

(1959) 09 KAR CK 0007

In the Karnataka High Court

Case No : Regular Appeal No's. 458 of 1954 and 106, 107, 108, 109 and 110 of 1955 and Second Appeal No's. 531 and 532 of 1954

N. Ayyanna Setty and Sons and Others

APPELLANT

Vs

State of Mysore

RESPONDENT

Date of Decision : 04-09-1959

Acts Referred:

Limitation Act, 1908 — Section 62

Madras General Sales Tax Act, 1939 — Section 11, 17, 18, 5, 8

Citation : (1961) 12 STC 731

Hon'ble Judges : A.R. Somnath Iyer, J;A. Narayana Pai, J

Bench : Division Bench

Advocate : V. Krishnamurthy, G. Sridharamurthy, K.R. Gopivallabha Iyengar and B. Venkata Rao, for the Appellant; Advocate-General, for the Respondent

Judgement

Narayana Pai, J.—All these appeals have been heard together for the reason that they involve certain common questions. They are also directed against three judgments of the learned District Judge of Bellary, all delivered on the 30th day of November, 1953, in three batches of cases tried or heard together by him. Two were batches of Original Suits transferred from the Courts of the Subordinate Judge and the District Munsiff, Bellary, and tried together by the learned District Judge. The third batch is of appeals arising out of the Original Suits tried by the District Munsiff's Court and the Subordinate Judge's Court, Bellary. The discussion contained in the three judgments of the learned District Judge of Bellary under appeal on the questions of law said to arise in all the matters heard by him is more or less on identical terms.

2. Regular Appeals Nos. 458 of 1954 and 107, 108, 109 and 110 of 1955 are respectively by the plaintiffs in Original Suits Nos. 32, 31, 35, 36, and 37 of 1952 on the file of the District Court. All these suits were tried together and common evidence was recorded in Original Suit No. 31 of 1952; they were disposed of by a common judgment on the 30th day of November, 1953, by which all the suits were dismissed. Regular Appeal No. 106 of 1955 is by the plaintiff in Original Suit

No. 28 of 1952 on the file of the District Court, Bellary. This and four other suits, viz. Nos. 25, 26, 27 and 29 of 1952 were tried together and common evidence was recorded in Original Suit No. 29 of 1952. They were disposed of by a common judgment dated the 30th day of November, 1953, by which all the suits were dismissed. The plaintiff in Original Suit No. 25 of 1952 had also filed Regular No. 105 of 1955 before this Court, but that appeal abated by reason of the appellant having died on 31st January, 1956, and the petitions presented in July, 1957, to this Court to set aside the abatement and bring on record the legal representative of the deceased appellant were dismissed, this Court declining to excuse the delay in seeking to set aside the abatement.

3. Second Appeals Nos. 531 and 532 of 1954 arise respectively out of Original Suit No. 9 of 1951 on the file of the Court of the District Munsiff, Bellary, and Original Suit No. 166 of 1950 on the file of the Court of the Subordinate Judge Bellary. The former was dismissed and the plaintiff filed Appeal No. 35 of 1953 on the file of the District Court. The latter was decreed and the defendant, the State of Mysore represented by the Deputy Commissioner of Bellary, filed Appeal No. 35 of 1952 on the file of the District Court, Bellary. These appeals with certain others were heard together and disposed of by a common judgment dated the 30th day of November, 1953. The plaintiffs lost in both the appeals, Appeal No. 35 of 1952 having been allowed and Appeal No. 35 of 1953 dismissed. The Second Appeals are by the plaintiffs.

4. On the merits the common question that arises is whether the plaintiffs in all these cases, who are described as dallali merchants or commission agents, can be said to be dealers within the meaning of the Madras General Sales Tax Act of 1939 (hereinafter referred to as the Act). A Bench of the Madras High Court consisting of Satyanarayana Rao and Viswanatha Sastry, JJ., in their judgment in Provincial Government of Madras v. Neeli Veerabhadrapa [1950] 1 STC 245 : I.L.R. 1951 Mad. 257, held in effect that a commission agent of any description could not be described as such a dealer and that therefore he cannot be made liable to tax under the said Act. The plaintiffs in all the Original Suits out of which the Regular Appeals arise specifically cite this ruling and rely upon it in support of their contention that they are not dealers liable to tax under the Act. The view of law stated in the said ruling was in conflict with the view stated in a previous Bench ruling of the same High Court reported in Province of Madras v. Sivalakshminarayana [1949] 1 STC 223 : ILR 1950 Mad. 421. During the pendency of these suits this conflict was referred for decision by a Full Bench presided over by Rajamannar, C.J. The judgment of the Full Bench is reported in Kandula Radhakrishna Rao v. Province of Madras [1952] 3 STC 121 : (1952) 1 MLJ 494. The Full Bench held that the learned Judges in Provincial Government of Madras v. Veerabhadrapa [1950] 1 STC 245 : ILR 1951 Mad 257 went too far in holding that in no event and under no circumstances can a commission agent be deemed to be a person carrying on the business of buying or selling goods and expressed their dissent from them. It was pointed out that the question whether a commission agent was or was not a dealer within the meaning of the

Act was a mixed question of fact and law, and that therefore the decision thereon must necessarily depend upon the nature of the business transacted by the commission agent. The opinion of the Full Bench was that where the commission agent acts merely as a broker, that is to say an agent employed for the purpose of making a bargain for another and in the course of such agency merely brings about privity of contract between the buyer and the seller without himself either buying or selling, cannot be a dealer. If, however, the nature of the transaction is such that the commission agent sells goods under the authority or with the consent of the owner he certainly transfers property in goods and that therefore the transaction would be a sale within the meaning of clause (h) of section 2 of the Madras General Sales Tax Act being a transfer of property in goods by one person to another, and the commission agent would therefore be a dealer within the meaning of clause (b) of the same section as a person who carries on the business of selling goods. The Full Bench at the same time held that upon facts the decision in Veerabhadrapa's case [1950] 1 STC 245 : ILR 1951 Mad. 257 was unassailable for the reason that the commission agents in that case were mere brokers. The propositions of law stated in the Full Bench were not disputed either in the lower Court or before us, - the entire attempt on the part of the plaintiffs being that the facts in these cases are the same as or similar to those in Veerabhadrapa's case [1950] 1 STC 245 : ILR 1951 Mad. 257 and that therefore the plaintiffs were mere brokers not liable to tax in respect of their commission agency turnover.

