

(1957) 03 AP CK 0004

In the Andhra Pradesh High Court

Case No : O.S. No's. 28 of 1949, 34 of 1950 and 100 of 1949 and A.S. No's. 481 of 1951, 295 and 296 of 1952 and 993 and 994 of 1952

Indira Bai and Another

APPELLANT

Vs

State of Madras (Now Andhra Pradesh)

RESPONDENT

Date of Decision : 22-03-1957

Acts Referred:

Citation : (1958) 9 STC 80

Hon'ble Judges : K. Subba Rao, C.J;P. Jaganmohan Reddy, J

Bench : Division Bench

Advocate : G. Jagadish, K. S. Ramaratnam, B. Bheemaraao, J. V. Sreenivasa Rao, D. Narasaraaju and M. Seshachalapathi, for the Appellant;

Judgement

Jaganmohan Reddy, J.—These are three plaintiffs' first appeals being A.S. No. 481/51 in O.S. No. 28/49, A.S. No. 295/52 in O.S. No. 34/50 and A.S. No. 296/52 in O.S. No. 100/49, against the judgment and decree of the Subordinate Judge, Kurnool, dated 22nd February, 1951, in the aforesaid three suits which were tried together by common consent. In O.S. No. 28/49 the plaintiff is Chunilal Lakshmichand Shah, partner of C. L. Shah & Co., purporting to file the suit on behalf of the dissolved firm and in O.S. Nos. 100/49 and 34/50, M/s. Kanti Brothers are the plaintiffs. All these suits were brought against the State of Madras in respect of the sales tax assessments. It was alleged in O.S. No. 28/49 that a sum of Rs. 16, 000 was collected from the firm by coercion for the year 1945-46 and with respect to O.S. Nos. 100/49 and 34/50 for the years 1947-48 and 1946-47, Rs. 37, 632-2-9 and Rs. 3, 402 were imposed respectively upon the plaintiffs and while in the former case steps were being taken by the defendant-respondent for the collection of the amount by coercive process, in the latter it was stated that the plaintiffs had paid the sum under protest, though the claim with respect to this was confined to only Rs. 3, 400 in order to avoid payment of heavy court-fee. The plaintiffs alleged in all these three suits that the goods were being sent by railway to places beyond the Province of Madras, the railway receipts, invoices for the goods and the hundies being lodged with the

bankers of the firm to be discounted and for collection of the amounts from the buyers with instructions to deliver the receipts to the buyers only on payment of money. It was, therefore, contended that the ownership of the goods continued to be in the plaintiff-firm till the actual payment by the buyers outside the Province where the goods would be transferred to them. In these circumstances, the plaintiffs averred that the respondent-defendant had no right to impose sales tax on such transactions and the collection in O.S. Nos. 28/49 and 34/50 of Rs. 16, 000 and Rs. 3, 400 respectively was illegal and ultra vires and prayed for a decree for the amounts with subsequent interest and costs while in O.S. No. 100/49 the plaintiff prayed for a declaration that the levy of sales tax was illegal and ultra vires and for orders restraining the defendant from collecting the above tax. In all the three suits notices u/s 80, Civil Procedure Code, were issued. The defendant-respondent denied the allegations of the plaintiffs, among others, the allegation that the property in the goods continued in the seller or that the ownership of the goods continued in the plaintiffs till the payment of the value of the goods, or the truth of the plaintiff's assertion that they had a right of disposal of the goods till the payment. The respondent further contended that in so far as it was aware of the terms of the suit transactions, the sale was complete within the Province of Madras, that the order of the Board of Revenue rejecting the plaintiffs' objection was right and therefore no suit would lie impeaching the correctness of the judgment, and that the suit was not in accordance with the notices given by the plaintiffs. In so far as O.S. No. 28/49 was concerned the defendant took the plea that the suit was barred by limitation and that the defendant was not aware of the truth of the allegations that the plaintiff was entitled to sue on behalf of the firm and with respect to O.S. No. 100/49 the adequacy of the court-fee paid was also raised. Except for this difference in the two suits, three common issues were raised in all the suits, (1) relating to the suit transactions taking place outside the State of Madras and if so the levy of sales tax being illegal, (2) jurisdiction of the court to try the suits, and (3) the suits being in accordance with the suit notices. The Subordinate Judge dismissed O.S. No. 28 of 1949 on the ground that it was barred by limitation and with respect to the sale being outside the State of Madras he held that the mere fact that the place of delivery is shown as Veldurthi or Nandyal or Dronachalam is insufficient to hold that the sales were completed at those places when the contracts show that the payment is to be made against railway receipt and further he held that those sales were outside the Province in which goods were consigned to the name of the plaintiff or of a third party which amounted to Rs. 1, 09, 650-12-0 where the plaintiff was both consignor and consignee and Rs. 86, 060-10-0 where a third party was shown as consignor and either that party or the plaintiff is shown as the consignee. In the result his finding was that the total sales outside the Province amounted to Rs. 1, 95, 710-12-0. In O.S. No. 100/49 he held that the sales outside the Province were with regard to transactions in which the goods have been despatched to "self" by the plaintiff prior to 1st January, 1948, and those amounted to Rs. 9, 26, 775-2-6 and he therefore gave a declaration and injunction with respect to the tax of Rs. 9,

