

(1971) 12 MAD CK 0002
In the Madras High Court

The Citadel Fine Pharmaceuticals Private Limited	APPELLANT
Vs	
The District Revenue Officer and Others Spencer and Company Limited Vs The Deputy Commissioner of Prohibition and Excise and Another Pharm Products (Private) Limited Vs The District Revenue Officer and Another	RESPONDENT

Date of Decision : 23-12-1971

Acts Referred:

Medicinal and Toilet Preparations (Excise Duties) Act, 1955 — Section 19

Citation : (1973) 86 LW 805 : (1973) 1 MLJ 99

Hon'ble Judges : Raghavan, J

Bench : Division Bench

Judgement

Raghavan, J.—These batches of writ petitions are filed for the issue of a writ of Prohibition or any other appropriate writ prohibiting the

respondents from taking further proceedings in pursuance of the notices dated 39th January, 1968 and 20th February, 1968, which were issued by

the tax collecting authorities on the ground that Rule 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules, 1956 framed u/s 19 of the

Medicinal and Toilet. Preparations (Excise Duties) Act 1955, (XVI of 1955) is ultra vires. The petitioners in each of the cases are manufacturers

of patent or proprietary medicines carrying on business in the State of Madras.

2. We shall take up W.P. No. 1053 of 1968 by way of sample and the allegations in the other petitions are more or less of the same pattern. The

petitioner is a partnership concern, which came into existence in July, 1960. During the period 1560 upto May, 1963 the petitioner-firm was

running two laboratories one at Madras and the other at Kumbakanam, wherein Various medicinal preparations, were manufactured by the

addition of tinctures containing alcohol. Subsequent to May, 1963, the petitioner-firm was owning its own laboratory, which it constructed at

Velachery situated in Chingleput District. Medicinal preparations containing alcohol were covered originally by the provisions of the Madras

Prohibition Act, 1937. By a notification issued under the said Act, the State Government exempted certain medicinal preparations from its

provisions except in regard to payment of duty. Even the provision relating to the payment of duty was made applicable only to notified

preparations, to which spirit as such was added either in the process of manufacture or to the finished product. The petitioner-firm is not

manufacturing any medicinal preparation to which spirit as such is added, but is manufacturing only medicinal preparations to which tinctures

containing alcohol are added.

3. In 1955 the Central Government enacted the Medicinal and Toilet Preparations (Excise Duties) Act (XVI of 1955) which was amended in

1961, hereinafter referred to as ""The Act"" with effect from 1st April, 1957, providing for the levy and collection of duties of excise on medicinal

and toilet preparations containing alcohol, and toilet preparations specified in the Schedule as being subject to the duties on excise levied under the

Act. Section 2 (g) defines ""medicinal preparation"" as including all drugs which are a remedy or prescription prepared for internal or external use of

human beings or animals and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or

animals. Section a (k) defines ""Toilet Preparation"" as meaning any preparation, which is intended for use in the toilet of the human body or in

perfuming apparel of any description, or any substance intended to cleanse, improve or alter the complexion, skin, hair or teeth, and includes

deodorants and perfumes. Section 3 which is the charging section runs as follows:

3(1). There shall be levied duties of excise, at the rates specified in the Schedule, on all dutiable goods manufactured in India.

(2) The duties aforesaid shall be leviable:

(a) Where the dutiable goods are manufactured in bond, in the State in which such goods are released from a bonded warehouse for home

consumption, whether such State is the State of manufacture or not;

(b) where the dutiable goods are not manufactured in bond, in the State in which

such goods are manufactured.

(3) Subject to the other provisions contained in this Act, the duties aforesaid shall be collected in such manner as may be prescribed.

