

State of Madras and anr. Vs. Efficient Publicities Private Ltd.

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Court : Chennai

Decided On : Nov-09-1978

Reported in : [1979]44STC427(Mad)

Judge : Gokulakrishnan and ;Varadarajan, JJ.

Appeal No. : Appeal No. 457 of 1974.

Appellant : State of Madras and anr.

Respondent : Efficient Publicities Private Ltd.

Advocate for Def. : V. Ratnam, Adv.

Advocate for Pet/Ap. : K. Venkataswami, Additional Government Pleader

Disposition : Appeal allowed

Judgement :

Varadarajan, J.

1. The defendants in O.S. No. 6676 of 1968 on the file of the First Assistant Judge, City Civil Court, Madras, are the appellants. The respondent was carrying on business in advertisement and publicity in Tamil Nadu. According to the plaint, in the course of such business, the respondent was getting blocks, slides, etc., made for its customers and passing them on to its customers. The commercial tax

authorities were making demands for tax on the cost involved in the preparation of blocks, etc. The respondent had been resisting these demands on the ground that no sale was involved in the transactions and had taken up the matter on appeal before the Appellate Assistant Commissioner for Commercial Taxes but without avail. The appellants had compulsorily levied sales tax aggregating to Rs. 22,218 for the years from 1961-62 to 1965-66. But a Bench of this Court has held on 8th March, 1967, in W.P. Nos. 2465 to 2468, 2702 to 2708 and 2767 to 2770 of 1966 that the line of activities carried on by the respondent cannot be deemed to be sales. The respondent thereafter requested the Deputy Commercial Tax Officer, II Division, Mount Road, Madras-2, for refund of the aforesaid sum of Rs. 22,218 by its letter dated 10th November, 1967. The demand has not been complied with. The action of the appellants in levying the said tax has been declared to be illegal and void. The appellants are, therefore, bound to refund the amount to the respondent. The respondent filed the suit in these circumstances for the recovery of the said amount together with interest from the date of the suit.

2. The second appellant adopted the written statement of the first appellant. The first appellant contended that the allegation that the respondent has been resisting the demands for sales tax on its transactions for the years 1961-62 to 1965-66 on the ground that no sales were involved in the transactions and that the authorities had not accepted the position is not correct. The respondent did not put forth any case for the assessment year 1961-62. But for the year 1962-63 the respondent disputed only the tax of Rs. 371.30, which was levied on pre-sale expenses and the appeal was allowed by the Appellate Assistant Commissioner and effect was given to his order. Similarly, for the year 1963-64, the disputed turnover to the extent of Rs. 5,064.00 and Rs. 71,320.00 on the sale of slides and blocks supplied by the respondent was rejected by the Appellate Assistant Commissioner and the respondent did not take the matter further in appeal before the Appellate Tribunal or the High Court. For the years 1964-65 and 1965-66, the assessments were made on the book turnover of the respondent, who has not questioned the assessment before either the appellate authorities or the revisional authorities. Therefore, it is wholly incorrect to allege that the respondent has been resisting the demands all these years.

3. The first appellant further contended that the civil court has no jurisdiction to entertain a suit as regards the correctness of the assessment in view of Section 51 of the Tamil Nadu General Sales Tax Act, 1959, as the respondent has not availed of the adequate remedy available under the provisions of that Act by preferring appeals or revisions and the civil court cannot go into the question of refund of sales tax by reopening the assessments, which have become final. The first appellant raised the question of limitation, contending that the respondent has abandoned its case, that the claim is hopelessly barred by limitation and that the respondent is not entitled to claim the benefits of the Limitation Act as if the cause of action arose on 8th March, 1967, when the High Court pronounced the judgment in the aforesaid writ petitions.

4. On the above pleadings, six issues were framed by the trial court. On issue No. 1 relating to the respondent's right to recover the suit amount, the learned First Assistant Judge held that the respondent is entitled to recover the amount. On issue No. 2 relating to jurisdiction of the civil court to entertain the suit, the learned First Assistant Judge held that the respondent is not seeking to set aside or modify the assessment orders of the commercial tax authorities, but simply wants a refund of the monies that had been collected illegally and the civil court has, therefore, jurisdiction to entertain the suit. On issue No. 3 relating to the question, whether the levy of sales tax for the years 1961-62 to 1965-66 is in order, he held that the transaction of the respondent is of an advertising agency and will not be liable to sales tax and that the levy is not in order. On issue No. 4 relating to the question, whether the respondent is estopped from putting forward the claim, the learned First Assistant Judge held that there is no estoppel against law. On issue No. 5 relating to the bar of limitation, the learned First Assistant Judge held that since the decision of the High Court in the said writ petitions was rendered in March, 1967, and the suit has been filed in November, 1968, it is not barred by limitation. On these findings, the learned First Assistant Judge decreed the suit as prayed for with costs.

