, a writ of certiorari must issue in spite of the acquiescence of the applicant or want of objection on his part. The principle in such a case is that the exercise of an unauthorised jurisdiction amounts to an usurpation of jurisdiction and renders the decision of the Tribunal a nullity. It is the duty of this court to remove the void order by issuing a writ of certiorari.'

In *Arunachalam Pillai v. Southern Roadways Ltd.*, the Supreme Court held :

'In our opinion, although the respondent has submitted to the jurisdiction of the Regional Transport Officer and had not in his petition under article 226 in the High Court taken the objection that that officer had no jurisdiction to vary the conditions of a permit, the High court acted rightly in allowing the respondent to urge that the Regional Transport Officer had no jurisdiction to vary the conditions of a permit.'

The decision of Govindan Nair J., in *Mariyan v. State of Kerala*, has no application here. The principle of that decision is that a person who has never raised the question of lack of jurisdiction before an authority hearing a revision should not normally be permitted to raise it in a proceeding under article 226. The person courted the chance of a decision in his favour and when he found that the decision was against him, he cannot turn round and attack the order in writ proceedings on the ground of want of jurisdiction. But, as I have indicated, the petitioner had no opportunity to object to the Income-tax Officer proceeding to make a best judgment assessment without issuing the notice under section 142(3). I do not think, the decision of Channell J., which was followed in *Ramnath Goenka v.*

Amarchand and Mangaldas, and which in turn was followed by Govindan Nair J., in *Mariyan v. State of Kerala*, would apply here.

I, therefore, quash the order passed by the Commissioner, exhibit P-4 and also that part of the orders of the Income-tax Officer and the appellate authority, exhibits P-1 and P-2, respectively, assessing the petitioner to income-tax on the income in respect of his transactions in dry ginger and pepper; and allow the writ petition to that extent. I make no order as to costs.

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