267-12-0 said to be levied thereon. In respect to despatches after 1st January, 1948, he held that they are sales within the Province by reason of explanation 2 to sub-section (h) of section 2 of the Madras General Sales Tax Act and he thought it unnecessary to consider whether the plaintiff was entitled to any relief u/s 7 of the Act, with regard to sales subsequent to 1st January, 1948, where the consignee is not the buyer and where the suit was not filed for any relief u/s 7 of the Act. With respect to O.S. No. 34/50 he held that the sales where the consignor and the consignee himself is shown as the plaintiff (sic) amounting to Rs. 71, 458-1-0, the plaintiff was entitled to a decree for Rs. 714-9-0 being the tax payable thereon with proportionate costs. The Subordinate Judge further held that the plaintiff had a right to file a suit and therefore the Civil Courts had jurisdiction to determine the questions arising under the Madras General Sales Tax Act. Further he held that the suit in O.S. No. 28/49 was not in accordance with the suit notice while O.S. Nos. 100/49 and 34/50 were in conformity with the suit notice. The three appeals as we have already stated arise out of these aforesaid respective findings in the above suits by the Subordinate Judge.

2. The respondent-defendant has also filed two appeals against the decision in O.S. Nos. 34/50 and 100/49 which are A.S. Nos. 993/52 and 994/52 respectively.

3. Learned Advocate for the appellant contends that in so far as A.S. No. 481/51 is concerned, the plaint is in conformity with the notice and the mere mention of coercion in the plaint and the omission of this word in the suit notice which merely stated that the payment was made under protest cannot render the suit not to be in conformity with the suit notice; that the suit is not barred by limitation because in computing the period of limitation of six months specified in section 18 of the Madras General Sales Tax Act (hereinafter called the Act) the period of two months after the issue of notice as prescribed by section 80, Civil Procedure Code, should be excluded u/s 15(2) of the Limitation Act, and alternatively that section 18 of the Act does not apply; as such, Article 62 of the Limitation Act would become applicable.

4. In these appeals learned Advocate has raised common questions, namely, that having regard to the fact that in all cases delivery of the railway receipts was against payment, the property in the goods passed to the buyers outside the Province of Madras and the sale must be held to be outside the Province; that the assessments for 1946-47 and 1947-48, the subject matter of A.S. Nos. 295 and 296 of 1952 respectively, were made under a composite order both with respect to sales within the Province and sales outside the Province, as such these sales cannot be split up and the whole assessment must be held to be bad; and that the explanation to the definition of sale is ultra vires the State Legislature and in so far as A.S. No. 296/52 is concerned the assessment would be defective on that ground. With respect to the first point, namely, the suit in O.S. No. 28/49 is not in conformity with the suit notice, it is necessary to advert to the relevant allegations in the suit notice and the plaint to determine what the allegations were. Exhibit A-94 is the suit notice dated 10th September, 1947, given by Shri

Bhim Rao, Advocate, Kurnool, to the Secretary to the Government of Madras and District Collector, Kurnool, on behalf of M/s. C. L. Shah & Co., u/s 80, Civil Procedure Code. In that notice after setting out that his clients deal in groundnut oil, it was stated that the sale of the goods sold by them, according to the terms of the contract, the intention of the parties and the law applicable to the course of the dealing adopted by his clients, was completed outside the presidency to the buyers who got title only after payment of the value of the goods and therefore not liable to sales tax under the Act. The notice further alleged that the plaintiff had to pay Rs. 16, 208-14-2 as sales tax for the period 1944-45 under protest, and that that levy of tax was ultra vires and illegal and unjust and therefore, called upon the Government to refund the sum, failing which the plaintiff would institute a suit for its refund. In sub-para (2) of paragraph 2 of the plaint, the plaintiff alleged that a sales tax amount of Rs. 16, 000 for the period 1945-46 was disallowed by the Board of Revenue and that this tax was collected from the plaintiff under coercion by the Deputy Commercial Tax Officer, Kurnool, without holding proper enquiry. In paragraph 5 the plaintiff stated that the cause of action for the suit arose on the date of the order by the Board of Revenue refusing to refund the sales tax and on the date when the tax was collected from them. In paragraph 6 relating to jurisdiction of the Court it was stated that the tax was collected illegally by the Deputy Commercial Tax Officer, Kurnool. It is clear from the plaint averments that the cause of action is alleged to be the collection of the tax illegally by the Deputy Commercial Tax Officer and the refusal to refund it by the State of Madras. The suit notice clearly states that the plaintiff was not liable for sales tax under the Madras General Sales Tax Act, that the levy was ultra vires, illegal and unjust and in effect states that it was illegal and that it was paid under protest. Section 80, Civil Procedure Code, provides that no suit shall be instituted against the Government or against a public officer in respect of any act done or purporting to be done by such public officer in his official capacity until the expiration of two months next after notice in writing has been delivered to or left at the office of the persons specified therein stating the cause of action, the name, description and place of residence of the plaintiffs and the relief which he claims and the plaint shall contain a statement that such notice has been so delivered. As we have observed the cause of action set out in the suit notice and the plaint with respect to which objection has been taken by the Subordinate Judge as not being in conformity with one another has been clearly stated in both to be illegal levy and collection of tax and the relief which the plaintiff claims both in the suit notice and the plaint is the refund thereof. The main requirements of the section having 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 tax was paid by him or collected from him in the suit notice and in the plaint. All that section 80, Civil Procedure Code, requires is that there should be a substantial compliance in the suit notice with respect to the matters specified in the section. If authority is necessary we may refer to the case of Secretary of State for India in Council v. Perumal Pillai, where a Bench consisting of Subramania Ayyar and Benson, JJ., following the