5. The respondent filed a return for each of the years 1961-62 to 1965-66. For the year 1961-62, the Joint Commercial Tax Officer accepted the return and assessed the respondent to tax and there was no appeal against this order. For the year

1962-63, the Joint Commercial Tax Officer added some additional turnover, rejecting the claim of the respondent for exemption, and passed an assessment order. There was an appeal by the respondent to the Appellate Assistant Commissioner of Commercial Taxes against the addition of the turnover and rejection of the respondent's claim for exemption, and it was allowed in favour of the respondent. For the year 1963-64, the Joint Commercial Tax Officer added some additional turnover rejecting a portion of the exemption claimed by the respondent. There was an appeal by the respondent to the Appellate Assistant Commissioner of Commercial Taxes and it was dismissed and no appeal was taken by the respondent to the Appellate Tribunal. The order of the Appellate Assistant Commissioner became final. For the years 1964-65 and 1965-66, the Joint Commercial Tax Officer accepted the returns of the respondent and passed the assessment orders. The respondent did not take the matter in any appeal. These facts are not in dispute before us. Subsequent to the assessment of the respondent for the years 1964-65 and 1965-66, traders doing similar business of advertisement and block-making filed W.P. Nos. 2465 to 2468, 2702 to 2708 and 2767 to 2770 of 1966, challenging the levy of sales tax on the transactions on the ground that no sale was involved and that it was only a service contract business and the commercial tax authorities had no authority to levy sales tax on the same. These writ petitions were allowed on 8th March, 1967, by a Bench of this Court and that judgment has become final. The respondent, who did not file any writ petition against the levy of sales tax on it, however, sent a notice calling upon the appellants to refund the suit amount and filed the present suit, after the claim had been disputed by the appellants. However, the appellants have accepted the position even with reference to the respondent in regard to the years subsequent to 1964-65 and 1965-66 and have admitted that the nature of business carried on by the respondent will not attract sales tax. In exhibit B-6, it was stated that the High Court has held in W.P. Nos. 2465 to 2468 of 1966 and others that the transactions of advertisement agencies are not in any sense sales liable to tax under the Tamil Nadu General Sales Tax Act, 1959, and, therefore, the total and taxable turnover for the year 1966-67 is determined at 'nil' rupees.

6. Though the judgment of this Court in W.P. Nos. 2465 to 2468, 2702 to 2708 and 2767 to 2770 of 1966 is not inter-parties or a judgment in rem and, therefore, not

binding on the appellants, it is a piece of evidence to show that the transactions similar to those carried on by the respondent do not involve any element of sale and are not liable to sales tax under the Tamil Nadu General Sales Tax Act, 1959. There is also exhibit B-6, whereby it has been held by the commercial tax authorities that the business of the respondent was of advertisement agencies and that it is not in any sense liable to tax under the Act. The learned First Assistant Judge also held that the business of the respondent was of advertising agencies and is not liable for assessment to tax under the Tamil Nadu General Sales Tax Act, 1959. In these circumstances, the question that the respondent was not liable to tax on the transactions for the years 1961-62 to 1965-66 was not disputed before us by the Learned Counsel for the appellants. No ground has been taken in the memorandum of grounds of appeal against the decision of the learned First Assistant Judge that there is no bar of limitation. The only contention urged before us is that the civil court has no jurisdiction to entertain the suit in view of Section 51 of the Tamil Nadu General Sales Tax Act and we are called upon to decide only that question.

7. Section 3 of the Tamil Nadu General Sales Tax Act, 1959, hereinafter referred to as the Act, is the charging section. Section 12 of the Act lays down the procedure to be followed by the assessing authority. Clause (1) of that section lays down that:

The assessment of a dealer shall be on the basis of the prescribed return relating to his turnover submitted in the prescribed manner within the pre-scribed period.

8. There is no dispute that the assessments of the respondent for all the years in question, namely, 1961-62 to 1965-66, were on the basis of the returns submitted by the respondent as required under Section 12(1) of the Act. Section 31(1) of the Act provides for an appeal to the Appellate Assistant Commissioner against the order passed under Section 12 of the Act by the appropriate authority within thirty days from the date on which that order was served on the assessee in the manner prescribed. Section 32 of the Act provides for suo motu revision of any order passed or proceeding recorded by the appropriate authority under Section 12 and certain other sections of the Act. Section 34 provides for suo motu revision by the Board of Revenue of any order or proceeding recorded

by the appropriate authority under Section 12 and some other sections of the Act or an order passed by the Appellate Assistant Commissioner under Section 31(3) of the Act, or any order passed by the Deputy Commissioner under Section 32(1) of the Act. Section 35 provides for revision to the Board of Revenue by any person aggrieved by any order passed by the Deputy Commissioner under Section 33(3) within a period of thirty days from the date on which a copy of the order was served on him in the manner prescribed. Section 36 provides for any person objecting to an order passed by the Appellate Assistant Commissioner under Section 31(3) of the Act or an order passed by the Deputy Commissioner under Section 32(1) filing an appeal against an order to the Appellate Tribunal within a period of sixty days from the date on which the order was served on him in the manner prescribed. Section 37 provides for an appeal to the High Court against the order of the Board of Revenue under Section 34 within sixty days from the date on which the order was served in the manner prescribed. Section 38 provides for a revision to the High Court within ninety days from the date on which a copy of the order under Section 36(3) or Section 36(6) of the Act is served in the manner prescribed by any person who objects to such order, or the Deputy Commissioner on the ground that the Appellate Tribunal has either decided erroneously or failed to decide any question of law. Section 51, providing for bar of suits and proceedings to set aside or modify assessments except as provided in the Act, reads:

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

(b) No injunction shall be granted by any court in respect of any assessment made, or to be made, or in respect of any action taken, or to be taken, in pursuance of any of the provisions of this Act.

9. At the relevant time Rule 16 of the Tamil Nadu General Sales Tax Rules, 1959, provided for refund and stated inter alia that 'if there are no arrears of tax due under the Act from the dealer, or if after such adjustment there is still an excess, the officer shall serve upon the dealer a notice in form C for refunding the amount of the excess tax, and along with such notice, he shall also send to the dealer a

voucher for claiming refund of that amount from the treasury'. Now, that rule has been replaced by Section 39-A of the Act, which has been inserted by Act 31 of 1972, with effect from 1st December, 1972. Section 39-A reads thus:

Amendment of order of assessment, etc.--(1) Where as a result of any order passed in appeal or revision or review under this Act, any change becomes necessary, in the order of assessment, the appropriate appellate authority, or revising or reviewing authority may authorise the assessing authority to amend the order of assessment accordingly and on such amendment being made, any amount overpaid by the assessee shall be refunded to him without interest, or the further amount of tax, if any, due from him shall be collected in accordance with the provisions of this Act, as the case maybe.