Section 19 confers on the Government the power to make rules. Sub-section (1) of Section 19 is of the widest amplitude giving power to the

Central Government by notification in the Official Gazette to make rules to carry out the purposes of the Act. Sub-clause (2) particularises some of

the powers without prejudice to generality of the power conferred under Sub-section (1) of Section 19. The Schedule contains description of

dutiable goods and the rate of duty leviable on such goods. In exercise of the powers conferred under Sections 9, 10 and 19 of the Act, the

Central Government made rules known as ""The Medicinal and Toilet Preparations (Excise Duties) Rules, 1956"". We are concerned with the Rules

9, 10, 12 and 13. Rule 9 runs as follows:

9. Time and manner of payment of duty--(i) No dutiable goods shall be removed from any place where they are manufactured or any premises

appurtenant thereto, which may be specified by the Excise Commissioner in. this behalf, whether for consumption, export or manufacture of any

other commodity in or outside such place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in

these rules or as the Excise Commissioner may require:

Provided that such goods may be deposited without payment of duty in a warehouse or may be exported out of India under bond as provided in

Rule 97:

Provided further that the Excise Commissioner may, if he thinks fit, instead of requiring payment of duty in respect of each separate consignment of

goods removed from the place or premises specified in this behalf, or from a warehouse keep with any person dealing in such goods an account-

current of the duties payable thereon and such account shall be settled at intervals not exceeding three months, and the account-holder shall

periodically deposit a sum therein sufficient in the opinion of the Excise Commissioner to cover duty on the goods intended to be removed from the

place of manufacture or storage.

(2) If any dutiable goods, are, in contravention of Sub-rule (1) deposited in, or removed from, any place specified therein the manufacturer thereof

shall pay the duty leviable on such goods upon written demand made by the proper officer, whether such demand is delivered personally to him or is left at the manufactory or his dwelling house, and he shall also be liable to a penalty to be determined by the Excise Commissioner which may extend to two thousand rupees, and such goods shall also be liable to confiscation.

Rule 10 runs as follow:

10. Alteration of duly--The rate of duty applicable to goods cleared on payment of duty shall be the rate in force on the date on which duty is paid,

or

cleared from a manufactory or Warehouse, on the date of the actual removal of such goods from such manufactory or warehouse:

Provided that if the goods have previously been removed from a warehouse under bond to be rewarehoused and the duty is paid on Such goods

without their being rewarehoused, the rate applicable thereto shall be the rate in force on the date on which duty is paid, or, if duty is paid through

an account-current maintained with the Excise Commissioner under Rule 9 of the date on which an application in Form A.R. 2 is delivered to the

Officer-in-charge of the warehouse from which the goods removed.

Rule 12 runs as follows:

12. Residuary powers for recovery of sums due to Government--Where these rules do not make any specific provision for the collection of any

duty or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the collecting

Government under the Act or these rules, such duty, deficiency in duty or sum shall on written demand made by the proper officer, be paid to such

person and at such time and place, as the proper officer may specify.

Rule 13 runs as follows:

13. No refund of duties or charges erroneously paid, unless claimed within six months--No duties or charges which have been paid or have been

adjusted in an account-current maintained with the Excise Commissioner under Rule 9 and of which repayment wholly or in part is claimed in

consequence of the same having been paid through inadvertence, error or misconstruction, shall be refunded unless a written claim is lodged with

the proper officer within six months from the date of such payment or adjustment, as the case may be.

The petitioner-firm was registered as a manufacturer of medicinal preparations prior to the Act. Subsequent to the Act the petitioner did not take

out any licence under the provisions of the Act, as the medicinal preparations manufactured by them according to the petitioner would not come

under the Schedule to the Act. The petitioner was manufacturing patent and proprietary medicines from the very inception by adding tinctures

containing alcohol. But they were not adding alcohol as such in manufacturing medicines. The Schedule to the Act was amended in 1961. The

actual levy is made in accordance with the Schedule. The Schedule prior to the amendment in 1961 ran as follows:

Item Description of Rate of

No. dutiable goods duty.

1. Medicinal toilet preparations, con- Rupees seventeen and annas eight per
taining alcohol, which are prepared gallon of the strength of London proof
by distillation or to which alcohol has spirit.

been added, and which are of the
strength or capable of being con-
sumed as ordinary alcoholic beverages.

2. Medicinal and toilet preparations not
otherwise specified containing
alcohol:

(i) Ayurvedic preparations con- Nil.

taining self-generated alcohol
which are not capable of being
consumed as ordinary alcoholic
beverages.

(ii) Ayurvedic preparations containing self-generated alcohol which are capable of being consumed as ordinary alcoholic beverages.

