
(1966) 06 AP CK 0005
In the Andhra Pradesh High Court
Case No : Appeal No. 88 of 1962

Bommidala Poornaish

APPELLANT

Vs

The Union of India

RESPONDENT

Date of Decision : 27-06-1966

Acts Referred:

Central Excises and Salt Act, 1944 — Section 33, 35, 36, 40
Civil Procedure Code, 1908 (CPC) — Section 20, 80, 9
Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 45, 5, 60

Citation : AIR 1967 AP 338

Hon'ble Judges : Jaganmohan Reddy, J;Anathanarayana Ayyar, J

Bench : Division Bench

Advocate : O. Chinnappa Reddi, P. Satyanarayana and C. Padmanabha Reddy, for the Appellant; K. Ramachandra Rao and B Jagannadha Sastry, for the Respondent

Judgement

Jaganmohan Reddy, J.

(1) This appeal has been referred to a Bench by our learned brother Basi Reddy, J having regard to the general importance on certain questions arising in the case namely:-

(1) Does the bar of limitation prescribed by sub-section (2) of Sec. 40 of the Central Excises and Salt Act, 1944, apply to a suit of the nature out of which this appeal arises, viz., a suit for a declaration that the order of the Collector, Central Excise, levying penalty and duty on certain tobacco is illegal?

(2) If the said provision does apply, then which is the crucial order for purposes of limitation, the order of the Collector, or the order passed by the Government of India on revision? And

(3) The admissibility of the opinion of an expert without the expert being examined.

(2) The appellant-plaintiff is a licensed tobacco trader in Guntur. He had entered into a contract on 1-6-1965 with a Japan Monopoly through the Tokyo Food Products Ltd., for supply of 500 bales of tobacco from 1955 crop and 250 bales of 1954 crop both for CPL variety, IAC, without butts. As the said variety was not available in Guntur and Krishna Districts, he purchased from one G. Bhavani Prasad of Hyderabad on 13-10-1955, 199 packages of I. A. C. Tobacco, partly at Rs. 100 and partly at Rs. 72-8-0. The consignor (seller) applied for a permit in AR. 3 form for transport of the said packages by a lorry from Hyderabad to Guntur and was given a T. P. 2 permit on 13-10-1955 for transport of the same between 4-30 p.m. on 13-10-1955 and 5-00 p.m. on 15-10-1955. The marks and numbers of the 119 bundles were stated in the A. R. 3 form and also when T. P. 2 permit was issued, by the consignor and his men, during the absence of the plaintiff at Hyderabad. It may be stated that T. P. 2 form permitted the consignee of the plaintiff at Hyderabad. It may be stated that T. P. 2 form permitted the consignee on the consignee's bond and the goods were thereafter transported and reached Vijayawada on 14-10-1955. They were unloaded at the wharf from the kloory and kept at the shed of Sri. G Ramalingeswara Navigation Company, as it could not be ferried across the river Krishna owing to the locks and the navigable passage being blocked by sand deposits due to the stormy weather. The plaintiff's clerk, Chadalavada Srinivasarao (P. W. 5) who was sent from Guntur to Vijayawada, approached the Range Officer on 16-10-1955 and asked for extension of the time under T. P. 2. Thereupon the Range Officer came to the wharf on 17-10-1955 for inspection and on verification of the tobacco packages loaded in the boat, is said to have found some discrepancies in the marks and numbers noted in A. R. 3 and T. P. 2 forms with the actual goods. It was found that there were small chits bearing serial Nos. 1 to 119 with gross weights of individual packages noted thereon; but the packages themselves did not bear any marks. In view of these discrepancies the goods were seized and handed over to M/s. Dayanand Tobacco Company at Vijayawada for safe custody. Thereafter, the Exercise Authorities conducted investigation and submitted a report to the Collector of Central Excise, Hyderabad who issued a notice under rule 32(2) of the Central Excise Rules, stating that the plaintiff transported 119 packages of IAC, tobacco weighing 14,220 lbs., net without a valid transport document and to show cause why that tobacco not be confiscated and a duty on the said amount of tobacco removed from G. Bhavani Pershad of Hyderabad be levied. The plaintiff showed cause and stated that the consignment seized was the same as covered by the TP. 2 permit and that the liability, if any, was of the consignor at Hyderabad and consequently requested that the charges may be dropped. By an order, dated 12-7-1956, the Collector directed confiscation of the tobacco and ordered payment of Rs. 1,200 in lieu of confiscation, giving an option to redeem the same and imposing a penalty of Rs. 1,000. He also further levied a tax of Rs. 12,423-4-0. The plaintiff filed an appeal to the Central Board of Revenue, but it was rejected as per the order, dated 14-5-1957, on the ground that he did not deposit the amounts adjudged payable as per the Collector's order. Thereafter, he filed a revision to the Government of India in the Finance

Department, but this was also rejected without assigning any reasons. Thereafter the plaintiff paid the penalty of Rs. 1,000 under protest and redeemed to the tobacco after paying Rs. 1,200. The plaintiff averred that, as the transport of the tobacco was at the instance of the consignor and on his bond, he could not be held responsible on his bond and even on merits, he contended that the finding of the Collector was based on suspicion. A declaration was, therefore, prayed for that the order of the Collector, dated 12-7-1956, is illegal, arbitrary and ultra vires.

(3) The defendant, Union of India, stated that the averment of the plaintiff that the goods were transported of the responsibility of the consignor is wholly incorrect: that the goods were moved under the bond of the plaintiff and that the present stand taken by the plaintiff that they were moved on the consignor's bond was never before raised or urged in the earlier proceedings and is untenable. The consignment, even as per the plaintiff's contention, reached to Vijayawada in the early hours of 14-10-1955. That consignment totally disappeared and the plaintiff who was bound to account for the same, failed to do so and the duty and penalty were properly levied. The goods that were seized by the Central Excise Officer, Vijayawada, on 16-10-1955 were totally different from those to be transported under the TP. 2 permit. It was further stated that, according to P. W. 5, the clerk of the plaintiff the goods were transported from the plaintiff the goods were transported from Bhuvangiri on the evening of 14-10-1955 and reached Vijayawada on the morning of 15-10-1955, that the same were purchased by the plaintiff agent and were loaded in two lorries. As such the two consignments started from different places and on different dates. The marks and numbers on the packages were 1 to 119 instead of 768 to 850 and 895 to 930 as per the consignor's warehouse register and the subsequent lists as stated in AR. 3 and enclosed to TP. 2. The Deputy Superintendent, who was ordered to investigate, found that the tobacco in gunny bags consisted of broken pieces of leaf, old scrap dust and stems. The weight of the entire consignment was 14,220 lbs., instead of 14,198 lbs. Consequently, the consignment was seized and deposited with Dayananda Tobacco Company for safe custody, after drawing separate samples from the two kinds of packages. They were sent to the Senior Marketing Development Officer, according to whose opinion, the tobacco in the mat bundles might be of 1955 season, the value of which was between Rs. 50 and 60 per putti. In so far as the tobacco in the gunny bags in concerned, some leaf might be of 1955 season but others belong to earlier years, and fixed his value between Rs. 15 and 20 per putti. He also opined that the tobacco in the gunny bags was not exportable. The order of the Collector, Central Excise, is therefore not arbitrary or illegal or in violation of any rules. The Central Government dismissed the revision application after due enquiry and consideration and after obtaining further opinion of the samples on the request of the plaintiff made at the time of the hearing of the revision. It was also contended that the notice u/s 80, C.P.C., was not valid and that the suit should be dismissed.