(2) Pending the exercise of the powers of appeal, revision or review, the appropriate appellate authority, or revising or reviewing authority may, on application made by the assessing authority or the assessee, stay the refund to the assessee of any amount overpaid, or the collection of further amount of tax due from the assessee, in pursuance of the order which is the subject-matter of appeal, revision or review.

10. The Learned Counsel for the appellants invited our attention to three decisions in support of his contention that the civil court has no jurisdiction to entertain the suit, in view of the bar in Section 51 of the Act and the various provisions referred to above, made in the Act itself for rectifying the errors, if any, committed by the appropriate authority in the matter of assessment. The first of those decisions is of the Supreme Court in *Kamala Mills Ltd. v. State of Bombay* : [1965] 57 ITR 643 (SC) . The appellant in that case was a limited company, a textile mill in Bombay, carrying on business in the manufacture and sale of textiles. During the period 26th January, 1950, to 31st March, 1951, it was registered as a 'dealer' under the Bombay Sales Tax Act, 1946. In that period, the appellants sold goods out-side the State of Bombay for Rs. 40,20,623-12-0 and Rs. 1,08,946-14-0. On these amounts general sales tax of Rs. 61,885-12-0 and special sales tax of Rs. 3,301-8-0 respectively were levied. The appellant filed a suit on the original side of the Bombay High Court on 20th December, 1956, claiming the said amounts

aggregating to Rs. 65,187-4-0, on the ground that it had been levied illegally and that the illegality was discovered soon after the Supreme Court delivered judgment in *Bengal Immunity Company Limited v. State of Bihar* : [1955]2SCR603 and Section 20 of the Bombay Sales Tax Act did not bar the institution of the suit. Section 20 of that Act reads:

Save as is provided in Section 23, no assessment made and no order passed under this Act or the Rules made thereunder by the Commissioner or any person appointed under Section 3 to assist him shall be called into question in any civil court, and save as is provided in Sections 21 and 22, no appeal or application for revision shall lie against any such assessment or order.

11. The claim made by the appellant in that case was resisted by the respondent, the State of Bombay, on several grounds, one of them being that the civil court had no jurisdiction to entertain the suit in view of the bar under Section 20 of the Act. The other ground was that the appellant's contention that Section 20 was ultra vires of the Constitution was without any substance. The suit was dismissed, upholding the plea that the civil court had no jurisdiction in view of Section 20. The Division Bench of the Bombay High Court agreed with the view of the learned trial Judge and dismissed the appeal. Further appeal was taken to the Supreme Court after obtaining a certificate from the High Court. The Supreme Court has observed in its decision:

There is no doubt that a claim for the refund of sales tax alleged to have been paid by the appellants through mistake is a claim of a civil nature and normally it should be triable by the ordinary courts of competent jurisdiction as provided by Section 9 of the Code; but this section itself lays down that the jurisdiction of the civil courts to try suits of a civil nature can be excluded either expressly or impliedly; and so, the point raised for our decision in the present appeal is whether on a fair and reasonable construction of Section 20, it can be said that the jurisdiction of the civil court is barred either expressly or impliedly....

This question has been recently considered by this Court in *Firm of Illuri Subbayya Chetty & Sons v. State of Andhra Pradesh* : [1963]50ITR93(SC) . Dealing with Section 18-A of the Madras General Sales Tax Act (Act 9 of 1939), which

corresponds to Section 20 with which we are concerned in the present appeal, this Court observed that the expression 'any assessment made under this Act' is wide enough to cover all assessments made by the appropriate authorities under this Act whether the said assessments are correct or not. It is the activity of the assessing officer acting as such officer which is intended to be protected and as soon as it is shown that exercising his jurisdiction and authority under this Act, an assessing officer has made an order of assessment, that clearly falls within the scope of Section 18-A. It was also observed that whether or not an assessment has been made under this Act, will not depend on the correctness or accuracy of the order passed by the assessing authority....

It would be noticed that Mr. Sastri's argument that the impugned order of assessment is without jurisdiction and, as such, does not fall within Section 20, proceeds on the assumption that the finding of the appropriate authority that the transactions in question were taxable under the relevant provisions of the Act, is a finding on a fact which is collateral. The question is: is this assumption well-founded? In our opinion, the answer to this question must be the negative....

It would thus be seen that the appropriate authorities have been given power in express terms to examine the returns submitted by the dealers and to deal with the question as to whether the transactions entered into by the dealers are liable to be assessed under the relevant provisions of the Act or not. In our opinion, it is plain that the very object of constituting appropriate authorities under the Act is to create a hierarchy of special tribunals to deal with the problem of levying assessment of sales tax as contemplated by the Act.... The whole activity of assessment beginning with the filing of the return and ending with an order of assessment, falls within the jurisdiction of the appropriate authority and no part of it can be said to constitute a collateral activity not specifically and expressly included in the jurisdiction of the appropriate authority as such. We are, therefore, satisfied that Mr. Sastri is not right when he contends that the finding of the appropriate authority that a particular transaction is taxable under the charging section of the Act, is a finding on a collateral fact and it is only if the said finding is correct that the appropriate authority can validly exercise its jurisdiction to levy sales tax in respect of the transactions in question. In fact, what we have said about the

jurisdiction of the appropriate authorities exercising their powers under the Act, would be equally true about the appropriate authorities functioning either under similar Sales Tax Acts or under the Income-tax Act....

