

(1965) 12 GUJ CK 0004

In the Gujarat High Court

Case No : Appeal No. 558 of 1960 & Appeal No. 558 of 1960 from Appellate Decree

Union of India

APPELLANT

Vs

Casam Mohmad Ajam Ismail

RESPONDENT

Date of Decision : 15-12-1965

Acts Referred:

Income Tax Act, 1922 — Section 34, 67

Citation : (1966) 18 STC 482

Hon'ble Judges : R.B. Mehta, J

Bench : Single Bench

Advocate : A.D. Desai, for the Appellant; K.H. Kaji, for the Respondent

Judgement

1. This appeal has been filed by the original defendants as the appellate court had reversed the trial court's decree dismissing the plaintiff's suit and had decreed the plaintiff's claim by holding that the assessment order and the recovery certificate in question were invalid and without jurisdiction and by further restraining the defendants from recovering the sum of Rs. 4,743-12-0 on account of Income Tax of the estate of the deceased, Mohmad Azam Ismail, for the assessment year 1942-43, on the strength of the assessment order and the recovery certificate in question.

2. The short facts which have given rise to this appeal are as under :

One Mohmad Azam Ismail, who was a resident of Rander, died at Rander on 25th March, 1945, leaving as his heirs four sons and one daughter. The Income Tax department had assessed him for his Income Tax for the year 1941-42 during his lifetime, but did not take any step for the recovery of the amount of tax as it was barred by limitation. After his death, proceedings were taken against the plaintiff, who was one of the heirs, being the son of the deceased, to assess the estate of the deceased for the assessment year 1942-43 for the period from April 1, 1941, to March 31, 1942. The assessment proceedings were started in 1947 against the plaintiff. By the order passed at exhibit 65 on 23rd March, 1947, the income

was assessed at Rs. 21,347 and the plaintiff was asked to pay Rs. 4,743-12-0 on account of Income Tax for the said year. As the plaintiff did not pay the tax, recovery certificate u/s 46 of the Indian Income Tax Act, 1922 (hereinafter referred to as "the Act"), was issued and sent to the Collector for the recovery of the tax as arrears of revenue. In pursuance of this certificate the plaintiff's bungalow known as "Bage Azam" in the village, Dumas, and which he had inherited from his father and which had fallen to his share under partition in 1950 was sought to be attached. The plaintiff, therefore, gave statutory notice, exhibit 27, on 14th December, 1953, and filed the present suit for a declaration that the said order of assessment and the said recovery certificate were illegal and without jurisdiction and for the consequential injunction restraining the Union of India, and the other defendant, the Collector of Surat, from recovering the said amount from the plaintiff the basis of the said assessment order and the said recovery certificate. The plaintiff had challenged the order of assessment on various grounds including, inter alia :

- (1) that no requisite notices were served on the plaintiff before passing the said order of assessment;
- (2) that the plaintiff was a non-resident and still he was taxed as a resident;
- (3) that the proceedings were taken only against the plaintiff and not against all the heirs;
- (4) that the recovery certificate in the name of the deceased could not be availed of against him.

3. The defendants contended that there was a bar u/s 67 of the Act to such a suit and that the plaintiff had been served with proper notices and his assessment as a resident was valid and that it was not necessary to serve notices on all the heirs and that the recovery certificate which was issued had been subsequently corrected. The trial court had held that the defendants had proved that the necessary notices were served on the plaintiff as the heir of the deceased or as his duly authorized agent. It also held that it was not necessary to issue notices to all the heirs and that the recovery proceedings were not illegal and that the plaintiff's liability to pay the Income Tax dues of the estate of the deceased in his hands was not affected by partition and that the plaintiff had failed to prove that the assessment in question was illegal and ultra vires. The trial court also held that the suit was barred u/s 67 of the Act. The plaintiff's suit was, therefore, dismissed by the trial court. The appellate court, however, held that there was no bar to such a suit u/s 67 of the Act as the assessment order and the recovery certificate were illegal and without jurisdiction. The appellate court also held that u/s 46(1) of the Act, the plaintiff could not be considered as a defaulting assessee. It also held that the assessment was without jurisdiction as no notice u/s 34 was given before assessing this escaped income by the order at exhibit 65. The appellate court also held that on the strength of the said certificate the amount of assessment demanded from the plaintiff could not be

recovered. The appellate court, therefore, reversed the decree of the trial court and decreed the plaintiff's claim as aforesaid. The defendants have, therefore, filed the present appeal.