(4) On these pleadings, the Second Additional Subordinate Judge. Guntur, drew the following issues: namely, (1) Is the order of the Central Excise Collector, Hyderabad, illegal? (2) Is the notice u/s 80, C.P.C., valid? (3) Is the suit in time? (4) Is the suit barred under the Central Excises and Salt Act, 1944? (5) To what relief is the plaintiff entitled.

(5) The Subordinate Judge held that the contention that the tobacco was moved out of Hyderabad not on the consignee's bond but on the consignor's application and on his bond, and as such the plaintiff could not be held liable, was not maintainable, because it was not specified in the suit notice u/s 80, C.P.C. In so far as the merits are concerned, that the marks were different, that the weight of the goods permitted to be transported and the goods seized are not the same, that the tobacco purchased at Bhavanagiri, was not held to have been established. On the only other point namely, whether the tobacco seized was not the same as that permitted to be transported, the Subordinate Judge relying on the expert's opinion of the Senior Marketing Development Officer, Exs B-29, and B-30 held that the tobacco on the samples taken from the seized tobacco was different and hence the order of the Collector was not illegal. On issues 3 and 4, he held on the interpretation of Section 40 of the Central Excises and Salt Act, 1944 (hereinafter called "the Act") that a civil suit was maintainable, but having regard to the finding on issue I based on the expert's opinion Exs. B-29 and B-30 the suit was dismissed with costs.

(6) Mr. Chinnappa Reddy for the appellant contends in his appeal that the Subordinate Judge was wrong in relying on Exs. B-29 and B-30 because the opinion of an expert is inadmissible in evidence without examining the expert and since that is the only point upon which an adverse finding was given against him, this appeal ought to be allowed. Before our learned brother Basi Reddi, J., the Government Advocate intimated that he was not pressing the question of the maintainability of a civil suit, and confined his arguments in supporting the finding of the trial Judge based on Exs. B-29 and B-30 and also urged that the suit comes within the suits contemplated by Section 40 of the Act and consequently, it is barred by limitation as the same was not filed within 6 months from the date of the order of the Collector. Mr. Chinnappa Reddy contends that Section 40 does not govern suits of this nature but only where liability was sought to be imposed for an act or omission of a tortious nature; but even if it could be construed that the section governs all civil suits, even then the limitation prescribed in sub-section (2) of Section 40 must be reckoned from the date of the order of the Collector: if so reckoned the suit is within time.

(7) Mr. K. Ramchandra Rao, however, denied that the suit itself is maintainable, because when the legislature has provided a hierarchy of tribunals under the statute itself, all the rights and liabilities arising thereunder must be determined by those tribunals, which determination is final and conclusive and cannot be challenged in a Court of Law.

(8) We shall first deal with the legal questions, as they are vital for the

determination of the nature, area and scope of a civil suit under statutes containing an express or implied provision for such suits being barred.

(9) It is not denied that Section 40 of the Act does not specifically prohibit civil suits from being filed against the orders of levy, assessment or imposition of a penalty, as published u/s 67 of the Income Tax Act, 1922. But even so, can it be implied from the provision of the statute that the Legislature had intended to prohibit the filing of such suits? In other words, where there is so express prohibition in a statute from filing a civil suit challenging the orders of assessment, etc., could not provisions of appeals and revisions and the injunctions that the appeal shall be final be construed as a prohibition?.

(10) In our view, where the Legislature has expressly or by necessary intendment or implication prohibited a civil suit, even in such cases, Courts have felt free to examine the question whether those hierarchy of tribunals have been vested with power to determine facts, the determination of which would vest in them the power to affirm or negative their jurisdiction. Beginning from the case of Raleigh Investment Co. Ltd. V. G. G. In Council, AIR 1947 PC 78 , to the latest case of Kamala Mills Ltd. Vs. State of Bombay, , these matters have been considered. But before we examine these questions, it will be necessary first to consider the scope and ambit of Section 40 of the Act. We will now give Section 40 in juxtaposition with Section 18 of the Madras General Sales Tax Act for a comparison of the language and for a proper appreciation of the several decisions to which we will soon be referring.

(11) Sec. 40 of the Central Excises and Salt Act:-

(1) No suit shall lie against the Central Government or against any officer of the Government in respect of any order passed in good faith or any act in good faith done or ordered to be done under this Act.

(2) No suit, prosecution or other legal proceeding shall be instituted for anything done or ordered to be done under this Act after the expiration of six months from the accrual of the cause of action or from the date of the act or order complained of.

Section 18 of the Madras General Sales Tax Act (9 of 1939)-

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

(12) It will be observed that sub-section (1) of Section 40 of the Act gives immunity to the Central Government or any officer of the Government for the acts done or orders passed in good faith. Since the element of good faith has been introduced as a condition to the application of the immunity, suits could not have been intended to be totally prohibited, and consequently, sub-section (2)

prescribed a limitation of 6 months from the he accrual of cause of action or from the date of the act or order complained of. The same period of limitation would apply to any suit, prosecution or other legal proceeding or anything done or ordered to be done under the Act. Section 18 of the Sales Tax Act which is in pari materia with Sec. 40 of the Act has been construed as barring only civil suits involving tortious liability but not to taxes illegally collected. In *The Panchayat Board Vs. The Western India Matches Company* by Agent Henrik Hybbidnettee, Leach. C. J., delivering the judgment of the Full Bench on the analogous provision, after examining Section 156 of the Madras Local Boards Act. 1884, which corresponded to Sec. 225 of the Madras Local Boards Act of 1920, the amendment in 1930 of Sec. 156 and the amendment in 1930 of Sec. 225 and the various decisions on the aforesaid section held that Sec. 225 of the Madras Local Boards Act is limited to suits for compensation or damages and that Section 156 prohibited any action from being brought against any local board, etc., on account of anything done or purporting to be done under the Act, the language of which is similar to Sec. 18 of the Sales Tax Act. In *The Province of Madras Vs. Chekka Satyanarayanamurthy*, , a further question, namely whether having regard to the provisions of the Act, is the jurisdiction of the ordinary civil Courts ousted or should remedy be found under the Act, was considered, and after discussing the relevant cases on this point, it was held that the Act with its subsequent amendments had not ousted the jurisdiction of the ordinary Courts. This matter also came up for consideration before a Bench of this Court consisting of Subba Rao, C.J. (as he then was), and one of us, in *Chunilal v. State of Madras (now Andhra Pradesh)*, AIR 1958 A P 670 (675). In that case, after referring to the above decisions, it was observed at p. 675 thus:-

"There can be no doubt that an assessee who is called on to pay a tax has a right to seek his remedy in a Court of Law by challenging the legality of that order. This he is entitled to do unless that right has been barred or taken away statutorily. The fact that there is under the taxing statute a right of appeal or revision against assessment is not by itself sufficient to take away the right of the assessee to have recourse to a Court of Law. Having regard to the fact that Civil Courts have jurisdiction to entertain such suits and also the fact that Sect. 18 of the Act does not apply to such suits, the only Article that is applicable is Art. 62 of the Limitation Act, which prescribes 3 years."