5. The plaintiff in Original Suit No. 32 of 1952 out of which Regular Appeal No. 458 of 1954 arises prayed for a decree directing the defendant, the State of Mysore, to refund with interest the sums of Rs. 720-6-0, Rs. 1,292-1-0 and Rs. 1,404-13-6 being tax collected from him in respect of his commission agency for the years 1947-48, 1948-49 and 1949-50 respectively, and also prayed for an injunction restraining the defendant from recovering from him the sum of Rs. 1,349-7-0 being the balance of tax due in respect of the said turnover for the year 1949-50; this plaintiff was also dealing in cotton as a commission agent in respect of which he had taken out licences u/s 5 of the Act for the 3 years paying a fee of Rs. 400 therefore which sum also prayed that the defendant may be required to refund to him. On all the sums recovery of which was prayed for in the suit the plaintiff also claimed payment of interest at 6 per cent. from the respective dates of payment.

6. The prayer in Original Suit No. 31 of 1952 out of which Regular Appeal No. 107 of 1955 arises is for recovery with interest of Rs. 953-0-4, Rs. 2,337-14-10 and Rs. 2,186-14-6 being the amount of tax collected from the plaintiff in respect of his commission agency turnover during the years 1947-48, 1948-49 and 1949-50 respectively. The prayer in Original Suit No. 35 of 1952 out of which Regular Appeal No. 108 of 1955 arises was likewise for the recovery with interest of Rs. 2,580-8-9, Rs. 4,950-8-8 and Rs. 4,558-11-9 being the tax collected from the plaintiff in respect of his commission agency turnover for the years 1947-48, 1948-49 and 1949-50; this plaintiff had also paid during the relevant period Rs.

250 by way of fee for licences in respect of cotton u/s 5 of the Act and prayed for the refund of the said fee levied from him.

7. The prayer in Original Suit No. 36 of 1952 out of which regular Appeal No. 109 of 1955 arises is similar. The sums claimed are Rs. 1,130-12-9, Rs. 2,226-4-6 and Rs. 2,604-8-6 being the tax collected from the plaintiff in respect of his commission agency turnover for the years 1947-48, 1948-49 and 1949-50.

8. In Original Suit No. 37 of 1952 out of which Regular Appeal No. 110 of 1955 arises, the prayers are for the recovery of similar tax paid for the years 1947-48, 1948-49 and 1949-50 in the sums of Rs. 2,356-11-0, Rs. 5,415-5-6 and Rs. 6,748-7-0 respectively with interest, for recovery with interest of a fee of Rs. 150 paid for a commission agency licence u/s 8 of the Act for one year and total fees of Rs. 350 paid during the 3 years in respect of licences for commission agency business in cotton taken out u/s 5 of the Act; the plaint also contains a prayer for an injunction restraining the defendant from proceeding to collect tax imposed on the plaintiff by way of provisional assessment in respect of the year 1950-51.

9. The plaint in Original Suit No. 28 of 1952 out of which Regular Appeal No. 106 of 1955 arises relates to as many as 5 years, viz., 1945-46 to 1949-50. The amounts collected by way of tax in respect of commission agency turnover the recovery of which with interest is claimed are Rs. 1,806-11-0, Rs. 2,927, Rs. 2,211-9-0 and Rs. 3,159-11-0 for the years 1945-46, 1946-47, 1947-48 and 1948-49 respectively; for the said four years the plaintiff had also taken out licences in respect of their commission agency business in cotton for which they had paid a total fee of Rs. 550; apart from that, in respect of a turnover of cotton for a broken period included in the year 1947-48 not covered by any licence a tax of Rs. 81-3-0 was also collected from him. The plaintiff asked for recovery of this total of Rs. 631-3-0 also with interest. He further asked for injunctions restraining the defendant State from collecting the tax determined in respect of the commission agency turnover for the year 1949-50, from collecting tax on similar turnover provisionally assessed for the year 1950-51 under order dated 15th January, 1951, and also from levying fee for a licence in respect of commission agency business in cotton required to be taken for the year 1949-50 under an order dated 15th January, 1951.

10. It will be noticed that in all these suits the principal prayers are for recovery of tax or licence fee already collected from the plaintiffs under orders passed by the department officers in respect of the same. The injunctions claimed are also against collection of tax assessed either finally or provisionally under orders actually passed by the departmental officers, or against levy of licence fee required to be paid also under orders already passed by departmental officers. In all the suits the principal defence on merits is that the plaintiffs, although they may be commission agents, are really dealers within the meaning of the Act. As such commission agents of that description they could claim exemption only if they have taken out licences under the provisions of section 8 of the Act. In most of the cases the plaintiffs have not taken out any licence under that section. The

plaintiff in Original Suit No. 37 of 1952 had taken out a licence for one year and likewise the plaintiff in Original Suit No. 28 of 1952; in respect of turnovers covered by those licences the plea is that the plaintiff concerned had violated the terms of the licences and thus forfeited the exemption claimable by virtue of such licence. In cases of dealings in cotton covered by licence u/s 5 of the Act, the turnover had in fact been exempted from tax and the relief by way of refund of licence fee is resisted on the same ground, viz., that the plaintiffs concerned are dealers within the meaning of the Act. Two other technical pleas are also taken, viz., that the suits are not maintainable at law and secondly that they are barred by limitation having been filed beyond the period six months prescribed u/s 18 of the Act.

11. The learned District Judge while rejecting the technical pleas raised by the defendant State upheld its contention that all the plaintiffs were dealers within the meaning of the Act. He took the view that the facts established by evidence were not the same as or similar to those in Veerabhadrapa's case [1950] 1 STC 245 : ILR 1951 Mad. 257, so as to establish the plaintiffs' contention that they were mere brokers.

12. In Original Suit No. 9 of 1951 on the file of the Additional District Munsiff of Bellary out of which Second Appeal No. 531 of 1952 arises the plaintiff claimed refund of a tax of Rs. 2,259-2-1 with interest and costs recovered from him for the year 1948-49. The plaintiff was dealing as a commission agent in cotton and groundnut. Although he had taken out a licence u/s 5 in respect of cotton business he had not taken out any licence u/s 8 in respect of the other commission agency business. The trial Court held on the evidence that the plaintiff had authority to sell the goods in his own name and that therefore he was a dealer, but that in respect of transactions in groundnut he could not be taxed on the admission by the department that he only sold as an agent of the ryots whereas the turnover to be taxable in respect of groundnut had to be purchased turnover; he however, ultimately dismissed the suit on the ground of limitation agreeing with the defendant that the suit ought to have been brought within the period of six months u/s 18 of the Act. In Original Suit No. 166 of 1950 on the file of the Subordinate Judge's Court, Bellary, out of which Second Appeal No. 532 of 1954 arises the plaintiff claimed the refund of a total sum of Rs. 3,539-3-3 being the amount of sales tax collected from him in respect of commission agency business for the years 1946-47, 1947-48 and 1948-49 respectively. The trial Court followed the ruling in Veerabhadrapa's case [1950] 1 STC 245, and held that the plaintiff was not liable to pay tax. It also rejected the department's plea of limitation holding that the appropriate period of limitation was not six months u/s 18 of the Madras General Sales Tax Act, but 3 years under Article 62 of the First Schedule of the Indian Limitation Act. He accordingly decreed the suit. Upon appeal by plaintiff in the one case and the State in the other, the learned District Judge took the same view as he had done the other suits already discussed, viz., that while rejecting the plea of limitation he held the contention of the State that the plaintiffs were dealers within the

meaning of the Act liable to pay tax in the absence of a licence u/s 8 of the Act.