4. The learned Assistant Government Pleader raised three points in this appeal :

(1) that the appellate court had clearly erred in the construction of section 46 of the Act and in holding that the plaintiff was not the defaulting assessee;

(2) that the appellate court had clearly erred in considering that the question of notice u/s 34 was a pure question of law and, in permitting this contention, the appellate court had allowed the plaintiff to raise a new ground which was not raised in the statutory notice or in the suit at any stage;

(3) that, in any case, the appellate court ought to have held that the plaintiff's suit was barred u/s 67 of the Act.

5. As regards the first point, there is no dispute that the present case is covered by the decision of the Supreme Court in *Additional Income Tax Officer, Circle I, Salem v. E. Alfred*. In that case the Supreme Court had in terms held that the generality of the definition of the "assessee" in section 2(2) of the Act was sufficient to include even a legal representative who was to pay the tax, though out of the assets of the deceased person. u/s 24B(2), where a person died before the publication of the notice referred to in sub-section (1) of section 22 or before he was served with a notice under sub-section (2) of section 22 or section 34, his legal representative shall on the serving of the notice u/s 22(2) or u/s 34 comply therewith and the Income Tax Officer might proceed to assess the total income of the deceased person as if such legal representative were the assessee. The Supreme Court also held that this fiction did not come to an end after the assessment, so that the legal representative remained a mere debtor thereafter to the department. The original assessee being dead before the notice, either general or special to him, he could not be treated as an assessee, and the process of the Act was, by the fiction, made available against a different person like a legal representative who was fictional deemed to be an assessee for purposes of assessment. It was in that sense that the legal representative became an assessee by the fiction and it was this fiction which had to be fully worked out, without allowing the mind "to boggle". Such a legal representative, who, by fiction, was deemed to be an assessee, therefore, came within the definition of the term "assessee," because he was the person by whom Income Tax was payable, though out of the assets left by the deceased person. The assessment of the legal representative was made u/s 23 of the Act and he had a right to appeal u/s 30, which he would not have, if he ceased to be an assessee after the determination of the tax. So far as sub-section (2) was concerned, the fiction was clearly attracted. u/s 45, therefore, if a notice of demand was issued u/s 29 on the assessee and was not complied with, the assessee would be deemed to be in default and u/s 46(1), if the assessee was in default, a penalty could be imposed. It was, therefore, held that such a legal representative, who

was a deemed assessee qua the assets and liabilities to pay the tax of the deceased, was clearly an assessee in default and liable to the imposition of penalty for that default. In view of this settled position of law, the appellate court was clearly wrong in holding that the plaintiff could not be considered to be a defaulting assessee for the purposes of section 46 of the Act.

6. As regards the next contention of the learned Assistant Government Pleader, it should be kept in mind that the plaintiff's statutory notice was in general terms and it was clearly alleged in paragraph 1 of exhibit 27 that the plaintiff was in Rangoon in March, 1947, and no assessment could be legally made for the year 1942-43 in his absence without serving on him the proper notices. In the plaint, even though in paragraph 3 it was stated that no notices under sections 23 and 34 were issued, in paragraph 4 it was clearly alleged that no assessment could have been legally made on the plaintiff in his absence without serving on him personally legally proper notices. In the written statement, even though the defendants denied the allegation that no notice u/s 22(2) was served on him, as regards the allegation in paragraph 4 there was a vague denial that the statement of the plaintiff that the assessment for the year 1942-43 was made behind his back and without his knowledge was not correct. That is why the learned trial judge had framed an issue No. 1 as under :

"Whether the defendants prove that the necessary notices were served on the plaintiff as heir of the deceased, Mohmad Azam Ismail, or his duly authorised agent as allege ?"