case of *Jones v. Bird* (5 B& A. 837), held that the cause of action in the section should not be taken in a narrow sense, the object of the section being merely to inform the defendant substantially of the ground of complaint. In *Jahangir v. Secretary of State* (1902 ILR 27 Bom. 189), it was observed that "these notices" must not be too strictly or too narrowly construed. They must not be construed as if they were pleadings and that they need not set out all the details and facts of the case which the plaintiff intends to prove and that the notice must be considered sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed. There are several decisions on this point which we find it unnecessary to refer. No doubt the Privy Council in *Bhagchand Dagadusa v. Secretary of State for India in Council* (1927 ILR 51 Bom. 725) did observe at page 747 that section 80 is express, explicit and mandatory, and it admits of no implications or exceptions. But these observations must be construed in the light of the facts of that case where the suit was filed within two months from the date of the suit notice against the specific inhibition in the section. The mandatory or explicit provisions are with respect to the matter to be specified in the notice, namely, the cause of action, address and the relief claimed. Learned Advocate for the Government, Shri Venkatesam, did not seriously contest this point and in the view we have taken the suit is not defective for non-compliance of the provisions of section 80, Civil Procedure Code. In so far as the question of limitation is concerned, it is necessary to state that the suit notice was issued on 10th September, 1947, for the refund of the amount alleged to be illegally collected after the dismissal of the plaintiff's appeal u/s 11 of the Sales Tax Action 14th May, 1947. A revision was filed before the Board of Revenue which by its order dated 4th March, 1948 (Ex. B-95) dismissed it. It does not appear that this order was served on the plaintiff, but as the learned Subordinate Judge has stated it was prepared on 12th March, 1948, for being forwarded to the plaintiff and since he has produced it on 16th January, 1951, it would have been served in the ordinary course by 15th March, 1948. The date when the tax was collected is not evident, but even putting it at the latest, it must have been collected by 10th September, 1947, which is the date of the suit notice in which it was categorically stated that tax was collected. Learned Advocate for the appellants contends that the suit in O.S. No. 28/49 is within time from 15th March, 1948, as it was filed within six months from this date as provided u/s 18 after deducting two months allowed for suit notice u/s 15(2) of the Limitation Act, i.e., it is within eight months from the date of revision petition which fixes the last day for the filing of the suit either on 4th November, 1948, or at the latest by 15th November, 1948. He further contends that section 18 of the Act does not apply to suits for illegal levy, assessment and collection of taxes, as the period of limitation is not that prescribed u/s 18 of the Act, but under Article 62 of the Limitation Act.

5. u/s 18 of the Act a suit with respect to any act done or purporting to be done under the Act must be filed within six months from the act complained of. The section is in the following terms :-