(iii) All others. Rupees five per gallon of the strength of London proof spirit.

3. Medicinal and toilet preparations, Nil.
not containing alcohol, but containing opium, Indian hemp, or other narcotic drug or narcotic.

After the amendment in 1961, the Schedule was recast, thus :

Item	Description of Rate of
No.	dutiable goods duty.

Medicinal preparations :

1. Medicinal preparations, being patent Ten per cent, ad valorem.
or proprietary medicines, containing alcohol, and which are not capable of being consumed as ordinary alcoholic beverages.

2. Medicinal preparations, containing Rupees three and eighty-five naye paise alcohol, which are prepared by distillation or to which alcohol has proof spirit.
been added, and which are capable of being consumed as ordinary alco-

holic beverages.

3. Medicinal preparations, not otherwise specified containing alcohol:

(i) Ayurvedic preparations, contain- Nil.

ing self-generated alcohol which

are not capable of being con-

sumed as ordinary alcoholic

beverages.

4. The petitioner received a notice from the Deputy Commercial Tax Officer, Madras dated 26th March, 1964, assessing the petitioner-firm to

duty on all medicinal preparations manufactured by it after 1st June, 1961, to which tinctures containing alcohol had been added. A similar notice

was received from the District Revenue Officer, Thanjavur. Thereupon, the petitioner filed Writ Petitions Nos. 1092 and 1093 of 1964 for the

issue of a writ of mandamus restraining the Board of Revenue, Madras, from enforcing any demand relating to payment of excise duty under the

Act. The earlier writ petition (W.P. No. 1092 of 1964) prayed for a writ of mandamus and the second writ (W.P. No. 1093 of 1964) related to

issuance of a licence under the Act. The above writ petitions along with a large number of similar Writ petitions were heard by Ramakrishnan, J.,

who while dismissing the second writ petition (W.P. No. 1093 of 1954) relating to taking out licence allowed W.P. No. 1092 of 1964 on the

ground that prior to making orders demanding payment of duty the respondents failed to issue the show cause notice and hear the representations

of the parties. In making the above order the learned Judge found that the products manufactured by the petitioner contained alcohol although

alcohol was not directly added to the manufactured product and therefore liable to excise duty. The said judgment of the learned Judge is reported

in Pharm Products Limited and Others Vs. The District Revenue Officer and Others, . The learned Judge made the following observations at Page

455:

The rules other than Rule 12 do not contain any specific provision for a case

where the manufacturer, due to his own default, fails to take out a licence and fails to ensure the proper safeguards for the manufacture under Rules 46 to 58. Had he done so, it would have ensured the levy of duty at the proper time and proper place. But that does not mean that the goods which are dutiable under the Act should escape from duty due to the default of the manufacturer. It is for such cases that Rule 12 provides the appropriate power for levy, it being in the nature of a residuary power, at the heading itself states. For the application of Rule 12, there is no period of limitation. A limitation, of six months is provided only for Rule 11 and I have already referred to the reasons which make me hold that it is not a case where the question relates to the recovery of a duty or charge short-levied or erroneously refunded.

The learned Judge further observed at page 456 as follows:

What we have in this case is a situation, where owing to the default of the manufacturer, he failed to take a licence and failed to pay the duty at the appropriate time and place. Later on, the department found out the omission on the part of the manufacturer to comply with the rules and called upon him to pay the required duty. It appears to me that such a demand will fall under the residuary power in Rule 12, and therefore the provision about limitation contained in Rule 9 will not apply.

5. In pursuance of the directions issued by this Court, a show-cause notice dated 29th January, 1968, and 20th February, 1968 were issued by the second and first respondent calling upon the petitioner to show cause within 15 days from the receipt of the notice why duty should not be levied against the petitioner-firm in respect of the manufacture or patent and proprietary medicines and whether such medicines contained tinctures or alcohol. The present writ petitions are filed seeking for the issue of a writ of prohibition prohibiting the respondents from proceeding further in pursuance of the show-cause notices.