7. After this issue was framed both the parties had led the necessary evidence. The learned Assistant Government Pleader, therefore, is not right in urging that this point about the legality of the assessment on the ground that proper and requisite notices had not been issued to the plaintiff was not urged in the statutory notice or in the plaint or that the same fact was not in issue before the trial court. It is true that before the trial court the point about the notice u/s 34 was not specifically argued. The attack on the order of assessment being however on the ground that the requisite notices had not been served on the plaintiff and as the necessary issue to that effect had been raised by the trial court and as the parties had not ample opportunities to lead necessary evidence on this point, it cannot be said that the appellate court erred in considering this question as a pure question of law based on the evidence on the record of the case. Even the learned Assistant Government Pleader had not asked for any opportunity to lead any additional evidence by showing that in fact the notice u/s 34 had been served on the plaintiff. In fact, his contention before the learned appellate judge was that the assessment proceedings should be deemed to have been taken u/s 34. In effect the order at exhibit 65, in terms, stated that the sections, under which the assessment was made, were sections 23(3) and 24B. It was also recited in the order that in response to the notice u/s 23(2) one Mahomed Ismail Ibrahim had attended. The appellate court was, therefore, right in holding that there was nothing on record to show that the requisite notice u/s

34 of the Act had been issued before assessing the plaintiff in regard to this escaped income. The learned Assistant Government Pleader also argued that the Government had no opportunity to lead evidence to show that such a notice was in fact issued. I cannot agree with this contention. No such grievance was made before the appellate court and even in the memo of appeal no such contention was initially raised and the new grounds have been added only at the time of the hearing of this appeal. The defendants had ample opportunity to lead the necessary evidence by producing all the requisite notices and it would be really allowing them to fill up the lacuna, if the matter were to be remanded as requested by the learned Assistant Government Pleader to enable him to lead further additional evidence. Finally, the learned Assistant Government Pleader in this connection argued that the trial court had erred in casting the burden of proof as to this issue on the defendants as it was the plaintiff who had challenged the assessment on the ground that no proper notices had been served on him. When the parties have actually led evidence this question would be merely academic. The plaintiff was in Rangoon and the evidence which was led by the defendant was to examine a bailiff. Thus all the necessary evidence was led and still the defendants were to in a position to show that any such notice u/s 34 had been served on the plaintiff. In this state of the record, the appellate court was right in treating this question as a pure question of law on the evidence which had been tendered by the parties. The want of notices u/s 34 would be clearly fatal to the assessment which was sought to be done in 1947 as regards the escaped income of the deceased in the assessment year 1942-43. Mr. Kaji in this connection relied upon the decision of the Supreme Court in *Y. Narayana Chetty v. Income Tax Officer, Nellore* at page 215; the Supreme Court held that the service of the requisite notice on the assessee was the condition precedent to the validity of any reassessment made u/s 34 and if such a notice was not issued, the contention that the proceedings taken by the Income Tax Officer in pursuance of an invalid notice and consequent orders of reassessment passed by him would be void and inoperative was well founded. It was held that the notice prescribed by section 34 could not be regarded as a mere procedural requirement. It was only if the said notice was served on the assessee as required that the Income Tax Officer would be justified in taking proceedings against him. If no notice was issued or the notice was shown to be invalid, then the proceedings taken by the Income Tax Officer without a notice or in pursuance of an invalid notice would be illegal and void. The Supreme Court approved the view taken by the Bombay and Calcutta High Courts in *Commissioner of Income Tax v. Ramsukh Motilal* and *R. K. Das & Co. v. Commissioner of Income Tax*. The appellate court was, therefore, right in view of the settled legal position in holding that, in the absence of a notice u/s 34, the impugned assessment order and the consequent recovery certificate were clearly illegal and void. The notice u/s 34 being a condition precedent, the order of assessment of the Income Tax Officer was clearly without jurisdiction, illegal and void.

8. The material question which, therefore, remains to be decided is whether such

a suit of the plaintiff is barred by section 67 of the Act and on this question both the learned advocates had addressed able arguments before me. Section 67 of the Act provides as under :

"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."