13. In the arguments before us in these appeals the points that have been strongly urged are the same three points which have been indicated in the summary of the contentions already given by us. On behalf of the plaintiffs-appellants it has been urged that the evidence on record clearly establishes that they were mere brokers and therefore not dealers within the meaning of the Act at all. They, therefore, contend that they were not liable to pay any tax at all and the tax levied upon them has been illegally levied and that therefore they are entitled to come to Court asking for the reliefs set out in their plaints. On behalf of the respondent-State while controverting this contention of the appellants it has been further urged that the suits themselves were not maintainable and alternatively if they can be said to be maintainable as suits permitted to be filed by virtue of section 18 of the Act, they should have been filed within the period of six months prescribed therefore under the said section.

14. As the technical pleas raised on behalf of the Stage go to the root of the matter, it is proper that we should consider those pleas in the first instance. In the judgment of the learned District Judge there is hardly any discussion on these points. On the question of limitation he simply followed the decision of the Madras High Court reported in *The State of Madras Vs. A.M.N.A. Abdul Kader Tharaganar Firm*, , and held that suits are governed by Article 62 of the Limitation Act. On the question of maintainability of the suits, although he recorded a clear finding on the relevant issues in the various suits that the suits were maintainable, the discussion on the subject contained in para. 24 of the judgment appears inconclusive. Referring to a decision of the old High Court of Mysore, *Subban Beigh v. The State of Mysore* [1953] 4 STC 108 : ILR 1952 Mys. 305, the learned Judge observes that the right to sue challenging the decision of a taxing authority exists only when that authority has no jurisdiction to assess on the undisputed facts or on the facts found by it or assumed by it to exist and the view taken by the authority as to its jurisdiction on those facts is erroneous in law; the learned Judge then adds : "In these suits it is alleged erroneous view of the law that has been attacked and so the suits are maintainable," without proceeding to state whether by taking such an erroneous view thereon the taxing authority had conferred upon himself a jurisdiction which he did not possess. We also find that the provisions of section 18-A of the Act, which have a material bearing on the question and which loomed large in the arguments before us, were not considered at all. Jurisdiction, however, cannot be conferred by consent. As observed by their Lordships of the Privy Council in *Raleigh Investment Co. Ltd. v. The Governor-General in Council* ILR [1947] 15 332 : AIR 1947 P.C. 78 : 74 I.A. 50, it is prejudices to take jurisdiction into consideration. It is necessary, therefore, to consider the effect of section 18-A of the Act. That section was introduced into the Act by amending Act VI of 1951 passes by the Madras Legislature and was brought into force on the 15th of May, 1951. The two suits with which are concerned in Second Appeals 531 and 532 of 1954 were filed before the section came into force, Original Suit 9 of 1951 having been filed on

the 6th of January, 1951, and Original Suit 166 of 1950 on the 27th of October, 1950. But all suits which are the subject-matter of the Regular Appeals were filed after the coming into force of that section. Original Suits 31 of 32 of 1952 were filed on the 16th of July, 1951, Original Suit 35 of 1952 was filed on the 13th of August, 1951, Original Suit 36 of 1952 was first presented on the 6th of August, 1951, and re-presented on the 13th of August, 1951. Original Suit 37 of 1952 was filed on the 3rd of October, 1951, and Original Suit 28 of 1952 on the 3rd of July, 1951. The learned counsel on behalf of the appellants in the Second Appeals argues that before the incorporation of section 18-A into the Act suits to set aside or modify orders of assessment passed under the Act were held to be maintainable and that therefore his clients' suits cannot be defeated by an appeal to that section and further they were held to be governed by Article 62 of the First Schedule of the Indian Limitation Act. The learned counsel on behalf of the appellants in the Regular Appeals contends that although his suits were filed after the 15th of May, 1951 they relate to assessments or orders completed or passed before that date and that therefore the right of suit which he did possess before the coming into force of section 18-A cannot be said to have been taken away by that section, which is only prospective in operation and not retrospective.

15. In the light of these contentions it is necessary to examine the legal position under the Act as it stood before the amendment of 1951 as well as the position subsequent thereto. There is no obscurity regarding the general principles of interpretation on the question of the ouster of the jurisdiction of ordinary civil Courts by particular statutes. The principles are well established. The difficulty arises only in their application to the particular statutes under consideration. There is also no doubt that although guidance can be taken from several decisions dealing with this question arising under several statutes, the ultimate decision in a particular case must rest entirely on the effect to be given to the provisions of that particular statute taken and interpreted in their entirety.

16. The following passage from the judgment of Willes, J., in *Wolverhampton Water Co. v. Hawkesford* (1859) 6 C.B. R.N.S. 336 is often quoted in this connection :

"There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy; there, the party can only proceed by action at common law. But there is a third class viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it * * * * The remedy provided by the statute must be followed, at it is not competent to the party to

pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

17. The general principles are also very lucidly stated by Varadachariar, J., in *THE SECRETARY OF STATE FOR INDIA Vs. V. M. MEYYAPPA CHETTIAR.*, . His Lordship stated that whenever the right sought to be vindicated is not a creature of the statute but a common law right relating to the person or property of the subject, Courts start with the presumption that there must be a remedy in the ordinary Courts and insist on very clear and unmistakable indications of an intention to curtail or exclude the same. By his reference to a common law right and the right to resort to the ordinary civil Courts in the event of any invasion of that right, his Lordship obviously has in mind the general provisions of section 9 of the Code of Civil Procedure, according to which Courts are given jurisdiction to try all suits of civil nature excepting only suits of which the Court's cognizance is either expressly or impliedly barred. To the same effect are the observations of Lord Thankerton in AIR 1940 105 (Privy Council) , where his Lordship stated that it is settled law that the exclusion of jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. He also adds that the determination of the question must rest on the terms of the particular statute under consideration and decision on other statutory provisions are not of material assistance except in so far as general principles of construction are laid down. In cases where the statute contains specific provision limiting or excluding the jurisdiction of civil Courts, the extent of the exclusion or the ambit of the civil Court's jurisdiction must be determined prima facie on the language used in the excluding provision. If it is sufficiently express and clear, no further difficulty arises. If, however, the language used is not quite definite or specific, its interpretation is influenced by the presumption against an intention to oust the jurisdiction of the civil Courts already referred to above. Where the statute contains a complete machinery for dealing with the grievances of the party providing a complete remedy for all such grievances, such a provision itself will amount to an implied ouster of the jurisdiction of the civil Courts, especially when the rights or obligations are exclusively those created by the statute.

