

(1959) 02 MAD CK 0016

In the Madras High Court

Case No : Writ Petition No's. 91, 142 and 270 of 1957

Rayalseema Constructions

APPELLANT

Vs

Deputy Commercial Tax Officer, Mannady Division, Madras 1
and Others

RESPONDENT

Date of Decision : 02-02-1959

Acts Referred:

Constitution of India, 1950 — Article 226, 265, 32
Madras General Sales Tax Act, 1939 — Section 3

Citation : AIR 1959 Mad 382 : (1959) ILR (Mad) 750 : (1959) 72 LW 446 :
(1959) 2 MLJ 97 : (1959) 10 STC 345

Hon'ble Judges : Rajagopalan, J;Balakrishna Ayyar, J

Bench : Division Bench

Advocate : M. Natesan, T.T. Srinivasan and A.N. Rangaswami, for the Appellant;
A.G. and Addl. Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

Balakrishna Ayyar, J.—The questions for determination in all these three writ petitions are the same, and, we shall therefore deal with them together.

2. The relevant facts are these: The Rayalseema Constructions, who is the petitioner in W.P. Nos. 91 and 142 of 1957, is a firm of construction engineers. For the year 1951-52 the firm was assessed under the Madras General Sales-tax Act, 1939, on a gross turnover of Rs. 2,23,174-10-0, as on "works contracts". The order of assessment was made on 25-3-1953, and, it was then determined that a sum of Rs. 2,440-15-7 was payable by the firm. Deducting the payments made by the firm a balance of Rs. 775-15-7 remains due in respect of this assessment. For the year 1952-53, the gross turnover of the firm was computed to be Rs. 2,54,666-13-9 and the assessment was made in a sum of Rs. 2,785-6-9. Deducting the various payments made by the firm a sum of Rs. 1,725-6-9 remains due in respect of this assessment.

3. The Department demanded payment of these sums amounting to Rs.

2,501-6-4. By that time this Court had held in *Cannon Dunkerley (Madras) Ltd. v. The State of Madras*, 1955 1 M LJ 87: AIR 11954 Mad 1130, that "works contracts" did not involve any element of sale of material; and that therefore the levy of sales-tax in respect of those materials was unlawful. The petitioner pointed this out to the Commercial Tax Officer on 3-8-1954. Nothing happened for a long time. But, on 26-11-1956 the Deputy Commercial Tax Officer wrote to the petitioner that he had been directed to take steps to collect this arrear under the Revenue Recovery Act, and, in view of that, he called upon the petitioner to pay up this amount. The subsequent representations which the petitioner made to the appropriate authorities proved of no avail. The petitioner had therefore come to this Court, for the issue of a writ of mandamus or other suitable direction, to the Deputy Commercial Tax Officer. Mannady Division, Madras-1, requiring him to forbear from collecting these amounts.

4. The petitioner in W.P. No. 270 of 1957 is a firm of tanners belonging to Vaniyambadi, which held a licence under the Madras General Sales-tax Act. In an order which he made on 31-3-1955, the Deputy Commercial Tax Officer found that the total turnover of the firm was Rs. 3,83,883-7-9. Of this only a sum of Rs. 5,787-12-0 represented the value of purchases made inside the State of Madras. The balance of Rs. 3,78,095-11-9 was the value of untanned hides and skins which the petitioner firm had purchased outside the State of Madras. The Deputy Commercial Tax Officer exempted a sum of Rs. 32,314, representing the value of untanned hides and skins which were sold as such by the petitioner firm and assessed the petitioner on the balance of Rs. 8,45,761-11-9.

5. This Court held in *Hajee Abdul Shukoor and Co. Vs. State of Madras*, , that,

"Under R. 16 (2) (i) it is only the sale of untanned hides and skins by a licensed dealer to a licensed tanner who tans the same that gives rise to a tax liability. Purchases of untanned hides and skins by tanners from persons other than licensed dealers are not within the taxing provision. Therefore in, computing the purchase turnover of a licensed tanner only the sales to him from licensed dealers could be included."