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

6. The act complained of, according to the Subordinate Judge, is the illegal collection of the tax and eight months would terminate on the 10th May, 1948, and consequently the suit will be barred by limitation. Learned Advocate, however, contends that if section 18 of the Act is applicable to such suits, eight months must be reckoned from the date of the revision and the Subordinate Judge was wrong in relying upon the decision of *Chinnammal Achi v. Saminatha Malavayoran* (1907 ILR 30 Mad. 367), where it was held that the period of six months u/s 59 of Madras Act II of 1864 must be calculated from the date when the Collector on revision under Regulation VII of 1828 passed his final order, because the case upon which reliance has been placed has been overruled by a Full Bench in *Bhayankaram Venkata Narasimhacharyulu v. Secretary of State for India* (I.L.R. 1942 Mad. 264). In the Full Bench case it was ruled that the period of six months allowed for a suit to set aside the sale u/s 59 must be calculated from the date when the Collector on revision u/s 3 of the Madras Regulation VII of 1828 passes his final order and not from the date when the sale is confirmed u/s 38 by the Deputy Collector. The cases of *Bajinath Sahai v. Ramgut Singh* (1896 ILR 23 Cal. 775) and *Muthu Korakkai Chetty v. Madar Ammal* (1919 ILR 43 Mad. 185) were also cited by the learned Advocate in support of the aforesaid proposition, but it is not necessary for us to refer to these cases because even if the contention of the learned Advocate is accepted as correct on the assumption that section 18 applies to suits of this nature, the six months period can only be reckoned from the date when the revision was dismissed, viz., from 4th March, 1948, or 15th March, 1948, as the case may be, in which case he cannot claim the benefit of the period of two months specified in section 80, Civil Procedure Code, with respect to a notice given prior to the dismissal of the revision. u/s 80, Civil Procedure Code, issue of a suit notice presupposes the accrual of a cause of action and it, as it is contended, the cause of action only arose on the date of the dismissal of the revision, the suit notice itself cannot be considered to be validly issued u/s 80, Civil Procedure Code. If this is so, clause (2) of section 15 of the Limitation Act which provides for the exclusion of the period of notice to be given in accordance with the requirement of any statute in force during the period of limitation prescribed for a suit, cannot be of any assistance. The contention of the learned Advocate on any view of the matter on this aspect of the case is without force. The next contention of the learned Advocate not only deals with the question of jurisdiction of civil courts to try suits with respect to recovery of tax, but also determines whether Article 62 of the Limitation Act would apply, because if section 18, as contended by him, is confined only to suits for compensation or damages against the State Government or any officer or servant of the State Government with respect to acts done or purporting to be

done by them under that Act, the court has not only jurisdiction to entertain suits relating to the levy, imposition and collection of tax, but also Article 62 would apply prescribing three years as the period of limitation for the recovery of tax. A case similar to the one we are considering arose for decision by Panchapakesa Ayyar, J., in *The State of Madras Vs. A.M.N.A. Abdul Kader Tharaganar Firm*, . The point for consideration in that case was whether in a suit for the recovery of Rs. 900 said to have been collected illegally from the plaintiff as sales tax by the defendants, State of Madras, the suit would become barred by limitation in six months u/s 18 of the Act or at least within a year under Article 16 of the Limitation Act or whether Article 62 of the Limitation Act giving 3 years will apply. The tax in that case was collected from the plaintiff on 27th May, 1946, and the suit was filed only on 10th January, 1948, so that if section 18 of the Act or Article 16 of the Limitation Act applied the suit would be barred by limitation. The learned Judge after referring to the Full bench decision in *Panchayat Board, Tiruvottiyur v. Western India Match Co.* (ILR 1939 Mad. 566) and that in *The Province of Madras Vs. Chekka Satyanarayanamurthy*, held that on the analogy of the language of section 225 of the Madras Local Boards Act (XIV of 1920) as amended by Act XI of 1930, which contained more or less the same provision and wording as section 18 of the Act, the latter section was limited to suits for compensation and damages and so inapplicable to cases of taxes illegally collected, nor has Article 16 of the Limitation Act any application to such a case where tax was merely recovered as arrears of land revenue and the claim was not made by the revenue authorities on account of arrears of revenue or on account of demand recoverable as such arrears particularly where the tax had been paid within the 15 days prescribed and had not become a tax liable to be recovered as arrears of land revenue. In the result Article 62 was applied. With respect we agree with this view of the learned Judge. Leach, C.J., delivering the judgment of the Full Bench in *Panchayat Board, Tiruvottiyur v. Western India Match Co.* (ILR 1939 Mad. 566), after examining section 156 of the Madras Local Boards Act of 1884, which corresponded to section 225 of the Madras Local Boards Act of 1920, the amendment in 1900 of section 156 and the amendment in 1930 of section 225 and the various decisions on the aforesaid section, held that section 225 of the Madras Local Boards Act is limited to suits for compensation or damages. Section 156 of 1884 Act 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 section 18 of the Act. It is not necessary for us to traverse the same ground as that covered by the Full Bench judgment except to say that having regard to the long line of decisions upon the analogous provisions of section 225 of the Madras Local Boards Act, the provisions of section 18 are also limited to suits for compensation or damages and do not apply to cases relating to the imposition, levy or collection of sales tax illegally. Learned Advocate for the Government did not contest this proposition having regard to the aforesaid decisions. If section 18 is not applicable to such suits the question is 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. This point was also considered by a Bench of the Madras High Court in *The Province of Madras Vs. Chekka Satyanarayanamurthy*, 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. 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 assessments 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 section 18 of the Act does not apply to such suits, the only Article that is applicable is Article 62 of the Limitation Act which prescribes three years. We, therefore, hold that the suit O.S. No. 28 of 49 is within time. The next point that has been urged in these appeals is that having regard to the nature of the transactions and the fact that in all cases the railway receipt was handed over to the buyer only against payment through a bank outside the Province, the sale should be held to have been effected outside the Province where the railway receipt has been delivered and hence no liability attaches for levy of tax under the Act.