18. Before the amendment of 1951 the provisions of the Madras General Sales Tax Act which are relevant for our present purpose were the following : Section 9 provided for submission of returns by the dealers and the assessment of tax by appropriate authorities. Section 10 directed that the tax so assessed shall be paid in such manner and in such instalments, if any, and within such time as may be specified in the notice of assessment. Section 11 permitted an assessee objecting to an assessment to appeal to the prescribed authority, who is generally the Commercial Tax Officer of the District. Section 12 gave the power of revision to the Board of Revenue, Madras. Subject to revision under that section, the appellate order u/s 11 became final by virtue of sub-section (4) of that section. Then there are two sections which are of importance, viz., sections 17 and 18 which read as follows :-

"17. (1) No suit, prosecution or other proceeding shall lie against any officer or servant of the State Government, for any act done or purporting to be under this Act, without the previous sanction of the State Government.

(2) No officer or servant of the State Government shall be liable in respect of any such act in any civil or criminal proceeding if the act was done in good faith in the course of the execution of duties or the discharge of functions imposed by or under this Act.

18. No suit shall be instituted against the State 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."

19. There can be no question that the liability to pay sales tax was created by this Act itself and it cannot be described as a common law liability. A person aggrieved by the imposition of such a liability on him by an order u/s of was given a right of appeal u/s 11. The Board of Revenue also had the power in revision to correct the mistakes of the taxing officers. In the sense, therefore, a machinery was created by the statute provision remedied to assessee aggrieved by improper or unjust orders of assessment. It is also clear that the Act as it then stood did not contain any provision expressly excluding or ousting the jurisdiction of civil Courts. On the contrary, the provisions of sections 17 and 18 prescribing certain restrictions in respect of certain class of suits suggested that there was a right of suit independently of or notwithstanding the Act and that the statute proceeded to restrict that right only in particular cases. The acts of these provisions, therefore, militates against any suggestion of an implied ouster of the jurisdiction of civil Courts by reason of the provision for appeal and revision contained in sections 11 and 12 of the Act. That was also the view taken by a Bench of the Madras High Court consisting of Govinda Menon and Basheer Ahmed Sayeed, JJ., in *The Province of Madras Vs. Chekka Satyanarayanamurthy*, . After referring to the several decisions of the Madras High Court and other High Courts and the Privy Council, their Lordships relied particularly on the judgment of Varadachariar, J., in *T.V.K. Kamaraja Pandiya Naicker Vs. The Secretary of State for India in Council*, . That case dealt with certain provisions of the Madras Local Boards Act. The appellant therein, a zamindar, sued for the recovery of a sum of money from the Government and for a declaration and injunction on the ground that during certain years the Collector had proceeded on a wrong basis in calculating the cess payable by the appellant u/s 79 of that Act. One of the pleas was that the suit was not maintainable in a civil Court. In substantiation of that plea the Secretary of State depended upon the finality of orders provided in clause (3) of section 86 of that Act, the general principle that where a statute indicates a particular mode of redress the jurisdiction of ordinary Courts is ousted also on the prohibition contained in section 228 of that Act. In rejecting those contentions his Lordship Varadachariar,

J., held that the finality of orders referred to in section 86 must be read as a finality within the frame-work of the statute itself and not as ousting the jurisdiction of Courts and that the wording of section 228 itself indicated that an aggrieved party is entitled to seek redress in a civil court except in cases where the assessing authority had in substance and effect complied with the provision of the Act. His Lordship referred to earlier decisions of the Madras High Court dealing with similar provisions contained in statutes relating to local bodies like municipalities, panchayats, act., and the right of persons aggrieved by the imposition of tax by such bodies. While on this subject it is interesting to note that the provisions of section 225 of the Madras Local Boards Act, 1920, are similar to those of section 18 of the Madras General Sales Tax Act. According to the former no suit or other legal proceeding can be brought against any local board, its president, etc., in respect of any act done or purporting to be done execution or intended execution of the Act or any rule, bye-law, etc., under it, unless two months notice had been given to the proposed defendant and every such proceeding should be commenced within six months after the date on which cause of action arose. There are similar provisions in the City Municipal Act and the District Municipalities Act. Thus, under those Acts provision is made for previous notice and a certain period of limitation in respect of suits against local boards and its officers or servants and in respect of taxation the jurisdiction of civil Courts is ousted only in so far as the taxing authorities comply in substance and effect with the provisions of the statute. That these are not isolated provisions but have a history behind them is clear from the discussion contained in Justice Varadachariar's judgment in Meyyappa Chettiar's case ILR [1936] 341 : ILR 1937 Mad. 211 already referred to. In that judgment his Lordship states that one well-known class of cases where the statute law has advisedly enacted only a restricted exclusion of civil jurisdiction is that relating to taxation by local or municipal bodies. Further on his Lordship states in the interpretation and application of taxing statutes the distinction between the liability to assessment and the method or quantum of assessment has long been recognised in the land revenue law of this country.

20. Thus on principle, on consideration of the history of the statute law of this country and also a long line of decisions dealing with similar provisions, it has to be held that the provisions of the Madras General Sales Tax Act before the amendment of 1951 did not prevent an assessee from going to a civil Court challenging the validity or legality of an order of assessment under the Act. Of course, while dealing with such cases civil Courts ordinarily confine themselves to the question of liability or absence of it to assessment and do not interfere with the method or quantum of assessment. They exercise their jurisdiction only to examine cases where the provisions of the Act have not been complied with or the statutory tribunals have not acted in conformity with the fundamental principles of judicial procedure.

21. It has been faintly argued on behalf of the State that if reliance is to be placed on section 18 to establish a right of suit it must be held that only such

suits as are described in that section are permitted and when so permitted they can be filed only within the period of six months prescribed in that section. It is difficult to accept this argument upon principle. The contention is not that the right of suit is one conferred by this section but the provision of this section placing restrictions only on a particular class of suits assumes the existence of the right of suit independently of the Act. The correct position therefore is that as contended for by the plaintiffs. On principal and authority already discussed they did have a right of suit and the restrictions contained in section 18 must be limited to the class of suits dealt with by that section. This has a bearing on the question of limitations also. It will be noticed that except that section 18 refers to a suit against the State Government also the provisions of that section are more or less the same as those contained in sub-section (1) of section 17. We have already stated that these provisions are similar to the provisions of section 225 of the Lord Boards Act. Dealing with the latter section, a Full Bench of the Madras High Court in *Panchayat Board, Thiruvothiyur v. The Western India Matches Company* ILR 1939 Mad. 566 : AIR 1939 Mad. 421, held that the section is limited to suits for compensation or damages and hence suits against local boards for refund of house tax alleged to have been illegally collected do not fall within that section and that therefore the latter class of suits is not governed by the limitation of six months prescribed in that section. Following the principles stated in that decision, *Panchapakesa Ayyar, J.*, of the same High Court held in *The State of Madras Vs. A.M.N.A. Abdul Kader Tharaganar Firm*, , that a suit for refund of sales tax illegally collected is not governed by the rule of limitation prescribed in section 18 of that Act, but by Article 62 of the First Schedule of the Indian Limitation Act as for a suit for money had and received. The learned counsel for the appellants have also brought to our notice the Bench ruling of the Andhra Pradesh High Court reported in *Santhanna v. The State of Madras (Now Andhra Pradesh)* [1958] 9 STC 80 : AIR 1958 A.P. 670, which has followed the above rulings of the Madras High Court in suits for recovery of sales tax illegally collected.