For the purpose of construing Section 20, we are not prepared to hold that an assessment based on an erroneous finding about the character of the transaction, is an assessment made without jurisdiction and, as such, is outside the purview of Section 20 of the Act....

Reverting then to Section 20, it seems to us plain that the words used in this section are so wide that even erroneous orders of assessment made would be entitled to claim its protection against the institution of a civil suit.... Our conclusion, therefore, is that Section 20 should be construed in the same manner in which Section 18-A of the Madras General Sales Tax Act was construed by this Court in *Firm of Illuri Subbayya Chetty & Sons* : [1963]50ITR93(SC) and that even on this wide construction, the said section is constitutionally valid.

12. In *State of Madras v. Sri Ramakrishna Mills (Coimbatore) Limited* [1969] 24 S.T.C. 274 which came up before a Bench of this Court, the suit had been filed to recover a sum of Rs. 11,170.00 alleged to have been paid by the plaintiff under a mistake of fact and law as sales tax. During the assessment year 1955-56, after 6th September, 1955, inter-State purchases or sales were not taxable by reason of the bar under Article 286(2) of the Constitution. In that period, the plaintiff had purchased goods worth Rs. 22 lakhs odd outside Madras State. The sales tax on those purchases came to Rs. 11,170. By a mistake of fact and law, the plaintiff had included those transactions in its return for assessment of sales tax and did not claim exemption. The Deputy Commercial Tax Officer accepted the plaintiff's return and assessed it by an order dated 30th September, 1956, and served it on him on 24th November, 1956. The plaintiff filed an appeal after a lapse of six months and not within the stipulated time of thirty days, raising the question of exemption. The Commercial Tax Officer dismissed the appeal on the preliminary ground that it is barred by limitation. The plaintiff was unsuccessful in the further appeal to the Sales Tax Appellate Tribunal. Without filing any revision to the High Court within sixty days, the plaintiff filed a suit in the civil court for recovering the

amount after issuing a statutory notice under Section 80 of the Code of Civil Procedure. The defence was that the suit was barred under Section 18-A of the Madras General Sales Tax Act, 1939. The learned Judges were concerned with the plea of legal bar to the maintainability of the suit. The contention urged before them was that the sales tax authority had failed to comply with Article 286(2) of the Constitution and that this must be considered as non-compliance with a fundamental provision of the statute as would make the entire proceedings before the appropriate authorities illegal and without jurisdiction. Disagreeing with that contention, the learned Judges observed:

Before the sales tax authority could come to a conclusion that the transaction is hit by Article 286 of the Constitution there is necessarily an anterior stage in the proceedings involving an examination of the details of the transaction, and it is only after it has decided on such examination that the sale is out-side the State, can it decide that the transaction should not be taxed. But, if, in the course of the same enquiry, it comes to the conclusion that the evidence shows that it is a sale inside the State, it has jurisdiction to assess it. It is not, therefore, a case where the 'entire proceedings' before the authority are illegal and without jurisdiction.

On the other hand, the relevant principle to apply, for the purpose of jurisdiction in such a case, is the one which the Supreme Court laid down in *Kamala Mills Limited v. State of Bombay* [1965] 16 S.T.C.613 (S.C.) where the facts are analogous to those in the present case.... They, therefore, held that even if a mistake was committed by the assessing authority in assessing the transaction, which would be hit by Article 286 of the Constitution, the decision was within the jurisdiction and the assessment could claim the protection of Section 20 of the Bombay Sales Tax Act.

13. The learned Judges upheld the plea that the suit was barred by Section 18-A of the Madras General Sales Tax Act, 1939.

14. In *Bata Shoe Co. Ltd. v. Jabalpur Corporation* : [1977] 3 SCR 182 the plaintiff-company paid a sum of Rs. 16,528 odd as octroi duty to the then Jabalpur Municipal Committee in respect of the articles imported by the plaintiffs' retail shops at Jabalpur within the limits of the Municipal Committee between 1st April, 1943, and 31st March, 1946. This duty was assessed by the Municipal Committee on an

amount which was 40 per cent less than the retail price of the goods brought within the municipal limits. The Municipal Committee decided in 1946-47 to reopen and revise the assessment by charging octroi duty at only 6 per cent less than the retail price of the goods and also to levy double the duty as penalty on the ground that the plaintiffs had intentionally evaded payment of the duty payable on the goods. On appeal, the Sub-Divisional Officer, Jabalpur, reduced the duty by modifying it as 12 per cent less than the retail price and upholding the rate of penalty, namely, double the duty. The Board of Revenue rejected the revision application of the plaintiffs who thereafter paid the amount under protest with a further amount that was also demanded. Subsequently, the plaintiffs filed the suit for recovery of the two sums aggregating to Rs. 31,677 odd. The Municipal Committee, which was succeeded by the Jabalpur City Corporation, raised contentions as regards jurisdiction of the civil court to entertain the suit as well as limitation. The trial court rejected both the contentions and decreed the suit. The High Court held on appeal that there was no bar of limitation and that the reassessment of octroi duty ultimately fixed in the appeal by the Sub-Divisional Officer could not be questioned in the civil court. The Supreme Court dismissed the appeal filed by the plaintiffs observing that the error could be corrected only in the manner provided in the Act and by the authority prescribed thereunder and that the remedy by way of a suit is barred. The learned Judges have observed:

In *Kamala Mills' case*, : [1965]57ITR643(SC) it was observed that if a statute creates a special right or liability, provides for the determination of that right or liability by tribunals specially constituted in that behalf and lays down that all questions in regard to that right or liability shall be exclusively determined by the tribunals so constituted, it becomes pertinent to enquire whether remedies normally associated with actions in a civil court are prescribed by the said statute or not. If the court is satisfied that the Act provides no remedy for making a claim for the recovery of an illegally collected tax, the court might hesitate to construe a provision giving finality to the orders passed by the tribunals specially created by the Act as creating an absolute bar to the suits and if such a construction was not reasonably possible, the court would be called upon to examine the constitutionality of the provision excluding the civil court's jurisdiction in the light

of Articles 19 and 31 of the Constitution. According to the 1st proposition in Dhulabhai's case, : [1968]3SCR662 . if the statute gives finality to the orders passed by the special tribunals created by it, the civil court's jurisdiction would be excluded if the statute provides adequate remedies to do what the civil courts are normally empowered to do in a suit.

15. The learned Judges have repelled the contention that the Act protects correct assessments only and that every incorrect or wrong order of assessment can be challenged by a suit though the statute gives it finality and provides full and effective remedies to challenge it and they have added that such a contention is contrary to the decision in the Kamala Mills' case, : [1965]57ITR643(SC) that if the appropriate authority while exercising its jurisdiction and powers under the relevant provisions of the Act comes to an erroneous conclusion, it cannot be said that the decision is without jurisdiction. They have added that the plaintiffs' reliance on the first proposition in the Dhulabhai's case, : [1968]3SCR662 is equally misconceived and that the case falls under one or the other of the two paragraphs in the second proposition laid down in that case.

16. On the other hand, Mr. V. Ratnam, appearing for the respondent, invited our attention to several decisions and strenuously contended that the appropriate authorities had no jurisdiction to levy assessment on the transactions which do not involve any element of sale, as has been held by this Court in the aforesaid writ petitions which had been filed by some third parties carrying on business similar in nature to the business carried on by the respondent, and contended that the orders are therefore illegal and the civil court has jurisdiction to entertain the suit filed for the recovery of the amount illegally collected from the respondent.

17. In Union of India v. Sarojini Rajah : [1974]97ITR37(Mad) the plaintiff filed a suit for the recovery of Rs. 15,370.00 odd with interest. Her case was that immediately after her husband's death on 30th November, 1959, she received a number of notices from the income-tax department in respect of the arrears of income-tax stated to be due by her husband, including copies of notices issued to certain banks attaching monies belonging to her husband, that, on receipt of those notices,

she intimated the Income-tax Officer that she had no monies or assets of her husband, that a notice dated 10th December, 1959, also had been issued to her calling upon her to pay a sum of Rs. 15,370 odd stated to be due as tax on the provisional assessment under Section 23B of the Income-tax Act, that she understood that the notice to be one relating to the provisional assessment of her income and in that mistake she paid the amount and that she realised when a few days later she received another notice demanding payment of a sum of Rs. 10,487 odd in pursuance of a provisional assessment of her own income that the earlier demand related to the provisional assessment on the return submitted by her husband. She requested adjustment of the amount paid by her against the sum of Rs. 10,487 odd demanded from her, saying that the sum of Rs. 15,370 odd had been paid by mistake. She paid the sum of Rs. 10,487 odd to avoid penal assessment and applied for refund of the sum of Rs. 15,370 odd, and after it was refused, she filed the suit for recovery of the amount with interest. One of the objections raised was that the suit in substance was to set aside a provisional assessment made under Section 23B of the Income-tax Act and it is barred under Section 67 of that Act and that the only remedy open to the plaintiff is to resort to the remedies provided under the Act. The learned Judges repelled the contention regarding the non-maintainability of the suit and observed:

We are not able to see how this suit is one to set aside or modify any assessment made under the Income-tax Act. This is a simple suit for recovery of money said to have been paid under a mistake or under coercion. The plaintiff does not seek to set aside or modify any assessment made under the Act against her husband. What she states is that she is not liable to satisfy the demand under exhibit A-1 for payment of tax due by her husband from out of her personal funds and, therefore, the collection made from her should be refunded.

18. We respectfully agree with the learned Judges, but this decision does not apply to the facts of the present case and cannot help the respondent. The plaintiff in that case did not dispute the correctness of the provisional assessment made under Section 23B of the Income-tax Act on the return submitted by her husband. She only contended that she was not in possession of any monies or assets of her husband and that she had paid the sum of Rs. 15,370 odd under the

mistaken belief that it was in relation to the provisional assessment of her own income and that she realised the mistake when she received a few days later another notice demanding payment of Rs. 10,487 odd in pursuance of a provisional assessment of her own income. Without questioning the correctness of the provisional assessment made on the return submitted by her husband, she sought to recover the amount on the ground that it had been paid by her under a pure mistake of fact. But, in the present case, as stated earlier, the assessments had been made on the basis of the returns submitted by the respondent itself, as required by Section 12(1) of the Act, and the amount could not be refunded to the respondent without a finding that the assessment itself was wrong on the ground that the transactions carried on by the respondent are works contracts and did not involve any element of sale. Though the respondent has not prayed for a declaration that the assessment orders are not valid, there is, in effect, a prayer for the court to hold so when the respondent seeks to recover the amount on the ground that there was no transaction of sale and that the amount has been collected illegally. In these circumstances, we do not agree with the learned First Assistant Judge that the respondent does not seek to set aside or modify the assessment orders made by the commercial tax authorities but simply wants a refund of the money that has been collected from it illegally. It is not possible to order any refund of the money except on the basis that the assessment orders are wrong on the ground that the transactions carried on by the respondent are not sales liable to be assessed under the provisions of the Act. We also do not agree with the observation of the learned First Assistant Judge that it is not the grievance of the respondent that the assessment order, when it was made, suffered any mistake and that the respondent has not come to the court for any relief to rectify the order of assessment. We do not also agree with the learned First Assistant Judge that the decision dated 14th April, 1969, in *Eastern Equipment & Sales Ltd. v. Sales Tax Appellate Tribunal*¹ does not help the appellants. In these writ petitions it has been held that if a litigant wants to take advantage of a subsequent decision of a superior court, it is his duty to keep the matter alive and not allow it to become final and then come by way of a rectification as if the order, when it was made, (1) W.P. Nos. 1080 to 1083 of 1969, suffered from a mistake. The respondent in the present case had not kept the matter alive