7. The documentary evidence in this case consists of contracts and other papers relating to contracts, railway receipts, invoices, demand drafts etc., the genuineness of which has not been questioned by the respondent. On the basis of the documents produced consolidated statements of the course of transactions were prepared and have been treated as evidence with the consent of the respondent's counsel without admitting the legal effect of the transactions as disclosed by those statements. The oral evidence of P.W. 1 Vardhaman and P.W. 3 Hemchand Devchand, the sole proprietor of Kanti Bros., was recorded in the suits and the depositions of K. Jagannatha Rao, Bank Employee examined as 6th witness and T. Harirao, Station Master, examined as 2nd witness, of the plaintiff in O.S. No. 14/50, were marked by consent as Exs. A-96 and A-85 respectively and treated as evidence in the suits. The statement A-93 is one where the plaintiff is the consignor and consignee. The goods are despatched from Kurnool, Dronachalam, Veldurthi, Dhone, Gutti, Salt Kotars, and Tadipati. This exhibit also shows the position of the seller-consignor and buyer-consignee. Stations from which the goods were despatched are admitted to be within the State of Madras. The third statement discloses the position where the buyer is the consignor and also the consignee and the fourth statement shows the plaintiff as consignor and buyer as consignee. Exhibit A-92 series are statements of goods sold and documents sent for collection through the Central Bank of India Ltd., and the Imperial Bank of India Ltd., from 1st April, 1945, to March, 1946, for a whole year and the verification at the foot of each statement by the bank would show that all relative railway receipts were delivered to the parties concerned after payment only at the destination. Exhibit A-28 is the statement which shows the

buyer as consignor and consignee. The millers in each case have despatched the goods from stations within the State. All the contracts produced, that is, A-25, A-20, A-22, A-6, A-23 and A-38 etc., show that the place of delivery is F.O.R., Kurnool, or places within the Kurnool District and that the terms and conditions of payment are that railway receipt should be sent through the bank for payment. In so far as the course of transactions is concerned, there is no dispute on the evidence between the appellants and the respondent. The facts that have been held proved and which are admitted by both sides are that oil was purchased from the millers as well as merchants at Kurnool by the appellants for ready delivery. The delivery was F.O.R. at Kurnool or some other railway station in Kurnool District. The mode of transport is through the common carrier and payment was against railway receipt at the place of destination through the bank. The railway receipts disclose four types of transactions : (1) where the seller is the consignor and the consignee; (2) where the seller is the consignor and the buyer consignee; (3) where the buyer is the consignor and the consignee; and (4) where the miller is the consignor and the plaintiff is the consignee.

8. It is now necessary to see from the course of business set out above where the sale has taken place whether in the Province of Madras or outside. "Sale" with all its grammatical variations and cognate expressions has been defined in section 2(h) of the Act to mean every transfer of property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration. The question therefore is where and when the property in the goods passed to the buyer. This will be determined under the Indian Sale of Goods Act. Under sub-section (2) of section 23 of the Sale of Goods Act, where in pursuance of a contract a seller delivers the goods to the buyer or a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer and does not reserve the right of disposal he is deemed to have unconditionally appropriated the goods to the contract, and according to sub-section (3) of section 19 unless a different intention appears the rules contained in sections 20 - 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Section 23 therefore is subject to the intention of the parties, and ordinarily the appropriation of the goods as specified in section 23(2) of the Sale of Goods Act will pass the property in the goods to the buyer. But notwithstanding the delivery to the carrier or other bailee for the purpose of transmission to the buyer if the intention appears otherwise the property in the goods may not pass to the buyer until the conditions imposed by the seller are fulfilled such as envisaged u/s 25 of the said Act, wherein a contract for sale of specific goods or where the goods are subsequently appropriated to the contract the seller may by the terms of the contract or appropriations reserve the right of disposal of goods until certain conditions are fulfilled. Where the contract is an F.O.R. contract, delivery of the goods to the railway passes the risk to the buyer; and ordinarily delivery of the goods to the