(13) In *J.S. Basappa Vs. Provincial Government of Madras (now Andhra Pradesh)*, , Chandra Reddy. C.J., and Krishna Rao, J., held that Section 18 of the General Sales Tax Act applies only to suits for damages and compensation and cannot be extended to cases for the refund of taxes paid to the Government. This position was also conceded by the Government Pleader in that case. This case went up in appeal to the Supreme Court and that in *The Provincial Government of Madras Vs. J.S. Basappa*, , confirmed this view, At p. 1876, Hidayatullah, J., after referring to Section 18, expressed the opinion of the Court in these words.

"This section applies to suits for damages and compensation in respect of acts under the Act. It is worded in familiar language by which authorities, including Government, are protected and identified in respect of bone fide acts done or purporting to be done under powers conferred by the statute. The period of limitation prescribed in the section does not apply to the kind of suits which were filed by Basappa."

It is, therefore, manifest not only from a plain reading of the section of the Act but also on a consideration of the authorities that only suits of a tortious nature, for compensation or damages are barred by Section 40. The question of collection of illegal taxes or orders imposing a tax, duty or penalty are not dealt with by the said provision.

(14) The next question is to what extent is the civil Court's jurisdiction barred even where there is a specific prohibition of suits challenging the orders of assessment, or for modification of any assessment made under the provisions of the particular Act. It will be useful to read Section 67 of the Income Tax Act, 1922, and Section 18-A of the Madras General Sales Tax Act, 1939, together, which we give hereunder:-

Sec. 67 of the Income Tax Act:-

"No suit shall be brought in any Civil Court to set aside or modify assessment made under this Act, and no prosecution, suit or other proceeding shall lie against any officer of the Government for anything in good faith done or intended to be done under this Act."

Sec. 18 A of the Sales Act:-

"No suit or other proceeding shall, except as expressly provided in this Act, be instituted in any Court to set aside or modify any assessment made under this Act."

(15) Where Civil Court's jurisdiction is barred by any statute, or for that matter where it is not expressly barred, is a remedy still open to an assessee to challenge an illegal order made thereunder and if so, under what circumstances? In a case where it is not expressly barred the question whether it is impliedly barred would depend upon the machinery provided in the statute for appeals and revisions for taking evidence, and for determining questions of fact arising in those proceedings. Even where Civil Court's jurisdiction is expressly barred or for that matter impliedly barred the jurisdiction of Civil Courts is nonetheless not held to be barred in certain circumstances, namely absence of an adequate remedy or where fundamental rules of procedure have been violated. In AIR 1947 PC 78 (supra), an assessee paid under protest the tax the following relief: (a) a declaration that certain provisions of the Income Tax Act on which the assessment was based were ultra vires and the assessment was illegal; (b) an injunction restraining the Income Tax Department from making the assessment in future; and (c) repayment of the sum assessed, Construing the remedy as one

for modification of the assessment, it was held that the Act itself contains machinery which enables an assessee effectively to raise the question whether or not a particular provision of the Act bearing on the assessment made upon him is ultra vires, and consequently, jurisdiction to question assessment otherwise than by use of the machinery expressly provided by the Act would appear to be inconsistent with the statutory obligation u/s 45 to pay the tax levied by the order of assessment. The argument there was that an assessment. The argument there was that an assessment was not an assessment "made under the Act" if the assessment gave effect to a provision which was ultra vires the Indian Legislature. In law, such a provision being a nullity, was non-existent. An assessment justifiable in whole or in part by reference to or by such a provision was more aptly described as an assessment not made under the Act than an assessment made under the Act, the section in question had therefore it was urged no application if the impugned provision in the Income Tax Act, 1922, was ultra vires. Their Lordships thought that this contention found some support in cases decided in India. While so, Lord Uthwatt, delivering the opinion of their Lordships, observed at page 80 thus:-

"In construing the section it is pertinent in their Lordships opinion, to ascertain whether the Act contains machinery which enables an assessee effectively to raise in the Courts the question whether a particular provision of the Income Tax Act bearing on the assessment made is or is not ultra vires. The presence of such machinery, though by no means conclusive, marches with a construction of the section which denies an alternative jurisdiction to enquire into the same subject-matter. The absence of such machinery would greatly assist the appellant on the question of construction and, indeed, it may be added that, if there were no such machinery and if the section affected to preclude the High Court in its ordinary civil jurisdiction from considering a point of ultra vires, there would be a serious question whether the opening part of the section so far as it debarred the question of ultra vires being dabated, fell within the competence of the legislature.

In their Lordship's view it is clear that the Income Tax Act, 1922, as it stood at the relevant date did give the assessee the right effectively to raise in relation to an assessment made upon him the question whether or not a provision in the Act was ultra vires."

(16) These observations under the Income Tax Act, where the jurisdiction was expressly barred, emphasise the need for having recourse to the machinery provided under the Act for a construction of the section which denies an alternative jurisdiction to enquire into the same subject-matter. Even there, the presence of such a machinery was held to be by no means conclusive but the absence of such a machinery would greatly assist and particularly, precluding a court in its ordinary civil jurisdiction from considering the question of ultra vires, would indicate that it is not so barred. In so far as the provisions of the Income Tax Act are concerned, it was held that a machinery was provided not only

ousting the alternative jurisdiction of the Civil Courts but also in determining the question whether a provision is ultra vires or not. It must not be forgotten that under the provisions of the Income Tax Act, questions of law can be referred to the High Court and from the High Court to the Supreme Court, so that the intention of the Legislature to oust the jurisdiction of a Civil Court could be said to be complete. Doubt however was expressed upon this latter conclusion by the Supreme Court in *Bharat Kala Bhandar Ltd. V. Municipal Committee, Dhamangaon*, Civil Appeal Nos 600 and 679 of 1964, D/- 26-3-1965=(reported in) *Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon*, , by a Bench consisting of five Judges, which was considering a case under the Central Provinces Municipalities Act, 1922. The question there was whether the provisions contained in section 83 of the said Act providing for appeal against the assessment of levy of or refusal to refund any tax under the Act and a further remedy or revision to the State Government as also a provision under sub-section (2) for reference to the High Court, would debar the jurisdiction of Civil Courts from entertaining a suit to challenge the validity of the assessment. It was held by a majority, consisting of Subba Rao, Mudholkar and Ramaswamy, JJ., that it was not so barred. It was contended that the provisions of the Municipal Act cannot possibly apply to a case where the right to obtain refund of payment is based upon the ground that the action of the Committee was in violation of the provisions of Section 142-A of the Government of India Act, 1935, which was similar to Art. 276 of the Constitutionality by a civil suit, and in support of it, the judgment of the Privy Council in AIR 1947 PC 78, was cited as authority. The majority considered the statement of their Lordships that the phrase "assessment made under this Act" in Section 67 meant an assessment finding its origin in an activity of the assessing officer acting as such and that the circumstances that he had taken into account an ultra vires provision of the Act was in that view immaterial in determining whether the assessment was "made under this Act" and observed:

"But with respect, we find it difficult to appreciate how taking into account an ultra vires provision which in law must be regarded as not being a part of the Act at all, will make the assessment as one "under the Act." No doubt the power to make an assessment is conferred by the Act and, therefore, making an assessment would be within the jurisdiction of the assessing authority. But the jurisdiction can be exercised only according, as well as with reference, to the valid provisions of the Act. When, however, the authority travels beyond the valid provisions it must be regarded as acting in excess of its jurisdiction. To give too wide a construction to the expression under the Act "may lead to the serious consequence of attributing to the legislature, which owes its existence itself to the Constitution, the intention of affording protection to unconstitutional activities by limiting challenge to them only by resort to the special machinery provided by it in place of the normal remedies available under the Code of Civil Procedure, that is, to a machinery which cannot be as efficacious as the one provided by the general law. Such a construction might necessitate the

consideration of the very constitutionality of the provisions which contains this expression. This aspect of the matter does not appear to have been considered in Releigh Investment Co."s case, AIR 1947 PC 78."