22. That therefore was the position before the introduction of section 18-A into the Act. Aggrieved assesseees had a right to file a suit to get rid of assessment orders under the Act and such suits were governed by Article 62 of the First Schedule of the Indian Limitation Act. The introduction of section 18-A, however, completely changes the situation so far as any right to set aside or modify orders of assessments is concerned. That section in clear terms states :

"18-A. 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."

23. The wording is copied from section 67 of the Indian Income Tax Act which reads as follows :

"No suit shall be brought in any civil Court to set aside or modify any 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."

24. It will be noticed that the latter portion of section 67 of the Income Tax Act is similar in wording to section 17 of the General Sales Tax Act, except that under the General Sales Tax Act there is no absolute bar against such suits for which the only restriction placed is the necessity of obtaining previous sanction of the Government. The earlier part of section 67 of the Income Tax Act corresponds to section 18-A of the Madras General Sales Tax Act except that the latter includes a reference to proceedings also and the clause "except as expressly provided in this Act." The amending Act VI of 1951 which introduced this section also introduced several new sections, particularly section 2-A, 12-A 12-B, 12-C and 12-D by virtue of which a separate Appellate Tribunal was constituted to which an assessee can appeal against an appellant order u/s 11 among other orders and a right of revision and also appeal in certain cases to the High Court was also provided. The total effect of all these provisions is two-fold. Firstly, provision is made for resort to a hierarchy of officers, an independent tribunal and the High Court for redressing any grievance which an aggrieved assessee may have, and secondly, a suit to set aside or modify an assessment order is expressly prohibited. Before the amending Act of 1951 it was possible, as already pointed out, to argue that there was no express bar against suits of that nature and further that the implication of the statute was in favour of such a right of suit rather than against it. With the introduction of the new hierarchy of tribunals with the High Court at its apex, every conceivable question which can be raised with reference to an assessment order including even a question about the constitutional validity of the Act itself can be raised by the assessee. It may be that officers and even the appellate tribunal being only creatures of the statute do not have the power to go into questions of constitutional validity of the statute, but no such limitation can be postulated with reference to the High Court and a point of law which the High Court can decide, we have no doubt, would include a point about the constitutional validity of the statute or of any of its provisions or the rules made thereunder. Thus both by explicit expression and by clear implication the right of suit to set aside or modify an assessment order is taken away.

25. As the wording of section 18-A is the same as that of section 67 of the Indian Income Tax Act, it is unnecessary for us to discuss this matter further on principle because of the clear propositions laid down by their Lordships of the Privy Council in two cases dealing with that section, viz., *Raleigh Investment Co. Ltd. v. Governor-General in Council* [1947] 15 ITR 332 : 74 I.A. 50, already referred to by us, and *Commissioner of Income Tax, Punjab v. Tribune Trust Lahore* [1948] 16 ITR 214 : ILR 1947 Lah. 809. In the former case after reviewing the provisions contained in the Income Tax Act and holding that an effective and appropriate machinery is provided therein for the review on grounds of law of any assessment and further that included in the question of law which might be referred to the High Court is any question as to the validity of

any taxing provision of the Act, their Lordships proceed to state as follows :-

"In their Lordships" view the construction of the section is clear. Under the Act the Income Tax Officer is charged with the duty of assessing the total income of the assessee. The obvious meaning, and in their Lordships" opinion, the correct meaning of the phrase "assessment made under this Act" is an assessment finding its origin in an activity of the assessing officer acting as such. The circumstance that the assessing officer has taken into account an ultra vires provision of the Act is in this view immaterial in determining whether the assessment is made "under this Act". The phrase describes the provenance of the assessment; it does not relate to its accuracy in point of law. The use of the machinery provided by the Act, not the result of that use, is the test."

* * * * "In conclusion, their Lordships would observe that the scheme of the Act is to set up a particular machinery by the use of which alone total income assessable for Income Tax is to be ascertained. The Income Tax exigible is determined by reference to the total income so ascertained, and only by reference to such total income. Under the Act (section 45) there arises a duty to pay the amount of tax demanded on the basis of that assessment of total income. Jurisdiction to question the assessment otherwise than by use of the machinery expressly provided by the Act would appear to be inconsistent with the statutory obligation to pay arising by virtue of the assessment. The only doubt, indeed, in their Lordships" mind, is whether an express provision was necessary in order to exclude jurisdiction in a civil Court to set aside or modify an assessment."

26. In the latter case their Lordships observe that the only remedies open to the taxpayer are to be found within the four corners of the Act and that this view of his rights harmonizes with the provisions of section 67 that no suit shall be brought in any civil Court to set aside or modify any assessment made under the Act.

27. The argument that the present suits for refund of tax said to be illegally collected are not in truth suits to set aside or modify the orders of assessment cannot be accepted. In form they may not be suits to set aside or modify the assessment orders; in substance, however, they do seek to do so because u/s 10 of the Act there is an obligation to pay the tax assessed and so long as the order and the notice of demand stand repayment cannot be ordered. Dealing with a similar argument, this is what their Lordships in *Raleigh Investment Co.*"s case [1947] 15 ITR 332 : 74 I.A. 50 state :-

"In form the relief claimed does not profess to modify or set aside the assessment. In substance it does, for repayment of part of the sum due by virtue of the notice of demand could not be ordered so long as the assessment stood. Further, the claim for the declaration cannot be rationally regarded as having any relevance except as leading up to the claim for repayment, and the claim for an injunction is merely verbiage. The could of words fails to obscure the point of the

suit. An assessment made under the machinery provided by the Act, if based on a provision subsequently held to be ultra vires, is not a nullity like an order of a Court lacking jurisdiction. Reliance on such a provision is not an excess of jurisdiction but a mistake of law made in the course of its exercise. Their Lordships therefore regard the suit as in truth directed exclusively to a modification of the assessment."