9. In the present case, it being a completed assessment, I am concerned with the first part of section 67 which bars a civil court from entertaining any suit wherein it is sought to set aside or modify any assessment made under the Act. Mr. Kaji argued that section 67 would have no application whatsoever to a case where the assessment was a void assessment and was, therefore, no assessment at all. The Income Tax Officer had no jurisdiction to initiate the machinery of assessment for escaped income unless the condition precedent was first fulfilled of serving a requisite notice u/s 34 of the Act. As such a notice was held to be a condition precedent by the Supreme Court, the assessment done by any Income Tax Officer without giving this requisite notice was illegal and a void assessment. The error in such a case was not merely a procedural error in the exercise of jurisdiction but it was an error which went to the root, which was completely fatal to the final order of assessment. Such assessment being therefore a nullity, Mr. Kaji argued that the bar u/s 67 would not be applicable. Mr. Kaji in this connection would be right in relying upon the decision of the Supreme Court in *Laxman v. State of Bombay*, at page 443, while considering the question whether a civil suit was barred u/s 4(a) of the Bombay Revenue Jurisdiction Act, the Supreme Court held that where something done or an order made was not an order at all because it was without jurisdiction, null and void, the provisions of section 4 were not attracted. The Supreme Court also pointed out that as laid down in the decision in *Province of Bombay v. Hormusji Manekji*, it is settled law that the civil courts have the power and jurisdiction to decide any question as to whether a Tribunal of limited jurisdiction had acted within the ambit of the powers conferred upon it by the statute to which it owed its existence or whether it had transgressed its limits placed on those powers by the legislature. The Supreme Court also stated that in a number of decisions this principle had been stated and followed. One of them was the decision in *Secretary of State v. Mask & Co.* in which the Judicial Committee had observed that it was settled law that the exclusion of the civil courts was not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It was also well settled that even if jurisdiction was so excluded, the civil courts had jurisdiction to examine into cases where the provisions of the Act had not been complied with or the statutory Tribunal had not acted in conformity with the fundamental principles of judicial procedure. The Supreme Court also observed that in their earlier decision it was not the intention of the court to overrule a rule which had been firmly established; otherwise, there would be found a fuller discussion on this question. Its error in the present case being a fundamental error, as notice u/

s 24 was a condition precedent, it would vitiate the entire assessment proceedings. It would therefore be clear that the civil courts' jurisdiction would not be excluded by such an invalid assessment which was clearly a nullity and no assessment at all. The learned Assistant Government pleader in this connection relied upon the decision of the Supreme Court in *Kalwa Devadattam v. Union of India*. In that case, a partition had taken place among the members of the family and the Income Tax Officer was bound to make an inquiry contemplated u/s 25A. However, no inquiry was in fact made and no order was recorded by the Income Tax Officer about the partition, and so, by virtue of sub-section (3), the Hindu family which had ceased to be undivided had to be deemed to be continuing to be a Hindu undivided family for the purposes of the Act. The Supreme Court in that case in terms pointed out that though the method of assessment and the procedure to be followed in that behalf were statutory, any error or irregularity in the assessment could be rectified in the manner provided by the statute alone by resorting to the machinery under the Act and that section 67 barred a suit in any civil court to set aside the assessment made under the Act. That view had been taken in that case as the error was held to be a procedural error and the assessment which was made by the Income Tax Officer was held to be an assessment of tax under the Act. Even though error had been committed in making the assessment without holding an inquiry into the alleged partition, such an error could be rectified only by resorting to the machinery provided under the Act and not by a suit in the civil court. That decision could have no application to the present case where the error was not a procedural error, but a fundamental error touching the jurisdiction of the Income Tax Officer, which was completely fatal to the entire assessment.