The following contentions were raised by the petitioners in their affidavit filed in support of the writ petition:

(1) No dutiable goods should be removed from any place where they are manufactured until the excise duty leviable thereon has been paid and in

the present case the goods having been removed, there is no provision for the levy of duty on such goods and Rule 12 authorising the levy is ultra

vires the Act and is liable to be struck down;

(2) Rule 12 is retro-active in scope with--out any limitation of time and a law, which is retrospective in its scope, cannot be made by a delegated

authority and to the extent that no period of limitation is prescribed; the rule is invalid ; and

(3) Between 1961 and July, 1965 the petitioner not having collected excise duties from its customers cannot be compelled to pay such duty as

their right to recoup the payment has been lost,

(4) The rule, therefore, is unreasonable and void;

(5) Under Rule 12 the power is vested in the appropriate officer, which is arbitrary, and unguided and therefore the Rule violates Article 14 of the

Constitution; and

(6) Article 14 is contravened as medicines containing a large percentage of alcohol, which could be consumed as an alcoholic beverage is charged

at a low rate, while a very high rate of duty is levied in respect of the same medicine, though manufactured with a very small percentage of alcohol.

6. The third respondent filed 2 counter affidavits and their contention is that Rule 12 of the rules is intra vires, that the rule is not vague or indefinite

and is not beyond the pale of delegated legislation, that the said rule is not unreasonable and that Article 14 of the Constitution is not contravened

in any manner. The Central Government raised a further contention that Rule 12 provided only for the collection of duty due to the Government

and the rule is not invalid even when no limitation has been prescribed. The rules have been framed only for carrying out the purposes of the Act

and that excise duty levied may be collected even after the goods leave the place of manufacture and that rule will apply to cases of short levy and

even to cases of nil levy.

7. Respondents 1 and 2 filed separate counter affidavits. Their defence is practically in the same line as that of the third respondent and they further

contended that the petitioner had applied for 12 licences as per the judgment of the High Court and that the same was under consideration of the

concerned District Revenue Officers. The respondents further contend that in pursuance of the directions issued by this Court, notices were issued

and that the petitioners without availing of the opportunity of being heard about which they complained on the former occasion before this Court,

rushed to this Court for the issue of a writ of prohibition. The contentions in substance put forward by respondents 1 and 2 are that Rule 12 is intra vires, that Article 14 is not contravened in any manner and that the authorities are entitled, to levy the duty.

8. The main question arising for determination is whether Rule 12 is ultra vires. The learned Counsel for the petitioner contends that the rule is ultra vires for the following grounds:

(1) Rule 12 will apply only to cases of short levy and not to nil levy; and
(2) Rule 12 relates to the residuary power to determine escaped duty in cases of short levy and the power to determine escaped duty being a charging power has to be provided by the Parliament itself in the main enactment and not delegated to the authorities under the rule making power u/s 19 and on this ground the levy is bad and the rule is invalid.

9. The contention put forward in the first ground set out above was raised and considered by Ramakrishnan, J., in W.P. No. 1030 of 1964 etc.

batch Pharm Products Limited and Others Vs. The District Revenue Officer and Others, , and finally decided in the following terms by the learned

Judge at page 456:

What we have in this case is a situation; where owing to the default of the manufacturer, he failed to take a licence and failed to pay the duty at the appropriate time and place. Later on, the department found out the omission on the part of the manufacturer to comply with the rules and called upon him to pay the required duty. It appears to me that such a demand will fall under the residuary power in Rule 12, and therefore the provision about limitation contained in Rule 9 will not apply.

10. In N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd.,

,a question of interpretation of the Rules 9, 10 and 10-A framed u/s 37 of the Central Excise and Salt Act, 1944, arose for decision. The said

Rules 9, 10 and 10-A substantially correspond to Rules 9,11 and 12 of the Medicinal and Toilet Preparations (Excise Duties) Rules 1956. There

also initially no amount was levied and the demand notices were issued long after the expiry of the 3 months provided under Rule 9. The High

Court quashed the notices demanding payment of duty and the Supreme Court had to consider the correctness of the view expressed by the High

Court. Their Lordships held that even when no duty had been assessed the entire duty when subsequently assessed will be a short-levy and that an

assessee, who has been assessed to a similar amount as well as the assessee who has been assessed to nil duty will all be put on a par and that is

the scope of Rule 12. The following extract from the judgment at page 348 explains the position fully:

We may point out that if the contention of Dr. Syed Mohammad that in order to constitute short-levy, some amount should have been assessed as

payable by way of duty so as to make Rule 10 applicable, is accepted, the result will be rather anomalous. For instance if due to collusion (which

means collusion between a party and an officer of the Department) a sum of Rs. 2 is managed to be assessed by way of duty when really more

than thousand times that amount is payable and if the smaller amount of duty so assessed has been paid, the Department will have to take action

within three months for payment of the proper amount of duty. On the other hand, if due to collusion again an order of nil assessment is passed, in

which case no duty would have been paid, according to the appellants Rule 10-A will apply. We do not see any reason to distinguish the above

two cases one from the other. Both are cases of collusion and if an assessee in collusion manages to have a petty amount of duty assessed and

paid he can effectively plead limitation of three months under Rule 10. Whereas in the same case of collusion where no duty has been levied there

will be no period of limitation. In our opinion, that will not be a proper interpretation to be placed on Rule 10-A by us. By the interpretation placed

by us on Rule 10, the position will be that an assessee who has been assessed to a smaller amount as well as an assessee who has been assessed

to nil duty will all be put on a par and that is what is intended by Rule 10.

11. The learned Advocate-General relied upon the decision of Ramakrishnan, J., which had become final, and contends that the said decision,

which has finally decided the content of Rule 12 has become res judicata. In support of his contention he cited the judgment of the Supreme Court

in Thakore Sobhag Singh Vs. Thakur Jai Singh and Others, . The facts in that case are that one Thakur Sabhal Singh, a jagirdar in the former State

of Jaipur applied to recognise Jai Singh as his adopted son for succession to the Thikana. On 23rd May, 1936, the Ruler of Jaipur in Council

ordered that he saw no reason at the present moment to recognise the adoption put forward by Sabhal Singh and that the alleged adoption of Jai

Singh shall in no way be deemed to be an adoption that will in any sense bind the Darbar as regards the question of succession. On 16th June,

1947, Sabhal Singh preferred another application to the Prime Minister of Jaipur for recognising the adoption of Jai Singh. The application was

sent to the Board of Revenue for report and they reported that the application was not maintainable in view of the prior order dated 23rd May,

1936. Before the disposal of the above application Sabhal Singh died and the Prime Minister of Jaipur directed that necessary enquiries be held for

taking action. The Collector held that one Sobhag Singh was the Senior member of the senior line of the original grantee and recommended that the

Matmi be granted in favour of Sobhag Singh. The Board of Revenue accepted the recommendation of the Collector. Jai Singh, the adopted son,

filed a writ petition and the High Court quashed the decision of the Board of Revenue and directed the Board to decide the case in accordance

with law. The High Court also found that on the death of the holder of the Jagir without having any issue the Jagir will vest in his adopted son in

accordance with the personal law. The Board held that Jai Singh was proved to have been adopted by Sabhal Singh and the rival claimant Sobhag

Singh filed an appeal to the Supreme Court against the said decision. It was contended in the Supreme Court that the finding of the High Court that

the Jagir will vest in the adopted son will operate as res judicata and will bind the parties. The Supreme Court at page 1331 observed as follows:

Against the order of the Board of Revenue rejecting the claim of Jai Singh to be recognised as the adopted son of Sabhal Singh, a writ petition was

moved in the High Court and prayer for quashing that order was made. The High Court dealt with the dispute on merits and held that the order of

the Board of Revenue holding that because of the Matmi Rules the adoption of Jai Singh by Sabhal Singh without the previous sanction of the

Ruler could not be recognized for the purpose of determining the succession to the Jagir was erroneous. The High Court did in making the final

order direct the Tribunal to decide the case in accordance with the law and in the light of the observations made in the Judgment, but the direction

was in our judgment, a surplusage. The High Court issued a writ in the nature of certiorari quashing the order of the Tribunal. It was unnecessary

thereafter to direct or advise the Board of Revenue to perform its statutory duty to decide the dispute according to law. The Board of Revenue

had to decide the dispute in accordance with the law declared by the High Court. All questions which had been expressly decided by the High

Court on contest between the parties and other questions which must be deemed by necessary implication to have been decided were *res judicata*

and could not be reopened before the Board of Revenue. In this appeal it is therefore not open to the appellant to contend that the decision of the

High Court on the questions decided in the writ petition was erroneous.