28. It has further been contended that at any rate so far as the relief for injunction is concerned, the bar u/s 18-A cannot prevail in view of the decision of the Supreme Court of India reported in *The State of Tripura Vs. The Province of East Bengal*, . But, the injunction sought in that case was one to restrain the assessing authority from proceeding with an assessment before any order of assessment had been passed. In distinguishing the *Raleigh Investment Co.'s* case [1947] 15 ITR 332 : 74 I.A. 50, their Lordships state that the position in the case before them was entirely different, the gist of the wrongful act complained of in the Tripura case *The State of Tripura Vs. The Province of East Bengal*, being subjecting the plaintiffs to the harassment and trouble by commencing against them an illegal and unauthorised assessment proceeding. There was no question of setting aside or modifying an order of assessment in that case. In the cases now before us the injunctions asked for are against the levy of tax and licence fee under and in terms of orders already passed. Hence the principles stated by their Lordships in the Tripura case *The State of Tripura Vs. The Province of East Bengal*, cannot assist the appellants in any manner.

29. The last argument on behalf of the appellants in the Regular Appeals is that section 18-A cannot be interpreted so as to have retrospective operation and that therefore it does not bar suits in respect of assessment orders passed before the 15th of May, 1951. The argument based on interpretation is that in the expression "any assessment made under this Act" the words "this Act" refer only to the Act as amended by the introduction of this section and not the Act as it stood before such introduction. We find it difficult to follow this argument. The section has been incorporated into the Act. When, therefore, it refers to the Act such reference must be read as relating to the relevant provision of the Act whether it existed before the amendment or was brought in by the amendment. The assessment orders mentioned in the section are those described as "made under this Act". The plain meaning of the expression would take in orders already made before the amendment also. If the intention was to restrict the operation of the section only to orders made after the amendment came into force, the wording would have been different. As the section stands and as the statute stands as amended, we do not see any reason to restrict the operation of the section in the manner contended on behalf of the appellants. There is also no question of any retrospective operation being given to the section. On and after the coming into operation of the section, no suits are to be filed to set aside or modify any assessment made under the Act. The section does not purport to affect pending suits or suits which have already been filed before the 15th of May, 1951. On the date on which the suits, which are the subject-matter of the

Regular Appeals were filed, the section was in the statute. The suits, therefore, were clearly within the prohibition contained in the section. It has been argued that before the amendment there was a right of suit vested in the appellants and that we should not interpret the section in such a way as to take away that vested right of the appellants. In the first place a right of suit is not a substantive right, but only a right of recourse to a Court or other tribunal for redressal of an injury suffered by the invasion of any substantive right. It is not as if that such a right was vested in them by the statute as it stood before the amendment. On the contrary, the position was that the unamended statute did not completely take away that remedial right which existed independently of the statute. At the highest it may be described as a vested right in the same way as a right of appeal may be described as a vested right. Even in the case of such a vested right of appeal all that can be contended is that a statute seeking to take away that right must do so either expressly or by necessary intendment and not otherwise (see *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, . In these case there cannot be the slightest doubt that the section has expressly taken away that right. The provisions of the section are clear and absolute. The only qualification is contained in the term "under this Act" which, as explained by their Lordships of the Privy Council in *Raleigh Investment Co.*'s case [1947] 15 ITR 332 : 74 I.A. 50, describes the provenance of the assessment and not its accuracy. Further, if the jurisdiction of Courts is so clearly taken away, our decision could not be influenced by the consideration that the plaintiff is left without any remedy. Reliance has been placed on the decision of *Panchapakesa Ayyar, J.*, of the Madras High Court in *In re Gigena Basha Saheb* [1949] 1 STC 240 : (1950) 1 MLJ 231, in which his Lordship held that the bar u/s 16-A of the Act can be invoked in any prosecution or proceeding only when the assessment, the turnover and the prosecution are all after the 1st of January, 1948, on which date section 16-A came into force. According to section 16-A the validity of the assessment of any tax, etc., made under the Act or the liability of any person to pay any tax so assessed shall not be questioned in any criminal Court in any prosecution. His Lordship puts it on the ground that before 1st of January, 1948, the accused person had the right to question the validity of an assessment and that no man can be said to lose such an existing right unless deprived specifically and unequivocally by the new enactment. One may ask, with respect, whether such a right, if any, has not been specifically or unequivocally taken away by the section which is very clear in its wording. Indeed the earlier decisions of the Madras High Court proceeded not so much on the basis of the right of the assessee to question the validity of the assessment as on the general principle that the burden was upon the prosecution to establish affirmatively that the accused was legally liable to pay the tax and had failed to pay it. The alteration in the law, therefore, is merely in the matter of mode of proof rather than in respect of any rights of any party. Although to make a law to punish that which at the time when it was done was not punishable is contrary to sound principles and to our Constitution, a law which merely alters the procedure or the mode of proof may, we apprehend, with perfect propriety be made applicable to past as

well as future transactions. The decision relied upon may perhaps be supported on the principle that whereas section 18-A bars the institution of a suit, section 16-A bars a defence which was available to the accused before the amendment and in that view his Lordship might have felt justified in taking the view that he has done. We do not think, however, that there is any such justification for taking a similar view in respect of section 18-A. We must give effect to the section as it stands and hold that on and after 15th of May, 1951, so suit can be instituted to set aside or modify any assessment made under the Madras General Sales Tax Act.

30. It has, therefore, to be held that all the suits which are the subject-matter of the Regular Appeals are not maintainable, but that the two suits out of which the Second Appeals arise which were filed before the introduction of section 18-A are maintainable. It must further be held that the latter two suits are governed by Article 62 of the First Schedule of the Indian Limitation Act.

31. In view of our finding that the suits out of which the Regular Appeals arise were not maintainable, it is unnecessary to examine the question whether upon merits the appellants can be said to have succeeded in establishing that they were not dealers within the meaning of the Madras General Sales Tax Act. As the suits themselves are not maintainable, all these Regular Appeals Nos. 458 of 1954, and 106, 107, 108, 109 and 110 of 1955 have to be and are hereby dismissed. In the circumstances of the case the proper order to make regarding costs, in our opinion, is to direct each party to bear his own costs both here and in the Court below and we direct accordingly.

32. As the suits out of which the Second Appeals arise have been held to be maintainable, we now proceed to discuss the question whether the plaintiffs therein were mere brokers within the meaning of the Madras General Sales Tax Act.

33. As we have already stated, the correctness of the principles stated by his Lordship Rajamannar, C.J., in *Radhakrishna Rao v. Province of Madras* [1952] 3 STC 121 : (1952) 1 MLJ 494 has not been canvassed before us. With respect we entirely agree with the statement of the law contained in that judgment. Shortly stated the question for investigation is whether the commission agents are merely brokers who bring the sellers and buyers together and establish privity of contract between them or they were entrusted with the custody and dominion over the goods by the sellers with authority to transfer the property therein to the purchasers. Although the actual facts or the circumstances relating to the transactions carried on by these appellants is largely a question of fact depending upon the evidence adduced in each case, the question whether on the facts so established the commission agents were mere brokers or agents with authority to transfer property is a matter of law.