buyer and passing the risk in respect of the goods from the seller to the buyer are strong indications of the passing of the property in the goods to the buyer, but these are not conclusive and may be negated by the seller reserving to himself the right of disposal as u/s 25 until fulfilment of certain conditions thereby preventing the passing of the property in the goods from him to the buyer. Prima facie therefore the property passes to the buyer upon the goods being delivered to the railway or to the common carrier. But that inference may be rebutted. For instance where he deals with the railway receipt in such a way as to show that he did not intend to part with the goods until payment in cash. Again the mere fact that payment is to be made against the delivery of railway receipt in an F.O.R. contract is not conclusive of the fact that the property in the goods has not passed to the buyer on the seller delivering the goods to the railway. It is now necessary to see what the intention of the seller was with respect to the passing of the property to the buyer. The contention of the learned advocate for the appellants is that the sellers clearly manifested their intention not to pass the property in the goods in Madras Province but only outside when they stipulated with the buyer that the railway receipt was only to be delivered against payment of the buyer. Chagla, J., (as he then was) in *Dinkerrai Lalit Kumar Vs. Sukhdayal Rambilas*, at page 824) repelled a similar contention raised thus :

"We do not agree with Mr. Setalwad that the expression railway receipt through bank merely deals with the mode of payment. This provision has got to be taken into consideration with all the other provisions in the contract in order to arrive at a true conclusion as to whether under the contract goods were to be delivered at Calcutta or at the various places mentioned in the contract."

9. From the admitted evidence in the case it is clear that in two cases, namely, where (a) the seller is consignor and consignee, and (b) the miller is consignor and plaintiff consignee, there was no sale within the Province of Madras by the plaintiffs. The property in the goods under the above transactions only passed to the buyer outside the Province on the delivery of railway receipt against payment. In transactions where the buyer is consignor and consignee it is equally clear that the sale had already taken place within the State before the buyer could transport the goods. This conclusion is sought to be rebutted by stating that there was a permit system prevailing requiring the permit holder alone to transport the goods from the Province and where the permit was given to the plaintiff only on condition that the sale should be to a particular Vanaspathi factory the consignee was being shown as the buyer. It is clear on the admission of P.W. 1 that goods had to be booked by the buyer within the Province and he was the person entitled to despatch the goods; as such the property in the goods has passed to him before despatch. In the case where the consignor is the seller and the consignee is the buyer also we must hold the seller, upon whom the burden of showing a different intention is case, which burden he has not discharged, to have despatched the goods and that the sale took place within the State. The plaintiff produced in evidence, Exs. A-3, A-3(a),

A-4 and A-4(a), being letters written by the buyer and the seller's representative to show that even though compensation for loss of goods in transit was paid to the buyer he made over the moneys to the seller as the seller was the owner. In the first place the correspondence was in April, 1947, about 5 months before the suit notice when the assessment had either taken place or was being made or at any rate it does not show why these letters had to be written; in the second place, the interpretation put by the buyer is not conclusive as to where the sale took place or property in the goods passed. We may here refer to the observations in *M. Siddique and Company Vs. Mysore Textiles Agencies*, by a Bench consisting of Wadsworth, O C J , and Rajamannar, J., as he then was, which sums up the legal position thus :-

"Having regard to the terms of section 23(2) of the Act, it must, we think, be held that the sale would be completed by the delivery of the goods to the railway for the purpose of transmitting them to the buyer, provided that the seller did not reserve the right of disposal. Translating this into the terms of ordinary commerce, if the seller delivered the goods to the railway for conveyance to "self" at Calcutta, there would not be such an appropriation as would pass title to the purchaser. In order to complete the transaction it would be necessary to endorse the railway receipt and deliver it to the buyer. If, on the other hand, when this consignment was booked at the railway station in Cochin State the railway receipt was made out to the buyer, this would become a document of title vesting in the buyer alone the right of ownership in the goods while in transit. The mere fact that the document of title was retained in the custody of the seller, though it might give him some equitable lien over the goods, would not prevent the title from passing to the buyer."

10. Having regard to what has been stated above we hold that where the consignor and consignee is the seller and the consignor is miller and consignee plaintiff, the sales took place outside and no sales tax is leviable on those transactions and in the other two cases where the consignor is seller and consignee buyer and where the consignee and consignor is buyer the sales took place inside the Province and are liable to sales tax under the Act.

11. Two other points raised by the learned Advocate, Mr. Srinivasa Rao for the appellants, remain to be considered. The first one of these is that the assessment being a composite one dealing with transactions which are taxable and those that are not taxable in each of A.S. Nos. 295 and 296 of 1952 it cannot be split up and the whole thing is said to be infected and must be held to be invalid. In support of this contention a judgment of the Supreme Court in *Ram Narain Sons Ltd. Vs. Asst. Commissioner of Sales Tax and Others*, is cited. There an assessment was made by the respondent which included in the composite order an assessment for pre-Constitution and post-Constitution periods. The pre-Constitution and post-Constitution assessment being held invalid the whole order was held invalid. In so far as this case is concerned, learned Advocate for the respondent sought to distinguish it on the ground that the remedy sought in the