12. The learned Advocate-General, therefore, contends that the findings of Ramakrishnan, J., in *Pharm Products Ltd., Thanjavur and Others Vs.*

District Revenue Officer, Thanjavur and Others, holding that the demand made on the petitioner will fall under the residuary power under Rule 12

of the rules and that Rule 12 will apply to the cases which will preclude the petitioner from agitating the same question again in the present

proceedings.

13. The learned Counsel for the petitioner sought to meet the above arguments by contending that the ultimate decision of Ramakrishnan, J., being

in favour of the petitioner, it is unnecessary for a successful petitioner to file an appeal against the finding against him. In this connection the learned

Counsel referred us to the unreported judgment of the Supreme Court in *Jagatjit Distilling & Allied Industries Ltd. v. State of Punjab and Ors.*

S.C.A. No. 840 of 1966. There the Excise and Taxation Commissioner by memorandum dated 13th August, 1933, imposed a penalty of Rs.

25,000 under Rule 9.36 and u/s 80 read with Section 36 of the Punjab Excise Act, 1914. The Company made representation against the order

imposing the penalty and requested the Commissioner to waive the penalty. That representation was rejected. The Company thereafter paid the

amount and filed a Writ petition challenging the validity of Section 80 of the Punjab Excise Act and Rule 9.36 of the rules framed thereunder. The

High Court upheld the validity of Section 80 and Rule 9.36 of the rules and other relevant provisions, but, reduced the penalty to Rs. 10,000. The

Company applied for special leave against the order upholding the validity of Section 80 of the Rule 9.36. Their Lordships held that the appeal was

unnecessary and made it perfectly clear that they had not gone into the validity

of the section or the rule.

14. The learned Counsel cited a number of decisions holding that it is unnecessary for a successful party to file an appeal against a finding which is

against him, when the ultimate conclusion is in his favour. In *Rango Balaji V. Mudiyeppa and Ors.* I.L.R.(1899) Bom. 296, A alleging that he was

the adopted son of X sued B to recover certain property granted to him by X under a deed. The Court found that A was not the adopted son of

IX, but that he was nevertheless entitled to the property under the deed and a decree was passed in favour of A. A's suit was thus decreed in its

entirety. In spite of the finding against him on the question of adoption it was held that the finding on the question of adoption will not operate as res

judicata in a subsequent suit between A and B, for a decree having been passed in favour of A, A could not have appealed from the finding that

was adverse to him.

15. In *Midnapur Zamindari Co. Ltd. v. Naresh Narayan Raj* AIR 1922 P.C. 241 : 64 I.C. 231 : 48 LA. 49 : 48 Cal. 460 a similar question arose

for consideration. In a suit by the zamindar against his tenant-company, the tenant-company pleaded; (1) occupancy right and (2) that the suit was

premature. The Court held that the suit was premature and that the tenant was not an occupancy ryot. Upon an appeal by the Zamindar to the

High Court the tenant filed a cross-objection to the finding that there was no occupancy right. The High Court affirmed the decree of the trial Court

on the ground that the suit was premature and upon the cross-objection affirmed the finding that there was no occupancy right. The tenant-

company filed an appeal to the Privy Council. The Privy Council held that the absence of an occupancy right was not res judicata against the

appellant, since the tenant had succeeded upon the other plea.

16. The next decision cited in *Kumarappa Chetty and Ors. v. Muthuvijaya Raghunatha Muthukumara Vanangamudi Valuvatti Thevar* (dead) and

Ors. 62 M.L.J. 141 : ILR 55 Mad. 483 : AIR 1932 Mad. 207. The following extract from page 211 in the judgment of Venkatasubba Rao, J.,

brings out the scope of the decision:

If the decree is wholly in favour of the defendant no issue decided against him can operate as res judicata so as to bind him in a subsequent suit, for

he cannot appeal from a finding on any such issue. Conversely, if the plaintiff's

suit is decreed in its entirety, no issue decided against him can be

res judicata for he cannot appeal from a finding on any such issue the decree being wholly in his favour.