34. The appellant in Second Appeal No. 531 of 1954, who is the plaintiff in Original Suit No. 9 of 1951 on the file of the Court of the District Munsiff of

Bellary, examined four witnesses in substantiation of his claim that he was only a broker. P.W. 1 Pedda Malla Reddi and P.W. 2 Konda Reddi are two ryots who bring their goods viz., groundnuts, for sale through the plaintiff. P.W. 3 Bhimalingappa is a clerk of one of the purchasers. P.W. 4 Narayanappa is plaintiff's own clerk. Briefly the description of the transactions as given by these witnesses is as follow : The ryots bring their goods to the plaintiff's shop early in the morning. These are brought in bags which are unloaded in front of the shop. Certain marks will be placed upon the bags apparently for identifying the ryots to whom they belong. The prospective buyers will then be sent for by the plaintiff or sometimes they come of their own accord hearing about the arrival of the goods. The purchasers or their representatives inspect the goods and the prices will be fixed after discussion between the parties. If the prices are acceptable to the ryots, then the sales will take place. One of the ryots P.W. 1 states that the market rates will be generally known by about 1 p.m. and the transactions are generally closed by about 2 p.m. He adds that having brought the goods they generally sell whatever be the rates ruling on that particular day. After the prices are so settled, the goods are weighed in the presence of the ryots, intending purchasers and the dallali merchant, the plaintiff. Each bag is weighed and the weighments are entered in what are called "chintalu" books (chintalu meaning weighment). The weighments are so noted both by dallali merchant as well as the purchaser. According to P.W. 4 the total weight will then be tallied with the figures taken down by the ryots as well as the purchaser. Pattis or lists are issued by the dallali merchant both to the seller, the ryot, as well as the purchaser. The purchasers then cart the goods away from the shop of the dallali merchant. The price is collected from the purchaser by the dallali merchant either the same day or sometime later and paid over to the sellers, the ryots. The dallali merchant gets a commission from both the purchaser as well as the seller. He collects that along with the price from the purchaser and deducts it from the price when he hands over the money or pays it to the seller. The dallali merchant also deducts certain other items such as cooly for chintalu etc. Both P.Ws. 1 and 2 are definite in their statement that it is they themselves that sell the goods. Both of them state in clear terms that the plaintiff does not purchaser their goods. It has, however, to be noted that the pattis prepared by the dallali merchant, the plaintiff, are made out in his own name. P.W. 3, the clerk of one of the purchasers, says that in their account books they note only the name of the dallali merchant, the plaintiff. It has been elicited from one of the ryots, P.W. 1, that he does not remember the names of the purchasers of his goods. There is no doubt however that the transactions are put through in the presence of both the selling ryot and the purchasing merchant and the price is settled in consultation with the ryot, who sells only if the price is acceptable to him. It has also been elicited from P.Ws. 1 and 2 that they look to the plaintiff alone for payment of the money to them and hold him responsible both for the goods and for the payment of the money. The commission and other deductions made are consented to by both the parties.

35. The only witness examined for the defendant-State is the Deputy

Commercial Tax Officer, who was the assessing authority as Assistant Commercial Tax Officer during the relevant period. He admits that he was not present when the actual sales took place. Therefore, his evidence is of no assistance to the Court in ascertaining the exact circumstances in which the transactions took place. His statement therefore that "the buyers have no contract with the seller principal" is of no value in the face of the clear evidence on behalf of the plaintiff that the transactions are put through in the presence of both the buyer and the seller and the definite evidence of the sellers that they themselves sell their goods. D.W. 1 in the course of his cross-examination admitted that he had examined some ryots, but at a later stage he relised from the statement and added that he had not examined any ryots as he had no concern with them. His statement to the effect "the fact that the transactions are entered in the plaintiff's books by him shows entrustment to him" is not in the nature of evidence but his personal opinion.

36. On this description of the transactions the learned District Munsiff took the view that the evidence clearly disclosed that the ryots would hand over the goods to the plaintiff giving him full authority to sell the goods himself and making him responsible for the goods as well as the payment of money therefore. He further added that it was equally clear that the goods would be in the dominion of the plaintiff and that it is he that transfers the property in the goods to the buyer. We cannot understand how such a clear inference flows from the evidence summarised above. The learned District Munsiff relies upon the allegation in the plaint that the plaintiff's business consists in selling the goods of principals (ryots) to the purchasers and taking a commission and other customary charges. He also relies upon a single sentence in the evidence of the first witness for the plaintiff to the effect that "the goods will be in the domain of the plaintiff and they will be in his shop", read with a sentence in the evidence of the second witness for the plaintiff "we have given full authority to the plaintiff to sell my goods" and another sentence in the evidence of the second witness for the plaintiff to the effect that "the plaintiff is responsible for the goods and payment of money." It seems to us that this is misreading of the evidence. So far as the allegation in the plaint is concerned, it has naturally to be understood in the light of the evidence. The selling of the goods by the plaintiff mentioned in the plaint is the selling in the manner spoken to by the witnesses. In the sentence extracted above from the evidence of P.W. 1 the statement of fact, in our opinion, is only this, viz., that the goods are kept in the plaintiff's shop. It is, in our opinion, improper to impute to a ryot like P.W. 1 the full knowledge of the legal implications of the word "domain" and much more improper to read a sentence in his evidence along with a sentence in the evidence of another witness and to construct a legal theory that the plaintiff had what the lawyers call full dominion over the goods with the authority to transfer property within the meaning of the Sale of Goods Act. In the light of the evidence that the goods are first placed in the plaintiff's shops separately marked by them, that the prices are settled after discussion between the ryots and the intending

purchasers and that the ryots agree to sell the goods when the prices fixed are acceptable to them, these sentences extracted from the evidence of the two witnesses do not, in our opinion, mean anything more than that they utilize the premises of the plaintiff and his services to find a purchaser for goods and to sell them at a price acceptable to them.

37. Examined in the proper perspective, the facts established by the evidence do not have the legal effect contended for on behalf of the respondent-State. The factual position is that the sale takes place in the presence of the selling ryots and the purchasing traders and every element in the completion of the contract of sale is settled and decided after discussion between the parties to the contract of sale, the plaintiff (the dallali merchant) merely assessing in bringing the two parties together and completing the bargain. The legal effect of this is that the dallali merchant is in the position of a mere broker.