10. The learned Assistant Government Pleader also relied upon the decision of the Privy Council in *Raleigh Investment Co. Ltd. v. Governor-General in Council*, at page 532, where the Judicial Committee had interpreted section 67 of the Act and had held that the obvious and correct meaning of the phrase, "assessment made under the Act" was an assessment finding its origin in an activity of the assessing officer acting as such. The circumstance that the assessing officer had taken into account an ultra vires provision of the Act was in that view immaterial in determining whether the assessment was "made under the Act". It was held that the phrase described the provenance of the assessment; it did not relate to its accuracy in point of law. So the test was the use of the machinery provided by the Act and not the result of that use. It should be kept in mind that at page 532 the Judicial Committee had held that any assessment made under the machinery provided by the Act, if based on a provision subsequently held to be ultra vires, was not a nullity like an order of a court lacking jurisdiction. Reliance on such a provision was not an excess of jurisdiction, but a mistake of law made in the course of its exercise and, therefore, it was held that such a mistake could be corrected by the machinery provided by the Act and not by a suit. No doubt this decision has been subsequently doubted and has been distinguished in view of the provisions of our Constitution in so far as the assessment under the ultra

vires provision is concerned but that question however does not arise in the present case. What is material in the present case is that the assessment which was made was a nullity and was a void assessment and, therefore, the said decision would not apply to the facts of the present case. As pointed out by the Supreme Court in *Desika Charyulu v. State of Andhra Pradesh*, at page 816, the very provision of setting upon an hierarchy of judicial tribunals for the determination of the question, on which the applicability of the Act depended, would be sufficient in most cases for inferring that the jurisdiction of the civil court to try the same matter was barred. Their Lordships, however, added that such an exclusion of jurisdiction would be subject to two limitations. The first reservation was the one made by Lord Thankerton in *Secretary of State v. Mask & Co.* The scope of the said exception had been examined by the Supreme Court in the case of *Firm Illuri Subbayya Chetty v. State of Andhra Pradesh*, where Gajendragadkar J. (as he then was), speaking for the court, said :

"Non-compliance with the provisions of the statute to which reference is made by the Privy Council must, we think, be non-compliance with such fundamental provisions of the statute as would make the entire proceedings before the appropriate authority illegal and without jurisdiction. Similarly, if an appropriate authority has acted in violation of the fundamental principles of judicial procedure, that may also tend to make the proceedings illegal and void and this infirmity may affect the validity of the order passed by the authority in question. It is in cases of this character where the defect or the infirmity in the order goes to the root of the order and makes it in law invalid and void that these observations may perhaps be invoked in support of the plea that the civil court can exercise its jurisdiction notwithstanding a provision to the contrary contained in the relevant statute."

11. The second reservation was as regards the exact extent to which the powers of the statutory tribunals were exclusive. In this connection Lord Esher's observations in *Queen v. Commissioners for Special Purposes of the Income Tax*, at pages 319-320, were approved as under :

"When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There, it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited

jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned, it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

12. It was held that whether a particular case falls under the first or the second category would depend on the purpose of the statute and its general scheme, taken in conjunction with the scope of the enquiry entrusted to the tribunal set up and other relevant factors.

13. The question before me is, therefore, to be decided in the light of these principles as to the exclusion of the jurisdiction of the civil courts, because the statute sets up a hierarchy of judicial tribunals for the determination of all questions regarding the Income Tax under the Act. The question which I have to consider falls within the scope of the first reservation, because the non-compliance in the present case is of a fundamental provision of section 34, which makes the entire proceedings before the Income Tax Officer illegal and without jurisdiction and, therefore, makes the entire order of assessment void. The learned Assistant Government Pleader, however, argued that in view of the second reservation, such a contention that the provisions of section 24 were not complied with can be determined only by a tax tribunal created under the Act and the jurisdiction of the civil courts was completely ousted by reason of the wide amplitude of section 67 by the words "assessment made under the Act." It is true that the decision is not merely made final only for the purposes of the Act but a complete machinery is provided by the setting up of an hierarchy of tax tribunals under the Act for determining the questions as regards the liability of the assessee to pay Income Tax under the Act. In the case of *Provincial Government of Madras v. J. S. Basappa*, a provision in section 18 of the Madras General Sales Tax Act, 1939, was considered, before it was amended, so as to contain section 18A which was identical with section 67 of the Act. At page 1877, the Supreme Court observed that in *Chetty's* case it was held that the civil court's jurisdiction might not be taken away by making the decision of a Tribunal final, because the civil court's jurisdiction to examine the order, with reference to the fundamental provisions of the statutes, non-compliance with which would make the proceedings illegal and without jurisdiction, still remained unless the statute went further and stated either expressly or by necessary implication that the civil court's jurisdiction was completely taken away. It was, therefore, held that without a provision like section 18A in the Act, the jurisdiction of the civil court would not be taken away, at least where the action of the authorities was wholly outside the law and was not a mere error in the exercise of jurisdiction. The finality that the statute conferred upon the order of assessment, subject,