It was further submitted that in Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh, , the Supreme Court made a reservation in respect of the observations of the Privy Council in Releigh Investment Co."s case, AIR 1947 PC 78, that it was not necessary for them to consider whether that assumption was well founded or not: but the presence of the alternative machinery by way of appeals which a particular statute provides to a party aggrieved by the assessment order on the merits, is a relevant consideration and that consideration is satisfied by the Act with which they were concerned in that appeal. The doubt expressed by the majority in the case of Civil Appeals Nos. 600 and 679 of 1964, D/- 26-3-1965= (reported in) Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon, , was referred to by Gajendragadkar, C. J., delivering the judgment of their Lordships in Kamala Mills Ltd. Vs. State of Bombay, , and it was observed that their Lordships do not think it necessary in that case to consider whether the majority opinion in the case of Bharat Kala Bhandar Ltd., Civil Appeals Nos. 600 and 679 of 1964, D/- 26-3-1965= (reported in) Bharat Kala Bhandar Ltd. Vs. Municipal Committee, Dhamangaon, , was justified in casting a doubt on certain a doubt on certain observations made by the Privy Council in Releigh Investment Co."s case. AIR 1947 PC 78, or on the validity or the propriety of the conclusion in respect of the effect of Sec 67 of the Income Tax Act.

(17) The contention of Sri K. Ramachandra Rao that the Judgment in Kamala Mills Ltd. Vs. State of Bombay, , is an authority for the proposition that where there is an express prohibition by a statute and where the machinery provided thereunder gives an adequate remedy, Civil Court"s jurisdiction is barred absolutely cannot having regard to the reservations implicit in the passage cited above be sustained by that decision. There is one more aspect of the matter. In Kamala Mills Ltd. Vs. State of Bombay, , the question was whether Section 20 of the Bombay Sales Tax Act excludes the jurisdiction of Civil Courts in entertaining the suit. At p. 1952 Gajendragadkar, C. J., furnished the answer:-

"Whenever it is urged before a Civil Court that its jurisdiction is excluded either expressly or by necessary implication to entertain claims of a civil nature, the Court naturally feels inclined to consider whether the remedy afforded by an alternative provision prescribed by a special statute is sufficient or adequate. In case where the exclusion of the Civil Court"s jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or the sufficiency of the remedies provided for by it may be relevant but cannot be decisive. If it appears that a stature creates a special right or a liability and provides for a determination of the specially constituted in that behalf, and it further lays down that all be determined by the tribunals so constituted, it becomes pertinent to enquiry whether remedies normally

associated with actions in Civil Courts are prescribed by the said statute or not. The relevance of this enquiry was accepted by the Privy Council in dealing with Sec. 67 of the Income Tax Act in Raleigh Investment Co.'s case, AIR 1947 PC 78, and that is the test which is usual applied by all Civil Courts"

It is, therefore clear that what the Courts have to decide is whether the remedy provided by the statute is an adequate remedy. What is an adequate remedy depends in each case upon the statutory provisions. In that case, the question was whether an assessment made under the Bombay Sales Tax Act, 1946, even if erroneously made and based on incorrect evidence of fact, is an order of assessment within the meaning of that section and cannot be called in question in any Civil Court. In holding that it is such an assessment that cannot be called in question the Court held the following at p. 1948:-

"The whole actively of assessment beginning with the filling 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"

"If we examine the relevant provisions which confer jurisdiction on the appropriate authorities to levy assessment on the dealers in respect of transactions to which the charging section applies, it is impossible to escape the conclusion that all questions pertaining to liability of the dealers to pay assessment in respect of their transactions are expressly left to be decided by the appropriate authorities under the Act as matters falling within their jurisdiction."

It was however pointed out by reference to the decision in Smt. Ujjam Bai v. State of Uttar Pradesh AIR 1962 SC 1921, that the Court was not dealing with the scope and effect of the power of the Supreme Court under Art. 32 or with the powers of the High Court under Art. 226 and that it was merely sought to be pointed out that a finding recorded by a taxing authority as to the taxability of any given transaction cannot be said to be a finding on a collateral fact, but is a finding on a fact the decision of which is entrusted to the jurisdiction of such authority. A reference was also made to the decision in AIR 1940 105 (Privy Council) where the Privy Council had occasion to consider the effect of the provisions of Sec. 188 of the Sea Customs Act (VIII of 1878), which provided that every order passed in appeal under the said section shall subject to the power of revision conferred by Sec. 191, be final, Mask & Co., had instituted a suit in which it sought to recover duty collected from it under protest on one ground that it was illegally recovered. The trial Court had rejected the claim on the ground that the suit was barred under Sec. 188. On appeal the High Court or Madras took a different view and held that the suit was competent. The Privy Council reversed the conclusion of the High Court and confirmed the view taken by the trial Judge. It would be noted that the relevant words on which the controversy between the parties as to the competency of the suit in that case

had to be resolved, were not as emphatic as they are in Sec. 20 and yet, the Privy Council upheld the plea that the suit was barred. It may however be pointed out that Lord Thankerton in the AIR 1940 105 (Privy Council) observed at p. 110:-

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

Gajendragadkar. C. J. While referring to this passage in *Kamala Mills Ltd. Vs. State of Bombay*, , stated that in that case their Lordships were not called upon to consider the merits of those observations or their scope and effect. Nonetheless. It cannot be said that the above observations were disapproved. To our mind, they are in consonance with the general law and the principles of jurisprudence which govern our thinking.

(18) This view is supported by an earlier judgment of the Supreme Court in *Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh*, which was dealing with a case of Section 18-A of the Madras General Sales Tax Act, which expressly prohibits Civil Court's jurisdiction. Even there Ganjendragadkar, J., (as the then was). Observed at p. 324 thus:-

"In dealing with the question whether Civil Court's jurisdiction to entertain a suit is barred or not, it is necessary to bear in mind the fact that there is a general presumption that there must be a remedy in the ordinary Civil Courts to a citizen claiming that an amount has been recovered from him illegally and that such a remedy can be held to be barred only on very clear and unmistakable indications to the contrary. The exclusion of the jurisdiction of Civil Courts to entertain civil causes will not be assumed unless the relevant statute contains an express provision to that effect, or leads to a necessary and inevitable implication of that nature. The mere fact that a special statute provides for certain remedies may not by itself necessarily exclude the jurisdiction of the Civil Courts to deal with a case brought before it in respect of some of the matters covered by the said statute."

(19) It is in the light of the elaborate alternative remedies provided by the Act that the scope and effect of Sec. 18-A, was adjudged, and it was held that the suit instituted for that purpose would be barred.