The next decision cited by the learned Counsel is Venkatachala Padayachi and Others Vs. Velayudha Padayachi, , where Venkatasubba Rao, J.,

sitting alone held as follows:

An adverse finding against a successful party in a suit on one issue cannot operate as res judicata so as to bind him in a subsequent suit, for he

could not have appealed against that finding, the decree having been in his favour.

17. Lastly the learned Counsel cited the decision in Lake v. Lake (1955) All E.R. 538, where a similar question came up for consideration before

the Court of appeal. There a husband petitioned for divorce on the ground of the wife's adultery and cruelty. The wife denied that she had been

guilty of adultery or cruelty, but pleaded that if she had committed adultery it had been condoned, and cross-prayed for a decree of judicial

separation on the ground of the husband's cruelty. The divorce commissioner, found that the wife had committed adultery, but that it had been

condoned by the husband. He also rejected the charge of cruelty. The petition was dismissed. The wife sought to appeal against the finding that she

had committed adultery. It was held that there was nothing of which the wife could complain in the order she had nothing against which she could

appeal. In our Opinion, the question of res judicata does not depend upon the appealability or otherwise of the decision, which is put forward as

constituting res judicata.

18. In Arikapudi Balakotayya and Others Vs. Yadlapalli Nagayya and Another, , where Somayya and Yahya Ali, JJ., had to consider the question

whether the doctrine of res judicata applies even to the decisions rendered in proceedings which are not suits. Their Lordships held that a decision

given in a proceeding other than a suit may still operate as res judicata if substantial rights of parties are determined. But if the decision is given in

summary proceedings, it does not operate as res judicata. At page 511 their Lordships after referring to Ramachandra Rao v. Ramachandra Rao

ILR (1927)Mad. 320 : 51 M.L.J. 99 : AIR 1926 Mad. 774, held as follows:

Even though a decision may be given in a proceeding which is not a suit, it may

still operate as res judicata if substantial rights of parties are determined. No doubt it is true as pointed out by Mr. Raghava Rao, the learned Advocate for the appellants, that the decision of the High Court in the previous proceedings was appealable and that the Judicial Committee laid stress on the fact that the decision of the High Court though appealable was not in fact appealed against and had been allowed to become final. But, as has been pointed out repeatedly, the question whether a decision operates as res judicata does not depend upon the appealability of the decision. A decision may not be appealable and still it may operate as "res judicata".

In our opinion, the question of res judicata does not depend upon the appealability of the decision. But the question is whether such decision was on a matter which was heard and finally decided. In our view, if Ramakrishnan, J., in the prior batch of writ petitions went into the question fully and gave his final decision it would operate as res judicata. But it is contended by the learned Counsel for the petitioner that there can be no res judicata on a decision relating to jurisdiction or when there is a subsequent change in law by statute or by reason of a later decision of the Supreme Court.

19. Our attention is drawn to the decision of the Supreme Court in Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy, .

The relevant portion in the headnote is extracted below:

The doctrine of res judicata belongs to the domain of procedure; it cannot be exalted to the status of a legislative direction between the parties so as to determine the question relating to the interpretation of an enactment affecting the jurisdiction of a Court finally between them, even though no question of fact or mixed question of law and fact and relating to the right in dispute between the parties has been determined thereby. A decision of a competent Court on a matter in issue may be res judicata in another proceeding between the same parties; the "matter in issue" may be an issue of fact, an issue of law, or one of mixed law and fact. An issue of fact or an issue of mixed law and fact decided by a competent Court is finally determined between the parties and cannot be re-opened between them in another proceeding.

(ii) The previous decision on a matter in issue alone is res judicata ; the reasons

for the decision are not res judicata. A matter on issue between the parties is the right claimed by one party and denied by the other, and the claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is res judicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent Court on facts which are the foundation of the right and the relevant law applicable to the determination of the transaction which is the source of the right is res judicata. A previous decision on a matter in issue is a composite decision; the decision on law cannot be dissociated from the decision on facts on which the right is founded.