In view of the decision the petitioner firm filed an appeal to the Commercial Tax Officer on 21-2-1936. But he dismissed the appeal on the ground that it was barred by time. The further appeal to the Sales-tax Appellate Tribunal also failed for the same reason. In these circumstances, the petitioner has come to this Court for the issue of an appropriate writ prohibiting the State of Madras from recovering the amount from the petitioner.

6. The case for the petitioners is that since it has now been established by the decision in 1955 1 MLJ 87 AIR 1954 Mad 1130, so far as "Works Contracts" are concerned and by the decision in *Hajee Abdul Shukoor and Co. Vs. State of Madras*, in respect of untanned hides and skins -- that the levy made upon the petitioners is unlawful they are not liable to pay the amounts, that the State has no lawful authority to require payment of net amounts and that therefore there

should be a direction prohibiting the State from collecting that amounts.

7. The case for the Government, however, is that though it may have been established by subsequent decisions that the relevant provisions of the Act and the Rules did not authorise the imposition of the tax amounts now in question the assessments are not nullities and that they have become final. Once an assessment has become final the amount charged thereunder remains payable and the State is entitled to collect it.

8. The arguments in the case, perhaps inevitably, spread over a wide area and involved the investigation of certain subsidiary questions as to how far the decisions given by the Privy Council prior to the Indian Independence Act are binding on the High Courts, and, to what extent the existence of an alternative remedy should influence this Court in exercising its writ jurisdiction in a matter of this kind. But, we consider it unnecessary to traverse all that ground over again, and, shall confine ourselves to the decision of the main questions before us.

9. The situation is this : The Commercial Tax Officers who made the assessment in these cases had jurisdiction in respect of the subject-matter. They had also jurisdiction in respect of the persons concerned. At the time they made the assessments they bona fide believed that the assessment was in accordance with the law. But, subsequent judicial investigation showed that the law conferred upon them no power to make the levy and therefore they had no jurisdiction to impose the tax. But, the assessments became "final" since either there were no appeals or the appeals failed on one ground or other.

10. In support of their contention that the Government have no power to collect the amounts involved in these petitions, learned counsel for the petitioners cited a number of decisions, and, to some of these, we shall now refer.

11. The first of these is reported in *Sugar Syndicate, Bahadargarh Vs. Excise and Taxation Commissioner, Punjab*, . The petitioner in that case was the Sugar Syndicate, Bariadargarh. It was liable to pay sales-tax u/s 4(2) of the East Punjab General Sales-tax Act 1,948, on the sales it effected after 31-3-1950. The Syndicate, however, filed returns before the Assessing authorities relating to sales made between 7-1-1950 and 31-3-1950 and paid a sum of Rs. 4,030-14-3 as sales-tax on such sales. As a matter of actual fact, however, the Syndicate was not bound to pay tax in respect of those sales. The mistake was not discovered till sometime in September 1952. The Syndicate then applied for refund of the amount u/s 12 of the Act. That application, however, was rejected by the concerned officer. The revision petition filed by the petitioner also failed. So it went to the High Court and asked for an appropriate writ.

12. It was conceded by the learned Advocate General that the Syndicate was not liable to pay sales-tax on sale effected between 7-1-1950 and 31-3-1950 and that its levy was not warranted by the provisions of the Act. The High Court allowed the petition and directed that a writ of mandamus should issue directing refund of the amount.

13. The argument of counsel for the petitioners was that the present are a fortiori cases. If money actually paid over to Government could be got back from Government, surely it was said a direction can issue to the Government to forbear from collecting something that is not lawfully due to them.

14. The second case is reported on page 597 of the same volume *State of Uttar Pradesh and Others Vs. Kanhaiya Lal Makund Lal Sarraf*, . In that case, a firm which was dealing in bullion, gold and silver ornaments, entered into forward contracts in silver as part of its business. In respect of such contracts it was assessed to sales-tax in the years 1948-49, 1949-50 and 1950-51, and, the amounts were paid. In 1952, the Allahabad High Court held that the provisions of the U.P. Sales-tax Act purporting to impose sales-tax on forward contracts were ultra vires. Thereupon the firm applied to the Commissioner of Sales-tax for a refund of the sums which had been collected from it. The refund was refused. The firm thereupon filed a petition for the issue of a writ of mandamus requiring the Sales-tax Officer and the Government to refund the amount. The petition was allowed by Chaturvedi J. The State of Uttar Pradesh appealed. The Advocate-General for the State argued that the amount in dispute was paid by the respondent firm under a mistake of law and was therefore irrecoverable. This contention was negatived and the appeal dismissed.