(20) After this judgment was prepared Sri Ramachandra Rao brought to our notice a more recent judgment of the Supreme Court in *K.S. Venkataraman and Co. Vs. State of Madras*, , which reiterates the position already noticed. In that case, a suit for refund of tax collected under an ultra vires provision of the Madras Sales Tax Act, was held by the High Court as being not maintainable in view of Sec. 18-A of the Act, which bars the jurisdiction of a Civil Court. The

majority of their Lordships of the Supreme Court held otherwise. Subbarao. J., speaking for the majority and considering the several cases, to which we have referred, summarised the law on this point at p. 527 (of SCJ)=(at p. 1100 of AIR) thus:-

"If a statute imposes a liability and creates an effective machinery for deciding questions of law or fact arising in regard to that liability, it may, by necessary implication bar the maintainability of a civil suit in respect of the said liability. A statute may also confer exclusive jurisdiction on the authorities constituting the said machinery to decide finally a jurisdictional fact thereby excluding by necessary implication the jurisdiction of a Civil Court in that regard. But an authority created by a statute cannot question the vires of that statute or any of the provisions thereof whereunder it functions. It must act under the Act and not outside it. If it acts on the basis of a provision of the statute, which is ultra vires to that extent it would be acting outside the Act. In that event, a suit to question the validity of such an order made outside the Act would certainly lie in a Civil Court."

(21) To sum up, the position as gleaned by these authorities is as follows:- Whether there is an express prohibition or not, the alternative remedy provided by the Act must be taken into consideration. Where elaborate provisions are made in the statute for alternative and adequate remedies, including provision for recording evidence and for determining facts. Civil Court's jurisdiction is barred. Where however there is absence of adequate remedy under the statute or where the provisions of the statute are not elaborate and the power to record evidence, etc., or of determining a collateral fact by the authority constituted under the statute upon which the jurisdiction under the Act is vested is not provided for, Civil Courts are not barred from entertaining a suit notwithstanding the fact that there is an express exclusion thereunder. Even where the jurisdiction is excluded, Civil Courts have jurisdiction to examine whether the provisions of the Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. In cases where there is no express prohibition, the general presumptions adverted to above apply with greater force and unless the provisions of the statute give a clear ringing indication of the exclusion of the jurisdiction of Civil Courts. Civil Court's jurisdiction is not barred. At any rate, it is the Civil Courts that have to determine these questions, including the question whether the authorities under the statute are expressly empowered for the determination of the particular issue or issues involved, whether of ultra vires nature of the impost or of the jurisdiction of the authorities to impose that tax, before their jurisdiction can be said to be excluded.

(22) It is contended by Mr. K. Ramachandra Rao, that the Central Excise Act, is a code by itself; that it creates authorities, provides for appeals and revisions and u/s 35, makes an order passed in appeal final, subject to the powers of revision conferred by Sec. 36, as such, notwithstanding the interpretation placed on

Section 40, that it only bars suits of a tortious nature, having regard to the material provisions of the statute there is an implied bar to civil suits. On the other hand Mr. Chinnappa Reddy contends that the provisions of the statute are not elaborate, that they do not provide for taking of evidence or determining collateral facts on which the jurisdiction to make assessment would rest, and at any rate, the machinery provided would put the person assessed thereunder in far disadvantageous position than he would be if he had recourse to a civil suit. On this premises he says the plaintiff has no adequate remedy, the absence of which is decisive in determining his right to have recourse to Civil Court, inasmuch as the finality of the appeal is in respect of the remedy provided under the Act and not otherwise. Further, in cases where such an appeal is subject to the payment of the entire tax, as in this case under the rules a right of appeal is only given under those circumstances the plaintiff cannot be said to have an adequate remedy and thereto the suit is not maintainable.

(23) In order to test the validity of these rival contentions, it is necessary to examine the provisions of the Act and the rules, Sec.3 which is the charging section imposes duties, empowers the levy and collection in such manner as may be prescribed, duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into any part of India, as and at the rates, set forth in the first schedule. Sub-section (2) empowers the Central Government by notification to fix for the purpose of levying the said duties, tariff values of any articles enumerated, either specifically or under general headings, in the first schedule as chargeable with duty ad valorem and after any tariff values for the time being in force. Sub-section (3) gives power to fix different tariff values for different classes or descriptions of the same article. Section 4 provides for the manner of determining the value of duties. Item 9 of the first schedule prescribes the duty leviable on various kinds of tobacco. On unmanufactured tobacco, the duty is on the point, and on manufactured tobacco, on the value of the product. The taxing office has been given the power to determine not only the category also to fix the value of manufactured product. The assessee can always dispute in some of those cases the percentage of imported tobacco mixed in the unmanufactured tobacco, because the rates leviable would depend upon that percentage. The power to summon persons and to take their evidence is conferred by Sec. 14, which also provides that the enquiry so held will be a "judicial proceeding" within the meaning of Secs. 193 and 228 of the Indian Penal Code. The provisions of Sections 132 and 133 of the CPC provide for exemption from attendance also made applicable under that section. The provision to record evidence no doubt will indicate that the officer determining the several matters should do so on the evidence before it.

(24) The Government contends that from the above provision it is evident that the Legislature implied exclusion of the Civil Court's jurisdiction. Whether this provision gives a clear indication in the absence of an express provision, is a matter which need not be gone into, because of what actually transpired in the

case, viz., that the samples were not taken in the presence of the plaintiff or his authorised representative and secondly, the evidence was not shown to have been recorded in his presence which would entitle him to a right of cross-examination. Apart from this, a provision relating to appeal subject to the payment of the entire tax is not a provision which could be said to provide an adequate alternative remedy. A Bench consisting of Subbarao. C. J, and Manohar Pershad, J., (as then they were this Court) in *B. W. Von Maltazan v. Collector of Customs*, AIR 1958 A P 188 and 191 of the Sea Customs Act, corresponding to Secs. 35 and 36 of the Act, in an application under Art. 226 held that such a provision can hardly be described as an adequate alternative remedy. Manohar Pershad, J., (as he then was), observed at page. 124:-

"It may be that in some cases the amount of deposit may be so heavy that the petitioner may not be in a position to deposit the same. It would in such cases amount to taking away the right of appeal by another process, namely, imposing a condition for the deposit of the amount."

In *Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others*, , their Lordships of the Supreme Court also expressed a similar view. In that case, their Lordships were considering the provisions of the Central Provinces and Berar Sales Tax Act as amended by the Act 15 of 1949. Mahajan, C. J. At page. 406 said:

"The finality that statute conferred upon orders of assessment, subject, however to appeal, and revision was a finality for the purposes of the Act. It did not make valid an action which was not unwarranted by the Act, as for example, the levy of tax on a commodity which was not taxed at all or was exempt."

These observations further reinforce the conclusion that under the Central Excise and Salf Act and rules adequate remedy has not been provided for when it made the appeal subject to the payment of the entire duty levied. In this view, we hold that the suit is maintainable.

(25) In so far as the question of limitation is concerned, when we have held that Section 40 does not apply to this cause of action, the limitation prescribed thereunder is not applicable to this suit. There is authority for the proposition that the general law of limitation will apply in such circumstances: See AIR 1958 Andh Pra 670 (supra), *J.S. Basappa Vs. Provincial Government of Madras* (now Andhra Pradesh), at p. 194. *Raghunandhan Reddy Vs. State of Hyderabad*, . The last of these cases considered the question of bar of suits in a Civil Court u/s 41 of the Hyderabad Abkari Act, analogous to Section 40 of the Act. A Bench of this Court consisting of one of us and Chandrasekhara Sastry, J., observed at p. 393 (of Andh WR)=(at p. 116 of AIR). "In any view, the claim for refund of earnest money deposited is not governed by Section 41 of the Abkari Act. The general law of limitation could be brought within three years."