when he filed the suit but had allowed the orders of the appropriate authority, namely, the Joint Commercial Tax Officer and the Appellate Assistant Commissioner, referred to above, to become final.

19. In *State of Madras v. Sri Ramakrishna Mills (Coimbatore) Limited* [1969] 24 S.T.C. 274 referred to above, it has been observed that the effect of Section 18-A of the Madras General Sales Tax Act, 1939, is that the aggrieved party cannot bypass these provisions and seek remedy by way of suit under the common law, and urge that what has been paid by him is one paid under a mistake of fact and law and therefore refundable under the general principle stated in Section 72 of the Indian Contract Act. The learned First Assistant Judge has proceeded on the basis that that observation will not apply to the facts of the present case and he has observed that the respondents in that case had 'gone to the civil court under some other context, namely, to question the assessment made by the tax authorities even before going to the High Court to get a decision whether the tax assessed was proper or legal. On the other hand, so far as the facts of the present case are concerned, there has been a categorical decision by the High Court that the transactions of the advertising agencies are not sales and they could not be assessed for sales tax payment. Inasmuch as it has been held that the taxes of the kind levied on the plaintiff are illegal, it is open to the plaintiff to have come to the civil court to get a refund of the same. The plaintiff does not seek the setting aside or modification of the assessment orders made by the commercial tax authorities, but simply wants a refund of the money that has been collected from it illegally'. We are of the opinion that this view of the learned First Assistant Judge is wholly incorrect, for, the respondent cannot recover the money except on the basis that the orders of the appropriate authorities assessing the respondent to sales tax are illegal and cannot be allowed to stand. There can be no order for refund of the amount except on an implied finding that the said orders are illegal and unsustainable.

20. Mr. V. Ratnam very strongly relied upon the decision of the Supreme Court in *Dhulabhai v. State of Madhya Pradesh*, : [1968] 3 SCR 662. The contention of the plaintiffs in the suits filed for the refund of tax collected under Section 5 of the Madhya Bharat Sales Tax Act, 1950, in those cases was that the amount was

illegally collected against a constitutional prohibition under Article 301 and the levy was not saved under Article 304(a). The notifications issued by the Government imposing tax on tobacco imported at different rates was declared void in the *Bhailal Bhai's case* : [1964]6SCR261 . The main defence was that the Madhya Bharat Act contains provisions of appeal, revision, rectification and reference and that the suits were barred by the provisions of Section 17 of that Act which provided:

Save as is provided in Section 13, no assessment made and no order passed under this Act or the Rules made thereunder by the assessing authority, appellate authority or the Commissioner shall be called into question in any court, and save as is provided in Sections 11 and 12 no appeal or application for revision shall lie against any such assessment order.

21. The District Judge found that the suits were maintainable. But, on appeal by the State of Madhya Pradesh, the High Court reversed the decision of the District Judge, though it had been conceded that the tax could not be imposed in view of the bar of Article 301. The Supreme Court allowed the appeal preferred against the decision of the High Court. Reference has been made in the decision of the Supreme Court to the decision in the *Kamala Mills' case*, : [1965]57ITR643(SC) without any disapproval. The Supreme Court has laid down seven propositions on an analysis of the various decisions. They are:

(1) Where the statute gives a finality to the orders of the special tribunals the civil courts' jurisdiction must be held to be excluded if there is an adequate remedy to do what the civil courts would normally do in a suit. Such a provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion, the examination of the remedies and the scheme of the particular Act to find out the intention becomes necessary and the result of the inquiry may be decisive. In the latter case, it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.

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

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

22. Mr. Ratnam relied on proposition No. (5) and submitted that the collection of the sales tax in this case was illegal on the ground that no sale was involved in the transactions carried on by the respondent and, therefore, the civil court has jurisdiction to entertain the suit. It must be noted that it has not been contended that there was anything unconstitutional in the case or that the refund of the