15. It will be noticed that in this case as in the cases before us the assessment had become final under the U.P. Sales-tax Act. Nonetheless the Court directed refund of the tax which had been collected on the basis of an ultra vires provision contained in the local Sales-tax Act. It must, however, be mentioned that the points taken before us, namely, that the assessment had become final and that therefore Government was entitled to collect or retain the tax; was not urged before the Allahabad High Court.

16. The next decision which was referred to on behalf of the petitioners is reported in *Orient Paper Mills Ltd. Vs. State of Orissa and Others*, . In that case a limited liability company called Orient Paper Mills Ltd., paid nearly Rs. 5,50,000, as sales-tax in respect of its transactions from 1-1-1950 to 31-3-1951. The assessment included sales-tax in respect of inter State sales. When the petitioners came to know the decision of the Supreme Court in *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, , they realised that no liability had laid on them to pay sales-tax in respect of inter-State sales and so applied for return of the sums they had paid. The refund was refused. The main ground on which refund was refused was that the order of assessment not having been successfully challenged in appeal or revision had become final and that the assessment could not be reopened merely because of the change in the law brought about by the decision of the Supreme Court. The Orissa High Court held that unless the application for refund was time barred the taxes must be refunded.

"The mere fact that the assessment order was not challenged by way of appeal or revision under the other provisions of the Act seems immaterial."

17. It will be noticed that this case is directly in point. It remains to add that the decision in *State of Uttar Pradesh and Others Vs. Kanhaiya Lal Makund Lal Sarraf*, , was confirmed by the Supreme Court in *Sales Tax Officer, Banaras and Others Vs. Kanhaiya Lal Mukundlal Saraf*, .

18. On the other side, the learned Government Pleader relied on *Raleigh Investment Co. Ltd. v. Governor-General in Council*, 1947 2 MLJ 16: AIR 1947 PC 78 and AIR 1948 102 (Privy Council) .

19. The facts in the former case were these. The Raleigh Investment Co. Ltd., was assessed to Income Tax by the appropriate Income Tax Officer who included in the income of the company dividends declared and paid outside British India to persons not resident in British India. The company contended that the provisions of the Indian Income Tax Act which authorised the Income Tax Officer to do this was ultra vires the Indian legislature, and it filed a suit to recover the amount which it had paid in pursuance of the assessment. The High Court of Calcutta held that the provision was ultra vires and that its jurisdiction to entertain this suit was not barred by Section 67 of the Income Tax Act. On appeal the Federal Court reversed the decision of the High Court. The company then appealed to the Privy Council, which observed,

"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.

* * * * * The argument for the appellant was that an assessment was not an assessment "made under the Act" if the assessment gave effect to a provision which was ultra vires the Indian legislature. In law such a provision, being a nullity, was non-existent. The obvious meaning, and in their Lordships' opinion the correct meaning, of the phrase "assessment made under the 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 the 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."

20. In the end, their Lordships dismissed the appeal.

21. It will be noticed that the principal question which their Lordships had to decide was whether or not the suit was barred by Section 67 of the Indian Income Tax Act. That section so far as it is here material ran :

"No suit shall be brought in any civil court to set aside or modify any assessment made under this Act"

This section ousted the jurisdiction of the civil court in respect of any assessment made under the Act. Even though a particular provision of the Act which was called in aid in order to make the assessment was ultra vires, by reason of that circumstance alone the assessment did not cease to be one made under the Act; and, in effect & substance, that is what their Lordships really decided. The argument on behalf of the company was that an assessment was not an assessment made under the Act if the assessment gave effect to a provision of the Act which is ultra vires the Indian legislature.