(26) In so far as the admissibility of Exs. B-29 and B-30 is concerned, Mr. Chinnappa Reddy contends that these documents are not admissible and cannot

be acted upon as evidence in the case. While the plaintiff did not raise any objection to these documents, he could only be said to have waived the proof of it and not the relevance. Under the Evidence Act, hearsay evidence is inadmissible and these documents can have no higher value than hearsay evidence. Statements made by persons not examined in Court are only admissible in evidence if they fall within Section 32 of the Evidence Act or could be used for the purposes of contradiction or corroboration when the person making them is examined, u/s 145 or 157 of the Evidence Act, Secs 56 to 58 in Chapter 3 of the Evidence Act provide that facts admitted need not be proved. Chapter IV lays down the requirement of oral evidence. Section 60 provides that oral evidence must in all cases whatever be direct and if the oral evidence refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of person who holds that opinion on those grounds. Expert's evidence cannot be an exception to this rule, unless the statute so provides, as in the case of chemical examiner's report, etc., under Chapter XLI of the Criminal Procedure Code. Unless it can be shown that these documents fall under any particular provision of the Evidence Act, they cannot be held to be admissible, Mr. Ramachandra Rao was unable to draw our attention to any such special rule either in the Evidence Act or under the Act. In R.M.Y.R.M. Palaniappa Chettiar and Others Vs. The Bombay Life Assurance Co. Ltd., at p. 299, a Bench of the Madras High Court was considering the admissibility of a questionnaire and its answers by the doctor were admitted in evidence without the doctor being examined. It was held that these were not admissible in evidence. The facts spoken to in them which were relevant issues in the suit could be proved only by giving oral evidence of them in Court. The doctor could and should have been examined by the defendant and the statements made by him in the correspondence with the Company are certainly no evidence of the correctness of the allegations made therein. The contention in that case that the documents were properly admitted in evidence because the plaintiffs permitted them to be marked by consent, was held not to make any difference to the non-admissibility of those documents Horwill, J., observed:

"Permitting a document to be marked by consent only means that party consenting is willing to waive his right to have the document in question proved, i.e. the plaintiffs were prepared to admit that Ex. D7C was what it purported to be; a certificate by Dr. Natarajan sent to the defendant company in response to the letter of the company to the plaintiff asking for such a certificate, and that Ex. P-2 was the reply of Dr. Natarajan to the questionnaire sent by the company to the doctor. Agreeing to the document being marked by consent certainly did not mean that the plaintiff accepted the correctness of every statement made by Dr. Natarajan in Exs. P-2, and D7C"

Again in Perumal Mudaliar Vs. The South Indian Railway Company, Limited, , Beasley, C. J., took a similar view to the one we have taken, namely, that the evidence of experts must be given in the ordinary way and subject to certain exceptions, viz., the certificate of the Imperial Serologist as to the nature of

blood stains and of the Chemical Examiner, which are made admissible by themselves as such. It is quite obvious that the opinion of an expert must be given orally and that a mere report or certificate by him cannot possibly be evidence. Unless the expert goes into the witness box and gives oral evidence, there can be no cross-examination of the expert at all.

(27) The case of *Jainab Bibi Saheba v. Hyderally Sahib*, ILR 43 Mad 609 (AIR 1920 Mad 547) (FB), was however cited as an authority for the proposition that Exs. B-29 and B-30 can be admitted. But that, Full Bench was dealing with the case of admissibility of evidence recorded in a previous judicial proceeding between the same parties in a subsequent proceeding by the consent of both the parties, and consequently, that case cannot be of much assistance. Sec. 33 of the Evidence Act provides that evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a latter state of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or in other circumstances set out in the rest of the section. The word "relevant" as used in the Evidence Act is equivalent to "having probative force" and the effect of the section is to make the evidence admissible in the circumstances specified, independently of the consent of the parties. In those circumstances, the evidence between the same parties in a judicial proceeding raising the same issues, was marked by consent of both the parties and was treated as evidence, which course was said to be not opposed to public policy and was in consonance with the parties both in England and in this country and which practice was given legal validity because it would save time and expense and in itself is neither inconvenient nor unjust. That is not the case here. In *Lim Yam Hong & Co v. Lam Choon & Co.*, evidence of Cheng Kee, a clerk or broker employed by the plaintiffs as to the existence of the contract which required corroboration, was corroborated by his statement made in the absence of the defendant that a confirmation slip of the contract was prepared in the plaintiff's office and was given by Cheng Kee into the defendant's own hand. But there was no evidence of the defendant being present. In those circumstances, the omission by the defendant's advocate to object to the confirmation slip was held not to alter the character of the testimony so as to convert it into corroborative evidence that which the law regards as merely fit for rejection as hearsay. Moreover, it was impossible to treat statements of Cheng Kee as corroborating his own evidence itself. In *Parwat Vedu Patil and Another Vs. Sukdev Shivram Patil, . Gajendragadkar, J.* (As he then was), expressed a similar opinion. It was held that the opinion sent by the expert in writing cannot prove itself, and that unless the expert stepped into the witness box, so as to enable the opponent to cross-examine him in reference to that opinion, the opinion expressed by him in a communication to one of the parties cannot be treated as evidence under the Evidence Act. So also, in a Bench Judgment of the Gujarat High Court in *Municipal Corporation of City of Ahmedabad Vs. Gandhi Shantilal Girdharlal and Another*, , a similar view was taken.

(28) We, therefore, think that the Subordinate Judge was wrong in admitting Exs. B-29 and B-30 as evidence without the expert being examined before him.

(29) Though the Subordinate Judge dismissed the plaintiff's suit acting merely upon these inadmissible documents on all other points he having held against the defendants, we have still to consider the appeal on merits, inasmuch as the respondents rely on that evidence as negating the plaintiff's claim. But before we do so, there is yet another legal point that has been urged which we find it convenient to dispose of at this stage.

(30) Mr. Chinnappa Reddy contends that the Subordinate Judge was wrong in holding that the plaintiff was not entitled to raise the contention that he cannot be held liable on his bond, because he did not sign the agreement as required under the rules to make him liable on his bond, on the ground that this question was not made the subject matter of the notice u/s 80, C.P.C. Section 80, C.P.C., imposes a condition on the filing of a suit against the Central Government or the General Manager of the Railways or against the State Government. It lays down that no suit shall be instituted against those authorities until the expiration of two months next after notice in writing has been delivered, stating the cause of action, the name, Description and place of residence of the plaintiff and the relief which he claims and the plaint shall contain a statement that such notice has been so delivered or left. There is no dispute in this case that the relief claimed by the plaintiff is for a declaration that the order of the Collector, Central Excise levying penalty and duty on him is illegal, arbitrary and void. The omission to mention in the notice one of many grounds upon which that relief is sought cannot amount to non-compliance with the provisions. The provision relating to cause of action must not be construed in a narrow sense. The object of the section is merely to inform the defendants the substance of the ground of complaint. In AIR 1927 176 (Privy Council) their Lordships of the Privy Council observed at pages 184 and 185 that Sec. 80 is express, explicit and mandatory and admits of no implications or exceptions. But the mere fact that some additional facts were not stated which gives an alternative cause of action does not mean that the provisions of the statute have not been complied with. The fact that there is a variation in the suit notice and the plaint does not necessarily amount to the provisions of the section not being complied with. The phrase "cause of action" was defined by Lord Esher, M. R., in *Read v. Brown*. (1888) 22 QBD 128, to mean:

"Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

As Lord Watson puts it in *Mst. Chand Kour v. Partab Singh*, (1887-88) 15 Ind. App 156 (PC) "it refers entirely to the grounds set forth in the plaint as the cause of action, or in other words to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. In *Re: D. Lakshminarayana Chettiar* and

Another, , a Full Bench of the Madras High Court also expressed a similar view. The cause of action specified in the notice issued in this suit to put it briefly, is the levy of duty and penalty on the ground that the goods transported were not the goods that were seized, that the order is contrary to law, weight of evidence and probabilities of the case, that the available documentary evidence was not investigated according to law, the order is bad and is liable to be set aside. The plaintiff in his plaint specified what those documents were which were not examined, and the allegation that the contract was not signed by the plaintiff to bind him on his bond is a question of evidence and does not form part of the cause of action, as that word is defined and understood to mean. As long as the cause of action as specified in the notice would enable the Government to know what the plaintiff's claim was about and whether the claim should be conceded or resisted, the provisions of Sec. 80 can be said to be complied with. In AIR 1958 Andh Pra 670. (supra), to which a reference has already been made, the cause of action stated in the notice and the plaint was that sales tax has been illegally recovered from the plaintiff and the relief claimed in the notice and the plaint was the refund of the tax collected. It was held that the main requirement of the section having thus been complied with, it does not make the suit defective because of the different words used by the plaintiff to describe the manner or the circumstances under which the tax was paid by him or collected from him, in the suit notice and in the plaint. Similarly in The State of Madras Vs. C.P. Agencies and Another, , it was held that though the terms of Sec. 80 are to be strictly complied with, that does not mean that the terms of the notice should be scrutinized in a pedantic manner or in a manner completely divorced from commonsense. In that case it was not clear at all from the notice whether the plaintiff's claim is based on a contract for the payment of godown rent or on the footing of damages for use and occupation of the plaintiff's godown or through whom the first defendant is alleged to have entered into the alleged agreement for the payment of godown rent or interest thereon. As such, it was contended that the notice did not fulfill the requirements of Sec. 80. It was found that, throughout the notice, the claim was described as "Godown rent" and not damages for use and occupation of the godown. Therefore the claim, prima facie, appeared to be founded on a contract. The arrangement for payment of godown rent was only incidental to the contract supply of the goods, and it is not unreasonable to infer that that arrangement was also made by and through the 2nd defendant acting for the first defendant. The relief claimed was that the Madras Government should pay up the amount claimed and if it does not pay or the failure is found to be due to the officer of the Madras Government then the officer concerned should be held responsible which indicates that the transaction was through some officer and the officer concerned in that case can be no other than the Assistant Marketing Officer through whom the goods were supplied as stated in paragraph 3 of the notice. It was held that on a fair reading of the notice it may be said that the fact of the contract for the payment of the godown rent, the quantity of goods stored, the rate at which and the period for which the claim was made and the failure of the first defendant to pay the same were

sufficiently stated so as to enable the first defendant, to know what the plaintiff's claim was about and whether the claim should be conceded or resisted.

(31) In the present case, in our view, the requirement of Section 80 have been complied with and the plaintiff cannot be shut out from raising the point or requiring the proof of the fact that he had entered into a contract to bind himself on his bond, while it is said point was taken by him in his reply to the show cause notice.

(32) We will now consider whether the plaintiff can be bound by his bond it may be stated that under rule 7 of the rules made under the Act, every person who produces, cures or manufactures any excisable goods, or who stores such goods in a warehouse, shall pay the duty or duties leviable on such goods, at such time and place and to such person as may be designated in, or under the authority to those Rules, whether the payment of such duty or duties is secured by bond or otherwise. The general rule therefore is that duty is recoverable from the person who stores such goods in his warehouse. Under Rule 152, goods may be removed from one warehouse to another, subject to the observance of the procedure specified therein, i.e., where the goods are removed from a private warehouse, the consignor or the consignee is deemed to be the licensee of the warehouse from which it is removed or the warehouse to which is removed. Under Rule 153, a bond has to be given where the goods are to be removed from one warehouse to another by the consignor or the consignee as the case may be. Under Rule 154, the Collector can permit any person entitled under the rules to remove the goods from the warehouse to another, to enter into a general bond with such surety on sufficient security, in such amount and such conditions as the Collector approves for the removal from time to time of any goods from one warehouse of destination within such time as the proper officer directs. Every bond executed under Rule 140 or Rule 164, is under Rule 155, be deemed to continue in force notwithstanding the subsequent removal of such goods to another warehouse. Rule 156 provides that, along with the application for the removal of the goods the consignor shall produce before the proper officer a certificate in the proper form stating the particulars of the Central Excise licence held by the consignor and the bonds, if any, executed by him. The general bond that the consignor, or the consignee has to enter into in Form No. B-1 (Gen-Sur) which binds the obligor in a sum of money payable to the President for being permitted to remove from time to time conditional on the provisions of the Central Excise Rules, 1944, being observed, without payment of duty from the bonded warehouse or licensed factory for exportation, and if the goods are duly removed and exported within such time as the Collector of Central Excise directs, the obligation shall be void, and that for breach or failure in the performance of any part of the conditions, the same shall be in full force and they will be bound under the Excise Rules.

(33) These being the Rules applicable, it is contended that the primary responsibility is on the consignor and it on his hand bond that the goods have to

be removed when he makes an application for such removal. Mr. Chinnappa Reddy contends that in Ex. B-11, Notification No. 2/53, dated 9-1-1953, issued by the Collector of Central Excise made under Rule 156-A of the Central Excise Rules, 1944, the Collector required that when warehoused goods were to be removed from one warehouse to another under cover of an individual or general bond prescribed in Rules 153 and 154 executed by the consignee, the consignor shall, along with his application for the removal of the goods, produce before the proper officer a letter of agreement issued by the consignee in the forms prescribed thereunder for removal under individual or general transmit bonds. These letters have not been produced, for it is stated by D.W. 3 Annaji Rao, the Range Officer at Hyderabad, that he issued permit (Ex. B-4) that the letter of agreement by the consignee as to his purchase and for transport on his bond must have been produced and that the letter of agreement and C.T. 2 form must have been kept in some miscellaneous file. In fact the consignor says he was not present at the time in Hyderabad when the application was made for their removal. All that D.W. 3 can say is that Ramayya, the plaintiff's agent, came to him for T.P. 2 form which is the permit (Ex. B-4) and signed on the reverse of the counterfoil of T.P. 2. But, this signature of Ramayya, it is stated, was only in token or having received the permit and has nothing to do with the execution of the agreement by the plaintiff. P.w. 2 Papa Prasad, who is looking after the business of the widow of Bhawani Prasad says that he does not remember whether the Inspector or himself have taken Form No. 1 from the assami of the plaintiff which shows that the goods are transmitted on the plaintiff's bond. When shown Ex. B-1, the application by him, he says that he did not see any signature of the plaintiff's assami on A.R. 3 (Ex. B-1). Further, he states that there is nothing in writing either with him or with the Inspector to show that the goods were transmitted on the consignee's bond. In the application A.R. 3 no doubt the place where there should be a mention of the bond is left blank but, at the top of it, the plaintiff's bond No. 28 was mentioned. It is stated that this was done subsequently and at any rate it does not bind the plaintiff. It may be stated that there is mention in the permit (Ex. B-4) that the goods were being removed on plaintiff's Bond No. 28. But, this again, he says, does not bind the plaintiff because it is what D.W. 3 has written. The plaintiff says the suit consignment was not moved under his bond that he never authorised anybody even A. Ramaiah, to move the goods on his bond and that he does not hold a power on his behalf.