38. If the inferences stated by the learned District Munsiff are in the nature of ipse dixit inconsistent with the true legal effect of established facts, the long discussion contained in the appellate judgment of the learned District Judge is entirely disconnected with the actual evidence in the case. The actual reference to the evidence is a short summary contained in portions of paragraphs 5 and 7 of the learned Judge's judgment. The rest of the discussion is copied straight from the common judgments delivered by the learned Judge on the same day in the original suits out of which the Regular Appeals arise. They seem to have a bearing more upon the contentions raised in those suits and argued before him than upon the evidence in this suit. He has, however, formulated certain principles which in his opinion, militate against the prima facie inference afforded by the evidence that the plaintiff in this case is a broker. We shall, therefore, briefly deal with those principles stated by the learned Judge. He has, for example, referred to the fact that the plaintiffs in all these cases maintain regular establishment of clerks and hamalis and maintain regular books of account and to the facts that the pattis or lists issued by the dallali merchants are issued in their own name and do not contain the names of either the seller or the buyer. He also attaches much importance to the fact that the payment of price is made not by the purchaser direct to the seller but to the dallali merchant, whom alone the selling ryot holds responsible for payment of the price. While not disbelieving the evidence that the selling ryot is actually present at the completion of the bargain, the learned Judge apparently considers this circumstance to be of consequence because, according to him, they do not seem to know the weight of the goods which they bring to the shops, they do not know how much is deducted from the weight of each bag on account of earth and other rubbish and they do not know or are unable to give the names of the purchasers.

39. It seems to us that the essence of the matter is the presence of the both the parties at the time of the completion of the bargain. This fact is not disbelieved by the learned District Judge. He actually states that "there is nothing strange in their being present at the time of the weighment and the sale" and further that

"it is also quite possible that they take part in the bargaining of the deduction or allowance to be made for the earth and other rubbish found in the goods brought by them," but strangely enough concludes "but so far as the sale is concerned there is no privity of contract between them and the purchasers." It is difficult for us to accept how the last inference flows when it is accepted that the sellers are present on the occasion and take active part in the bargain and in the settlement of the price. Once that fact is established, it is in our opinion impossible to contend that the owner of the goods, who is present at the transaction, discusses and settles the prices and says that he is selling the goods,, has nothing to do with the transaction of sale. In our opinion, the only possible inference is that he himself concludes the contract of sale. The plaintiff's part is only to bring the two parties together and to establish privity of contract between them. That being the case, the other incidental matters of practice such as the manner in which the broker maintains accounts or prepares the pattis, the fact that the broker makes himself responsible for the payment of the price to the ryot cannot make any difference to the substance of the matter. It is not denied that the dallali collects as a matter of practice commission from both the parties and nobody has objected to that; now has anybody complained that there was anything unusual or improper in the dallali making further deductions for chintalu, hamali, etc. The two Benches and the Full Bench rulings of the Madras High Court already referred to by us have on a review of the entire matter held that these deductions are all in the nature of agreed commission and do not form part of the price. The evidence discloses that what is spoken to by the witnesses is the established practice of the market and this fact has not been disputed. If that were so, we do not see anything strange in dallali merchants of the type of the plaintiff in this case maintaining an establishment of clerks, coolies, etc., and maintaining regular sets of account books. The manner in which they conduct their business and the manner in which accounts are kept are all governed by and in consonance with such established practice. We do not think therefore that the learned District Judge was correct in playing down the most essential feature in the transactions and making much of incidental circumstances which are insufficient to take away the value of the central fact.

40. We hold, therefore, that on the evidence the appellant in Second Appeal No. 531 of 1954 has succeeded in establishing that he is only a broker and consequently not a dealer within the meaning of the Madras General Sales Tax Act.

41. This finding is sufficient to dispose of the Second Appeal in favour of the appellant. We might, however, add that the opinion of the learned District Munsiff stated in para. 9 of his judgment that even on the admitted case of the Department the plaintiff only sold groundnut as agent and he cannot be made liable to pay tax because turnover in respect of groundnut is chargeable at purchase and not at sale appears to us to be correct. The opinion to the contrary expressed by the learned District Judge that the commission agents could be deemed to have bought and sold the goods is a pure surmise. It is nobody's

case that the transaction of sale of the type concerned in this case was anything but a single transaction or that it could be theoretically split up into two transactions of a purchase by the dallali from the ryots and an immediate sale by him to the traders. On the question of limitation we have, following the opinion of the Madras High Court, held that the suit is governed by Article 62 of the First Schedule of the Indian Limitation Act and not by the period of six months mentioned in section 18 of the Madras General Sales Tax Act. The payments of tax, the recovery of which is claimed in this suit, were made in July and December, 1949, and the suit was filed on the 6th of January, 1951, and was therefore in time.

42. The result in Second Appeal No. 531 of 1954 is allowed and the appellant's suit, Original Suit No. 9 of 1951 on the file of the Court of the District Munsiff of Bellary, is decreed as prayed for. The appellant will have his costs from the respondent in all the three Courts.

43. Proceeding now to consider the merits of the claim the appellant in Second Appeal No. 532 of 1954, it has first to be observed that the question in the form in which it has been discussed in the rest of the suits has not been raised at all by the appellant in his suit, Original Suit No. 166 of 1950 on the file of the Subordinate Judge's Court, Bellary. His claim in the plaint is that he is a commission agent and that on the strength of the decision of the Madras High Court in Veerabhadrapa's case [1950] 1 STC 245 : ILR 1951 Mad. 257, he could not be held to be a dealer at all within the meaning of the Act. Evidence was recorded in July and August, 1951, long before the question of the liability of commission agents to sales tax was settled by the Full Bench in Radhakrishna Rao's case [1952] 3 STC 121 : ILR 1952 Mad. 571. The plaintiff examined only one witness on his behalf viz., Bheemareddi, who is the manager of the plaintiff's shop. Apart from such formal matters as the facts and figures relating to the returns and assessment, the only evidence which is of relevance to the present question given by the witness is the following. He simply stated : "The ryots bring the goods to our shop and we sell it for commission". At another place he states that "they (the ryots) bring the goods to the shop and whenever they ask us to sell it we sell. On the day when they bring the stock we issue pattis to them and settle their accounts." At another place he says : "We do not purchase the goods from the ryots but the ryots keep them with us and we sell them on commission." This evidence, in our opinion, is entirely insufficient to make out that the plaintiff was only a broker engaged to bring the sellers and buyers into contact and establish privity of contract between them. Nowhere has the witness for the plaintiff stated that the sales of the goods brought by the ryots have been effected in their presence after inviting the purchasers and settling the bargain between the parties. On the contrary it would appear that the ryots simply keep the goods with the plaintiff and the plaintiff sells them whenever desired by ryots. In these circumstances it has to be held that the plaintiff is entrusted with the custody of the goods and is clothed with authority by the ryots to sell them on their behalf.

44. The plaintiff's claim therefore that he is not liable to sales tax fails for lack of proof.

45. Second Appeal No. 532 of 1954 is therefore dismissed. As, however, the plaintiff proceeded on the basis of a Bench ruling of the Madras High Court and also succeeded in the first Court, we direct that the parties shall bear their own costs in all the three Courts.

46. Ordered accordingly.