The decision was that none the less the assessment would be an assessment made under the Act, and therefore the jurisdiction of the civil court stood ousted by Section 67 of the Act. It was not in contention before their Lordships that Section 67 of the Indian Income Tax Act was itself ultra vires the Indian legislature. That being so, the Indian Legislature could prohibit civil courts from entertaining suits which sought to question or modify an assessment made under the Indian Income Tax Act.

22. This decision is only an authority for the proposition that a suit would not lie to set aside or modify an assessment made under the Indian Income Tax Act.

23. The next and even more important circumstance to remember about this case is that the decision was given under the Government of India Act, 1935, which contained no provision analogous to Article 265 which appears in our Constitution. This Article states in explicit terms :

"No tax shall be levied or collected except by authority of law," and this makes a vital difference. We have an express prohibition against the levy or collection of tax save under the authority of law and the Constitution also provides remedies for enforcing that prohibition. The Government of India Act, 1935 contained no such provisions.

24. The facts in AIR 1948 102 (Privy Council) were as follows : In respect of the assessment for the year 1932-33 the Tribune Trust, Lahore, claimed exemption under s 4(3)(1) of the Income Tax Act. The matter was finally decided by the Privy Council in favour of the assessee. Meanwhile, during the pendency of the appeal before the Privy Council assessments continued to be made in respect of the same property disallowing the claim for exemption which the assessee had preferred.

The assessee did not appeal against the order disallowing its claim. After the assessee succeeded before the Privy Council in respect of the year 1932-33 the assessee applied to the Commissioner to reopen the assessments for the years subsequent to 1932-33 and quash the assessments as they had become a nullity in view of the decision of the Privy Council. The Commissioner of Income Tax rejected the applications. On a case being stated, the High Court ruled in favour of the assessee. The Commissioner of Income Tax appealed to the Privy Council and the appeal was allowed. Their Lordships observed :

"Upon this footing, then the argument must be that the assessee has a right enforceable against the Commissioner to require refund of tax paid by him upon grounds of equity and good conscience, though the assessment has been made and the tax received in good faith. Their Lordships cannot accept this argument. They have reviewed the Code of Income Tax law for the purpose of showing that it exhaustively defines the obligations and remedies of the tax payer.

It would be wholly incompatible with this that he should have collateral right, necessarily vague and ill-defined founded on the principles of equity and goods conscience. Their Lordships are of opinion that the only remedies open to the tax payer, whether in regard to appeal against assessment or to claim for refund, ore to be found within the four corners of the Act. This view of his rights harmonises with the provision of Section 67 to which reference has already been made, that no suit shall be brought in any civil court to set aside or modify any assessment made under the Act. It is the Act which prescribes both the remedy and the manner in which it may be enforced."

25. This case presents no difficulty. The officer who made the assessment had jurisdiction as regards the subject-matter. He had also jurisdiction as regards the assessee concerned. All that happened was that he made a mistake in applying certain provisions of the Act. It was not a case of want of jurisdiction, but a case where an erroneous decision was given in respect of a matter in respect of which jurisdiction undoubtedly existed. In the case before us, the question is one of jurisdiction, or rather of lack of jurisdiction on the part of the concerned Sales-tax officers. The officers concerned thought that they had jurisdiction to act as they did, but, it was subsequently discovered that they had no such jurisdiction. It may next be observed that the remedies now available to the citizen in the writ jurisdiction of this court did not then exist.

26. The learned Advocate General who assisted us in this case at our request took us to some of the earlier Government of India Acts and explained in detail the difference between the levy of a tax, the assessment of a tax and the collection of a tax.

27. Lord Dunedin in *Whitney v. Commissioners of Inland Revenue*, 1926 A.C. 37, stated as follows : "Now, there are three stages in the imposition of a tax; there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already" been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed docs not voluntarily pay."

28. The learned Advocate General pointed out that each of these three stages is separate and complete and contended that a person who objects to the amount of the tax imposed on him ought to avail himself of the remedies provided by the taxing statute, and, if the assessment has become final either by reason of the

fact that the assessee failed to avail himself of the remedies provided by the Act or because those remedies became unavailing, he cannot thereafter complain. Once the assessment has become final all that remains to be done is to collect the tax assessed. At that stage the assessee can no doubt complain if an attempt is made to collect the money from him in a manner or a mode which is not permitted by the law; but he cannot object or complain about the actual collection itself.