(34) While this evidence may be inconclusive, Mr. Ramachandra Rao contends that there was no statement that the goods were not transported on the plaintiff's bond. In this letter (Ex. B-16) the plaintiff merely stated that the tobacco belonging to them was seized by the Central Excise Officer at Vijayawada while it was being transported under a proper T.P. 2 permit from the warehouse of Bhawani Prasad at Hyderabad to their godowns at Guntur. His contention was that the goods removed from the godowns were the goods seized and complained that for slight irregularities the Central Excise Authorities had seized the goods. It is however stated that in reply to the show-cause notice asking him

why duty was no leviable on 14,198 Ibs of I.A.C. tobacco removed by him from the warehouse of Bhawani Prasad in terms of the bond executed by him under Rule 154, the plaintiff says he had raised the objection but this reply has not been produced. In the plaint however the plaintiff for the first time stated that the 119 packages were not transported under the cover of B-5, General Surety Bond, which statement was demurred to by the defendants in their written statement. Apart from the consideration of the question urged that no relief can be granted as it is not part of the cause of action omitted to be specified in Section 80 C.P.C., notice, there being no issue on the specific point, it cannot be said that failure of the Government to produce the agreement could afford any relief to the plaintiff or that he can be declared to be not liable on this bond. As such it is rightly contended that the appellant cannot be permitted to urge this point in appeal, particularly when it was not raised before the Central Excise Authorities.

(35) Now coming to the merits of the case, the question is whether the goods moved from the godown of Bhawani Prasad were the goods that were seized. According to the case of the plaintiff as well as the defendant, three persons could have knowledge of the marks and description of the goods that were removed from the godown, namely Ramayya, the clerk of the plaintiff P.W. 2 and P.W. 3. Apart from these witnesses, two lorry drivers who transported the goods could also have knowledge as to the markings on the packages that were loaded in their lorries for transport and the unloading of these goods into the wharf after which they were seized. Though the statements of Ramayya and the lorry drivers were taken by the Excise Authorities at the time of investigation, they were not examined before the Court nor even before the Central Excise Collector who made the order complained of. It may be remembered that the statements of all these persons recorded by the Enquiring Officer were not taken in the presence of the plaintiff and as such, he had no opportunity of cross-examining them, nor was any one examined, in connection with Ex. B-23, mediatonama, of the seizure of these goods. In these circumstances the statements made before the investigating Officer are not admissible and cannot be taken into account. The case of the defendants was that the packages bore definite marks of the godown register of Bhawani Prasad which was not produced, the extract of which is Ex. B-28. Even according to this extract, which is said to be not admissible as the original registers were not proved, there were bundles Nos. 768 to 895 to 930. Of these bundles, 768 to 850 and 895 to 930, i.e. 119 bundles were transported under Ex. B-4, Ex. B-4(a) being the list attached to Ex B-4(b) the permit recovered from the possession of the consignee, the plaintiff. The markings on the goods seized admittedly did not contain the Nos. 768 to 850 to 930 on the packages but the packages that were seized only had chits serial Nos. 1 to 119 attached to them. Further it is not denied that, of these packages, 838, 820 and 829 were cleared from the seller's godown as per Ex. B-9, stockard on 26-4-1955. The witness, D.W. 3 further stated that unless they existed on packages he would never issue T.P. 2; that warehouse Nos. Are given on the

packages as soon as the packages were received in the warehouse and these Nos. Are entered in the weighment register and Part 1 warehouse Register. These entries were initialled by the Excise Officials after due verification after check weighment. It is those warehouse Nos. That are put in ABC, 3 and in the slip attached to T.P. 2. T.P. 2 was issued after verification. In cross-examination, he admitted that as per Hyderabad practice, chits are stitched to packages noting the particulars as to the packages besides marking on the packages the warehouse serial Nos. He further stated on seeing Ex B-9 that Nos. 818, 820 and 829 were issued for processing on clearance but states that it is not true that the three packages were released from the godown and that as per Ex. B-9 they would have been only within the warehouse but shifted for some processing, and that if so shifted entries will be made in the Weighment Register and Part II Register. After processing, the packages will be given new Nos. From this evidence, it is clear that even if the goods were not removed they would have borne new Nos. But nonetheless D.W. 3 who says that he verified everything, on his own admission, gave T.P. 2 for these three packages also under the old Nos. It does not appear to be credible that he verified the numbers before issuing the permit. P.W. 2 who was treated as hostile because his evidence was at variance with the statement given by him to the Investigating Officer stated in his examination-in-chief that the list consists of both old and new serial numbers, that the numbers from 768 to 850 and 895 to 930 are the numbers marked on the packages with their corresponding weights. He further stated that, at the time of the first warehousing of the above goods, they entered them in the weighment registers and then they have warehouse numbers to the packages and that they also put these numbers on the packages and that the Inspector signed the Weighment Register. In cross-examination, he says that he mentioned in Ex. B-5, that he gave serial numbers 1 to 83, and that he put them for purposes of counting. According to the Excise Rules, he need not put those serial numbers and in fact he should not put new numbers which are not mentioned in AR. 3 and T.P. 2. He further states that he might have mentioned these numbers by mistake. He varies this admission by later saying that the original numbers 768 to 853 have not been removed by him but fresh serial numbers 1 to 83 were written on chits and stitched to the packages under instructions of the Inspector who checked and weighed the consignment, that when Masthan Rai directed him to give new numbers 1 to 119 to both the consignments as it was the first sale after stock-taking he gave three numbers. He denies having stated in Ex. B-5 that, in respect of the 83 gunny bags the chits containing the original serial numbers 1 to 83 have been given by him by mistake. He also says that the suit consignments do not refer to Nos. 818, 820 and 829. It would appear from this evidence that at any rate, chits bearing serial numbers 1 to 119 were stitched to the packages which were handed over to the consignee. Whether the godown register Nos. Were on the packages or not the assertion of D.W. 3 that he verified the Nos. On the packages at the time of giving the permit does not appear to be substantiated, particularly having regard to the mention of the three packages which were cleared and which, even according to the witness,

should have borne new numbers. In these circumstances, the finding of the learned Subordinate Judge that he cannot hold that the consignment was different from Ex. B-4 consignment by reason of packages not containing marks and warehouse Nos. B.P. 768 to 850 and 895 to 930 cannot be held to be unjustified or unwarranted. Apart from this, now that Ex. B-29 and Ex. B-30 are held to be inadmissible, there is no evidence. The only difference in the weight between the consignment delivered to the consignee and that seized from the wharf was 22 Ibs. In a consignment of a total weight of 14,119 Ibs., amounting to 0.6 per cent. As pointed out by the Subordinate Judge, the difference is negligible particularly when D.W. 1 himself says that there can be variation due to absorption of moisture amounting to about one per cent. This small difference, as the Subordinate Judge points out, can be explained as attributable to error in observation or error arising in weighment made at different times and under different circumstances, and we agree with this conclusion.

(36) In these circumstances, the order of the Collector declaring that the goods removed were not the same goods must be declared to be unsustainable. Accordingly, we allow the appeal, set aside the judgment and decree of the lower Court and decree the suit of the plaintiff with costs here and below.

(37) Appeal allowed.