High Court by the assessee was by way of a writ under Article 226 of the Constitution, and as it will not, by the nature of the remedy sought in a writ proceeding, be practicable to separate legal from the illegal assessment, he contends, that the whole assessment was held to be invalid. Further he urges that the learned Advocate-General, Madhya Pradesh, did not seriously contest the position that that assessment which was bad in part was infected throughout and consequently the decision is not an authority for the proposition that where in a suit it is possible to separate from the composite order on the basis of evidence the taxable and non-taxable items, the order is bad. There is no doubt that the nature of the remedy sought in the three appeals before their Lordships was by way of a writ under Article 226 and on a petition under Article 32 of the Constitution. It is, therefore, necessary to examine the decision of the Supreme Court with particular regard to the facts in that case. The appellants entered into an agreement with several mills to buy as their agents on their account and on their behalf kapas in various markets of Madhya Pradesh and in this capacity they so worked from 1st October, 1949, to 30th September, 1950. The Sales Tax Authorities included the kapas transactions in the appellants' turnover and ordered them to pay sales tax on the said transactions. It was held that in so far as the post-Constitution transactions were concerned they were bad as the ban imposed under Article 286(1)(a) and the Explanation thereto could not be removed by the President's order. It was further held in the petition under Article 32 that apart from the invalidity on the above ground, the assessment was also bad by reason of the transactions being of inter-State nature, and also for the reasons that the sale had taken place in Uttar Pradesh. It was upon this basis that the composite orders were deemed to be invalid. The contention of the learned Advocate for the respondent on a prima facie reading of the decision in Appeals Nos. 132, 133 and 137 of 1955 dealt first by the judgment of Bhagwati, J., would appear to support him in the contention that since the remedy sought for was by way of a writ the assessment could not be split; but this argument does not bear closer scrutiny. Their Lordships relying on the judgment of the Privy Council in *Bennett & White (Calgary) Ltd. v. Municipal District of Sugar City* (1951 A.C. 786), observed at page 790 as follows :-

"There is authority for the proposition that when an assessment consists of a single undivided sum in respect of the totality of the property treated as assessable, the wrongful inclusion in it of certain items of property which by virtue of a provision of law were expressly exempted from taxation renders the assessment invalid in toto. "The decision upon which their Lordships relied was not one where in a writ the composite order of assessment was held invalid. It was, as in the instant case, one where after the remedies permitted to the assessee under the taxing Acts he questioned the legality of the assessment in a suit in Civil Courts. In that case also a question was urged that where a remedy was given by way of appeal no right of suit exists or that Civil Courts have no jurisdiction. This argument was negatived after examining several authorities, the effect of which was stated in these words at pages 808-809 :

"In their Lordships" judgment the effect of these authorities is that a tax-payer called on to pay a tax in respect of certain property has a right to submit to the ordinary courts the question whether he is taxable in respect of that property unless his right to do so has been clearly and validly taken away by some enactment, and that the fact that the statute which authorises assessment allows an appeal or a series of appeals against assessments to other tribunals is not sufficient to deprive the tax-payer of that right."

12. In the above Privy Council case which was from Canada three motor vehicles of the type called "dumptors" under an agreement with the assessee deemed to be the property of the Crown were included in the assessee's property and assessed. As their Lordships pointed out they were not an insignificant component of the total subject matter of the assessment and they expressed the view that the course of action adopted by the Supreme Court of Canada in holding the assessee entitled to a declaration that the assessment and taxation of all personal property in question except the dumptors were properly made and imposed was not warranted. In other words, the deletion of the three dumptor items and approving the assessment subject to this deletion was disapproved and it was, dealing with this aspect, then observed at page 816 :

"..... when an assessment is not for an entire sum, but for separate sums, dissected and earmarked each of them to a separate assessable item, a court can sever the items and cut out one or more along with the sum attributed to it, while affirming the residue. But where the assessment consists of a single undivided sum in respect of the totality of property treated as assessable, and when one component (not admissible as "de minimis") is on any view not assessable and wrongly included, it would seem clear that such a procedure is barred, and the assessment is bad wholly."

13. The observations of Anglin, C.J., in *Montreal Light, Heat & Power Consolidated v. City of West Mount* (1926 S.C.R 515) were also referred to with approval by the Supreme Court and relied upon. The above principle of law was held to apply not only to the appeals arising out of the writ petitions under Article 226, but also in the assessment the subject-matter of the petition under Article 32 where the sale outside the States, namely, Kanpur, Bombay, Lucknow and Faizabad, separately shown as item (d) was held to have been completed in Uttar Pradesh and the turnover could not be taxed by the State of Madhya Pradesh. With respect to the said item also which could easily be separated even where the remedy was sought by way of a writ, Bhagwati, J., said at page 773 that "the assessment, moreover, is a composite one covering the pre-Constitution period as well. The case therefore falls within our judgment in Civil Appeals Nos. 132, 133 and 137 of 1955 just delivered." Following this reasoning the assessment order was set aside. In the circumstances set out above, in our view, the matter can no longer be said to be *res integra* and we are bound by the decision of the Supreme Court. The last point argued on behalf of the appellants relates to appeal No. 296/52 pertaining to the assessment for the year 1947-48. In the