amount is claimed on the ground that any provision of the Act, under which the amount was purported to have been collected by the appropriate authorities, had been declared ultra vires for the relevant period. The decision of this Court in the aforesaid W.P. Nos. 2465 to 2468, 2702 to 2708 and 2767 to 2770 of 1966 was not inter partes and the judgment rendered therein is not a judgment in rem, as has been mentioned earlier. The decision in those writ petitions can be taken only as a piece of evidence or circumstance. The respondent has to prove that no sale was involved in the business carried on by it and, therefore, no sales tax was leviable under the Act. The enquiry as to whether no sale was involved in the business carried on by the respondent could be made only by the tribunals constituted under the Act, as mentioned above, in the various provisions, namely, Sections 31(1), 36 and 38, and also in Sections 32, 34, 35 and 37 of the Act. As said earlier, the amount could not be refunded except on the footing that no assessment could have been made on the business carried on by the respondent. Section 51 of the Act clearly lays down that no suit or other proceedings shall, except as expressly provided under the Act, be instituted in any court to set aside or modify any assessment made under the Act. No doubt, the respondent has not specifically prayed for setting aside or modifying the assessment orders made for the years 1961-62 to 1965-66, but, as we stated earlier, the amount collected as sales tax under the provisions of the Act could not be refunded except on the footing that the assessment orders are invalid. Therefore, Section 51 of the Act would clearly bar the suit. We do not think that, by laying down the fifth proposition in the Dhulabhai's case, A.L.R. 1969 S.C. 78 the Supreme Court has held broadly that every order of assessment, which is not in accordance with law, is such as could be challenged by instituting a suit in a civil court without having recourse to the provisions specifically made available in the Act for questioning the correctness of the same. We say this, having regard to the fact that, in that case, the Supreme Court has not differed from its earlier decision in the Kamala Mills' case, : [1965] 57 ITR 643 (SC) which has been referred to in the decision without any disapproval, and the Supreme Court had held in the Kamala Mills' case³ that for the purpose of Section 20 of the Bombay Sales Tax Act, which corresponds to Section 18-A of the Madras General Sales Tax Act of 1939 and Section 51 of the present Act, they were not prepared to hold that an assessment based on an

erroneous finding about the character of the transaction is an assessment made without jurisdiction and is, as such, outside the purview of Section 20 of the Bombay Sales Tax Act, that Section 20 of the Act is wide enough to cover all assessments made by the appropriate authorities under the Act, whether the said assessments are correct or not, that it is the activity of the assessing officer acting as such officer which is intended to be protected, and as soon as it is shown that exercising his jurisdiction and authority under the Act an assessing officer has made an order of assessment, that clearly falls within the scope of Section 18-A and that whether or not an assessment has been made under the Act will not depend on the correctness or accuracy of the order passed by the assessing authority, and Section 20 of the Bombay Sales Tax Act should be construed in the same manner in which Section 18-A of the Madras Act of 1939 was construed by the Supreme Court in the Firm of Illuri Subbayya Chetty and Sons' case [1963] 14 S.T.C. 680 (S.C.). These observations made by the Supreme Court in the Kamala Mills' case, : [1965] 57 ITR 643 (SC) are a complete answer to the submission of Mr. Ratnam that because the tax had been levied on transactions similar to those held in the aforesaid W.P. Nos. 2465 to 2468, 2702 to 2708 and 2767 to 2770 of 1966 to be not taxable as admitted for the future years by the appropriate authorities themselves in exhibit B-6, it must be held that the assessments are illegal in the sense that they could be questioned by filing a regular suit in the civil court without having recourse to the provisions contained in the Act itself for correcting such errors. Therefore, we are of the opinion that the decision of the Supreme Court in the Dhulabhai's case, : [1968] 3 SCR 662 does not help the respondent.

23. Mr. V. Ratnam next relied upon a decision of a Bench of the Andhra Pradesh High Court in State of Andhra Pradesh v. Appanna Satyanarayana Murthi and Raja Rao & Co. [1970] 26 S.T.C. 190. In that case, the plaintiffs were dealers registered under the Andhra Pradesh General Sales Tax Act and carrying on business in copra. They were assessed on their turnover in copra for the year 1957-58 and the subsequent years. Under the Act separate sales tax could be levied on coconuts and copra as two separate commodities at the time of the assessment in that case. But by Act No. 26 of 1961 there was an amendment deleting copra from the commodities assessable to sales tax and an explanation

brought in by the amendment provided for inclusion of copra in the definition of 'coconut' and the amendment was retrospective from 15th June, 1957. The allegation in the plaint in that case was that as a result of the amendment the levy of sales tax and its collection had become illegal and that the plaintiffs were entitled to refund of the tax paid by them under coercion. The claim was resisted on several grounds, including the ground of non-maintainability of the suit in the civil court. The trial Judge held that the claim did not pertain to the merits or propriety of the assessment and that the jurisdiction of the civil court to entertain the suit was not barred. Even in the appeal it was contended that the civil court had no jurisdiction to entertain the suit and also the claim for refund is unsustainable, because the assessment itself had not been set aside or modified. The contention regarding the non-maintainability of the suit was repelled by the learned Judges and they have observed:

It is necessary to take notice of an aspect peculiar to these cases. The claim for restitution arises by reason of a supervening event. Where the claim for restitution arises because of such an event and the retention of the tax previously collected is challenged as an 'illegal act', the cause of action rests on facts or actions of authorities that are impugned, which are de hors the statute under which the levy and collection had been made. It appears to us that in the circumstances like the present, the test whether the statute bars the action in a civil court is obviously inappropriate. The remedy that is sought in civil courts is for the redress of a wrong done not under a colour of taxing statute but because of something extraneous to it. The action is in essence in respect of something done or omitted to be done, not under the said enactment but outside the purview of the jurisdiction or power conferred by the said enactment. Therefore, the question as to whether the remedy by a resort to civil court is barred in these cases on hand by reason of the preclusive provisions of the special law, does not arise at all. The act complained of is an illegal retention of the amount and the illegal retention of the amount is an act not directly attributable to any power conferred by the special enactment. Nor does the special enactment provide any machinery for challenging the illegal retention of the tax that was collected.