29. Referring to Article 265 of the Constitution, the learned Advocate-General argued that it did not permit the calling in question of an assessment that had already become final. The Article really consists of two parts. The first part states that no tax shall be levied except by authority of law. The second part says that no tax shall be collected except by authority of law. When the stage of collection is reached, all that the Article says is that the manner of collection must be authorised by the law. The State is prohibited from adopting illegal or arbitrary methods of collecting the tax already levied and assessed. That is all. At this stage the assessee does not get a right to challenge the correctness of the assessment already made. Once the tax is assessed it becomes the duty of the appropriate officer to collect the tax. The stage at which the legality of the assessment can be questioned is by then past.

30. We do not by any means feel assured that Article 265 can or ought to be cut up in the manner that the argument of the learned Advocate General requires. The word "levy" is frequently used to include both of the first two stages involved in the process of taxation, viz, the levy properly so-called and the determination of the amount of the tax. It appears to us that the words "levy" and "collection" are used in Article 265 of the Constitution in a comprehensive manner and that they are intended to include and envelop the entire process of taxation commencing from the taxing Statute to the taking away of the money from the pocket of the citizen. And, what Article 265 enjoins is that every stage in this entire process must be authorised by the law.

31. Even if it be permissible to cut up Article 265 in the manner which the learned Advocate General suggested, it will be difficult to deny the petitioners the relief they seek. The petitioners are not objecting to any mode of collection. Their objection is more fundamental. They object to the collection itself. The answer given on behalf of the State to this objection of theirs is that the assessment has become final. Now, to say that an assessment has become final is not equivalent to saying that the assessment is lawful as has been demonstrated in the present case. When we say that an assessment has become final all that we ordinarily mean "is that the assessee may no longer challenge it in the manner provided by the appropriate Statute, that is to say, by resorting to the remedy of appeal, revision or reference, as the case may be.

It may be that these remedies have been tried unsuccessfully or it may be that the time within which these remedies should have been sought has expired. But it does not follow that the assessment is lawful. Suppose for example a citizen is

engaged in buying or selling not merely rice and wheat but also lands and houses. Suppose also the Sales Tax Officer includes in the turnover of his business not merely the value of the rice and wheat but also the value of the lands and houses he has dealt with in the year and charges sales tax on the whole. There can be no doubt whatever that the levy of sales tax so far as it relates to Immovable property would be illegal.

The Sales-tax Officer would have no jurisdiction whatever to do that. Nonetheless, if owing to some reason or other the assessee omits to appeal the assessment would have become final. The finality of an assessment under the terms of a taxing statute is not always or necessarily conclusive of the legality of the assessment. An assessment made without jurisdiction, or in pursuance of a provision which is found to be ultra vires, continues to be unlawful, and, nothing less than a validating provision properly enacted would alter that fact.

32. The solution to the problem raised by the present petitions is really to be found in the old and familiar distinction between an act done, in excess of jurisdiction and an erroneous exercise of jurisdiction. Laws have to be worked through human agency, and men are liable to err. The Constitution does not guarantee that the persons employed to administer the law will not make mistakes when exercising the powers conferred on them. If they make mistakes in the exercise of their powers, the persons affected must ordinarily use the remedies of appeal, reference or revision, as the case may be. But, where there is an absence of jurisdiction the situation is materially altered.

And, it would not make any difference whether the absence of jurisdiction arises out of an attempt to usurp jurisdiction, or because the officer has through ignorance or otherwise strayed beyond the limits of his jurisdiction. In relation to a tax, where an assessing officer acts outside the boundaries of his jurisdiction, his acts would to that extent be null and void. No one would have any power to call upon a citizen to make payment of a tax so imposed, and, if any authority seeks to collect a tax so imposed, the citizen can call in aid Article 265, and seek the assistance of this court.

33. There was some argument as to the exact nature of the writ that may issue in a case of this kind. We are of opinion that a writ of mandamus should issue directing the respondents to forbear from collecting the amounts which form the subject-matter of these petitions.

34. There will be no order as regards costs.