(iii) A decision on an issue of law will be res judicata in a subsequent proceeding between the same parties, if the cause of action of the subsequent proceeding be the same as in the previous proceedings, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, nor when the decision relates to the jurisdiction of the Court to try the earlier proceedings, nor when the earlier decision declared valid a transaction which is prohibited by law.

(iv) Where the law is altered since the earlier decision, the earlier decision will not operate as res judicata between the same parties; *Tarini Charan Bhattacharjee's case* I.L.R.(1929). Cal. 723. It is obvious that the matter in issue in a subsequent proceeding is not the same as in the previous proceeding, because the law interpreted is different.

A question of jurisdiction of the Court, or of procedure, or a pure question of law unrelated to the right of the parties to a previous suit, is not res judicata in the subsequent suit.

(v) A question relating to the jurisdiction of a Court cannot be deemed to have been finally determined by an erroneous decision of the Court. If by an erroneous interpretation of the statute the Court holds that it has no jurisdiction, the question would not, in our judgment, operate as res judicata. Similarly by an erroneous decision if the Court assumes jurisdiction which it does not possess under the statute, the question cannot operate as res judicata between the same parties, whether the cause of action in

the subsequent litigation is the same or otherwise.

Ramanujam, J., in Palaniappa Chettiar (died) and Others Vs. Babu Sahib and Others, , followed the above decision and held that the principle of

res judicata or the rule of estoppel will not apply to matters relating to jurisdiction. In coming to the above conclusion Ramanujam, J. referred to

the judgment of one of us in (Nagappa Chettiar v. Arunachala and extracted a passage from the Mudaliar C.R.P. No. 2493 of 1966 said decision,

which runs as follows:

The petitioner cannot be prevented from relying upon the current legal position and contend that the Act would have no application. It is not a

representation coming from him ; it is a statement of the correct legal position which obtains today. There is, therefore, no room for invoking the

doctrine of estoppel. Nor do I think that the principle of approbation and reprobation is applicable because the changing legal position is something

which the petitioner could not help and the rival positions which he was compelled to take stemmed not from his own view of the law but the

divergent views taken by Courts, the view of the Supreme Court being the final one.

We are of opinion that the principle laid down by the Supreme Court in Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy,

, referred to above, will apply to the facts of the present case. In this view, the judgment of Ramakrishnan, J., will not operate as res judicata.

20. The next line of attack of the petitioner is that the main enactment being silent on the question of levy of duty on escaped turnover, the rules

cannot provide for it. In support of that contention the learned Counsel relied upon Haji J.A. Kareem Sait Vs. The Deputy Commercial Tax

Officer, , to which one of us was a party. There it was held that Sub-rule (7) of Rule 5 of the Central Sales Tax (Madras) Rules, 1957 providing

for limitation and determination of escaped turnover by best judgment is in excess of the rule-making power and the sub-rule, as a whole, is

therefore invalid. Relying upon the aforesaid decision, it is contended that the Act in so far as it does not provide for recovery of escaped

assessment or provide residuary powers for recovery of sums due to Government but only provides for them in the Rules, the demand in

pursuance of the Rules is unsustainable. The contention of the learned Counsel is

well founded.

21. In *R. Sundararajulu Naidu v. Entertainment-Tax Officer, Madurai-VII* (1967) 1 M.L.J. 458, Venkatadri, J., had occasion to consider a similar

question in dealing with the validity of the rule as made under the Madras Entertainment-Tax Act (X of 1939) where in the main Act there was no

provision for assessing the escaped income but a provision had been made only in the Rules. The learned Judge held that where the main

enactment is silent on the question of levy of escaped assessment, the Rules made under the Act cannot extend the charging power. Following the

decision in *Haji J.A. Kareem Sait Vs. The Deputy Commercial Tax Officer*, referred to above, we hold that Rule 12 in so far as it seeks to extend

the charging power u/s 3 of the Act is invalid and without jurisdiction. Ramakrishnan, J., however, without considering this aspect held that the rule

is valid. In the view that we have taken it is unnecessary to deal with the only remaining question whether the impugned Rule contravenes Article 14

of the Constitution. We are, therefore, of opinion that the notices issued seeking to assess the petitioner are without jurisdiction.

22. The Rule nisi issued is made absolute. There will be no order as to costs.