23. In the earlier part of the judgment, the learned Judges have observed:

The learned Government Pleader sought to impress on us that these cases on hand are governed by the ruling in the Kamala Mills' case, : [1965]57ITR643(SC). We cannot agree with his contention. That decision turned on the principle that an authority vested with jurisdiction and powers under the relevant Act has the competence to determine whether a particular transaction was an outside sale and even if the authority commits an error, it is nevertheless an error within its jurisdiction and is capable of being corrected by the appellate forum. The error is one within jurisdiction and no fundamental departure from the statutory provisions is made so as to permit a review by a civil court. We think that there is no warrant for the application of that rule in the cases on hand.

24. We do not see how this decision would apply to the facts of the present case where the refund of the amount is sought not on the basis of anything which is extraneous to the provisions of the Act under which the amount purports to have been collected as tax but only by contending that the business carried on by the respondent did not involve any element of sale and could not, therefore, be taxed under the provisions of the Act, which recourse, in view of Section 51 of the Act, could be had only before the hierarchy of tribunals constituted under the provisions of the Act itself.

25. Mr. V. Ratnam finally relied upon the decisions of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 1 All E.R. 208. and of the Supreme Court in *Raja Jagadambika Pratap Narain Singh v. Central Board of Direct Taxes* : [1975]100ITR698(SC) (S.C.) and submitted that the orders of assessment of the respondent for the years 1961-62 to 1965-66 are nullities and they could be questioned in a civil court. In the English case, the appellants before the House of Lords submitted a claim for the first respondent, the Foreign Compensation Commission, whose determination thereof could not be questioned in any court of law by virtue of Section 4(4) of the Foreign Compensation Act, 1950. In May, 1963, the Commission provisionally determined that the appellants before the House of Lords had failed to establish their claim on the ground that the T.E.D.O., which had become the successor-in-title to the appellants, was not at any time a British national. The appeal before the House of Lords was from an order of the Court of Appeal allowing the appeal of the Commission filed against the order

of Browne, J., declaring that the provisional determination by the Commission was made with-out or in excess of the jurisdiction and was a nullity. Section 4(4) of the Foreign Compensation Act, 1950, provided that the determination by the Commission of any application made to them under that Act shall not be called in question in any court of law. The Commission contended in that case that there was a provisional determination of the claim by it and it was apparently valid as there was nothing on the face of the document to cast any doubt on its validity, and if it was a nullity it could be established only by raising some kind of proceedings in court, and that is expressly prohibited by Section 4(4) of the Act. But the appellants before the House of Lords contended that that is not the meaning of the words of the provision and that 'determination' means a real determination and does not include an apparent or purported determination which, in the eye of the law, has no existence because it is a nullity. Lord Reid has observed in his judgment:

It is a well-established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly--meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.

Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the courts has been held to protect a nullity....

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 this 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.... If it is entitled to enter on the enquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law.

26. The appeal was allowed by the majority of the three Law Lords, Lord Morris of Borth-y-Gest and Lord Pearson dissenting, and two of the majority of the Law Lords holding that the provisional determination by the Commission was a nullity.

27. The assessment orders in the present case had been passed on the returns submitted by the respondent itself admitting that the transactions were liable to be taxed under the provisions of the Act. Therefore, it could not be stated that the assessment orders, in pursuance of which the amount had been paid by the respondent, were a nullity.

28. In *Raja Jagadambika Pratap Narain Singh v. Central Board of Direct Taxes* : [1975] 100 ITR 698 (SC) it has been observed:

Mere exemptions from taxation of income otherwise competently taxable fell wholly within the jurisdiction of the officer for determination. There is a fundamental difference where the claim is that agricultural income is beyond the legislative competence of Parliament to enact and altogether outside the jurisdiction of the Income-tax Officer. It may well be contended that the impost is ultra vires his powers and, therefore, a nullity. Merely because an order has been passed by the officer and has not been appealed against, it does not become legal and final if otherwise it is void: for instance, if there is a flagrant violation of natural justice, the order by a Tribunal may be a nullity.

29. As stated earlier, the assessment orders have been made by the appropriate authority on the admission made by the respondent in the return submitted for the relevant years admitting that the transactions were liable to be taxed under the provisions of the Act and there is no question of any legislative incompetence in the present case. Even if the appropriate authorities had committed any error in exercising the jurisdiction conferred upon them by the provisions of the Act, it could not be stated that they had no jurisdiction and, therefore, their orders are nullities, for, it has been observed in the Kamala Mills' case, : [1965]57ITR643(SC) as stated earlier, that whether or not an assessment has been made under the Act will not depend on the correctness or accuracy of the order passed by the assessing officer and that it is the activity of the assessing officer acting as such officer which is intended to be protected and as soon as it is shown that exercising his jurisdiction and authority under the Act an assessing officer has made an order of assessment, that clearly falls within the scope of Section 51 of the Act corresponding to Section 18-A of the Act of 1939. We are, therefore, of the opinion that these last two decisions relied upon by Mr. Ratnam do not help the respondent.

30. Thus, on a consideration of the various decisions to which our attention had been drawn and the materials on records, we hold that the assessment orders in this case had been passed on the basis of the admission made by the respondent in the returns submitted by the respondent for the relevant years, that the appropriate authorities had jurisdiction to pass the orders of assessment, that the amounts could not be ordered to be refunded to the respondent except on the footing that the assessment orders are erroneous, that the finding that the assessment orders are erroneous which alone would lead to an order for refund of the amount collected in pursuance thereof could be given only by the Tribunal constituted in accordance with the provisions of the very Act, that there was a provision for refund of the amount wrongly collected in Rule 16, which has now been replaced by Section 39-A of the Act, and that the civil court has no jurisdiction to entertain the suit by virtue of Section 51 of the Act.

31. We accordingly allow the appeal with costs throughout and set aside the judgment and decree of the learned First Assistant Judge and dismiss the suit.

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