view we have taken above, we find it unnecessary to decide this point. Suffice it merely to set out the contention of the learned Advocate challenging the legislative competence of the Madras Legislature to enact and the validity of explanation (2) to section 2(h) of the Act. Explanation (2) which was added by clause (b) of sub-section (1) of section 2 of the Madras General Sales Tax (Amendment) Act XXV of 1947, came into force on 1st January, 1948, and is in the following terms :-

"Notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale or purchase of any goods shall be deemed, for the purposes of this Act, to have taken place in this State, wherever the contract of sale or purchase might have been made -

(a) if the goods were actually in this State at the time when the contract of sale or purchase in respect thereof was made, or

(b) in case the contract was for the sale or purchase of future goods by description, then, if the goods are actually produced in this State at any time after the contract of sale or purchase in respect thereof was made."

14. The submission of the learned counsel for the appellant was that in effect the explanation enables sales tax to be levied not on sale of goods but only on contracts of sale by reason of the goods being in the State, that it is ultra vires the Madras Legislature to enact the statute having an extra-territorial operation, that this provision is repugnant to the provisions of the Sale of Goods Act and therefore should not prevail as the previous sanction of the Governor-General was not obtained for enacting the amendment introduced in 1947. This is the very contention raised before two Benches, one of the Madras High Court in *Louis Dreyfus & Co. Ltd. v. State of Madras* (1954 5 S.T.C. 307; 1954 2 M.L.J. 326) and the other in *Peri Kameswara Rao v. State of Madras* (1955 6 S.T.C. 143; 1955 A.L.T. 168). Both these decisions proceed on the assumption of the finality of the decisions in *Poppatlal Shah v. State of Madras* (1953 4 S.T.C. 188; 1953 1 M.L.J. 739) and *State of Bombay v. The United Motors* (1953 4 S.T.C. 133; 1953 S.C.J. 373). It was held in these cases that any of the elements which constitute a sale would go to establish a sufficient nexus with the territory to justify the imposition of a tax, that the provision of the impugned explanation is not repugnant to the provisions of the Indian Sale of Goods Act, each being enacted under distinct legislative items in the State and Concurrent Lists dealing with different subjects not traceable to one another and hence the assent of the Governor-General was not necessary. It is contended by the learned counsel for the appellant that having regard to certain observations of their Lordships of the Supreme Court in their latest judgment in *Bengal Immunity case* (1955 6 S.T.C. 446; 1955 An. W.R. (S.C.) 422), we must hold that the above Bench judgments are no longer good law. As we have already observed, in the view we have taken, it is not necessary to determine these questions and in any case we understand that the case decided by this Court is pending appeal before the Supreme Court which would finally determine the question raised before us. In the result appeal A.S.

No. 481 of 1952 is allowed partly to the extent of refund of tax on the turnover of Rs. 1, 95, 710-12-0 being sales outside the Province. There will be a decree for the refund of the tax on the above turnover with proportionate costs here and in the court below. Appeals Nos. 295 and 296 of 1952 will be allowed with costs throughout. In A.S. No. 296 of 1952 there will be a decree for declaration and injunction as prayed for with respect to Rs. 37, 632-2-9 being tax sought to be collected. In A.S. No. 295 of 1952 there will be a decree for Rs. 3, 400. Appeals of the State Nos. 993 and 994 of 1952 are dismissed with costs.

15. On these appeals being set down for being mentioned Subba Rao, C.J., made the following order :-

These appeals are posted for being mentioned on the ground that there are certain mistakes in the judgment. In Appeals Nos. 295 of 1952 and 481 of 1951, learned counsel points out that no interest was awarded to him from the date of the plaint till date of payment. The omission in the judgment, in our view, is due to oversight. We, therefore, amend the judgment and give the appellant interest at 6 per cent. per annum from date of plaint till date of payment.

16. Another point is raised in Appeal No. 481 of 1951. It is said that, by the same parity of reasoning, we adopted in the connected appeals, we should have allowed this appeal also in full. This obviously cannot be decided at this stage. The appellant, if advised, may take out an application for review of the judgment.

17. In A.S. No. 296 of 1952, it is contended that we should, in exercise of our discretion, give the appellant Advocate's fee not on the amount at which the plaint was valued for jurisdictional purposes but on the amount in respect of which the declaration was asked for. We do not think there are any extraordinary circumstances in this case to exercise our discretion in the manner indicated by the learned counsel. We order accordingly. Ordered accordingly.