however, to appeal and revision, was a finality for the purpose of the Act, and it did not make valid an action which was not warranted by the Act, as for example, the levy of tax on a commodity which was not taxed at all or exempt. Therefore, in the absence of a provision like section 18A corresponding to the present section 67 of the Act, it was held that the taxing of sales which did not take place within the State was a matter wholly outside the jurisdiction of the taxing authorities and, in respect of such illegal action, the jurisdiction of the civil court continued to subsist. On the other hand, in *Kamala Mills v. State of Bombay*, the Supreme Court distinguished the decision in *Basappa's case*, at page 1951, by holding that decision was based on the fact that the said Act at the relevant time did not contain section 18A which was construed in *Chetty's case*, and, therefore, finality was only for the purposes of the Act and it did not make valid an action which was not warranted by the Act, as, for example, the tax on a commodity which was not taxed at all or was exempt. Where a similar provision like the present section 67 was present in section 20 of the Bombay Sales Tax Act, 1946, protecting assessments "made under the Act", it was held at page 1947 of the aforesaid decision that the said clause took in all assessments made or purported to have been made under the Act. At page 1948, the entire scheme of the said Act was considered and it was held that all questions pertaining to the liability of the dealers to pay assessment in respect of their transactions were expressly left to be decided by the appropriate authorities under the Act as matters falling within their jurisdiction. Whether or not a return is correct, whether or not transactions which were not mentioned in the return, but about which the appropriate authority had knowledge, fall within the mischief of the charging section, what was the true and real effect of the transactions which were assessable, all those and other allied questions had to be determined by the appropriate authorities under the said Act. It was, therefore, held in that particular case that the finding of the appropriate authority that a particular transaction was taxable under the provisions of the Act was not a finding on a collateral fact which gave the appropriate authority jurisdiction to take a further step and make the actual order of assessment. The whole activity of assessment beginning with the filing of the return and ending with an order of assessment, fell within the jurisdiction of the appropriate authority and no part of it could be said to constitute a collateral activity not specifically and expressly included in the jurisdiction of the appropriate authority as such. Thus the case was held to fall in the second category laid down by Lord Esher and the question about the taxability of a particular transaction was held to be a finding of fact in issue and not a finding on a collateral fact on which depended the jurisdiction of the authority. Even in the last paragraph, at page 1953, it was observed that, in that case, the Act under which the tax was recovered as well as the charging section were valid and the appropriate authorities had dealt with the matter in regard to the taxability of the impugned transactions in accordance with the provisions of the Act and, in consequence, the tax in question was recovered on the basis that the said transactions were taxable under the Act. A contention was raised that the transactions were outside sales and they did not and could not fall under the

charging section because of article 286 and that the tax was levied as a result by mistake. It was in terms observed that assuming that such a mistake was committed, the conclusion that the transaction in question fell within the purview of the charging section could not be said to be without jurisdiction or a nullity and the assessment based even on such an erroneous conclusion would claim the protection of section 20 of the said Act. The learned Assistant Government Pleader had strongly relied upon the aforesaid decision in the case of Kamala Mills. That decision clearly interpreted the scope of the second reservation as to the extent of the exclusion of the jurisdiction of the civil court. In Basappa's case, the order was held to be final only for the purpose of the Act in the absence of a provision like section 18A corresponding to the present section 67, while in the case of Kamala Mills Ltd., due to the presence of such a section, it was held that even a finding as to the transaction being taxable or not was also a finding of a fact in issue as distinguished from a finding on a collateral fact and it would not make the assessment order without jurisdiction or a nullity, and, therefore, such an assessment would be entitled to claim the protection of the wider exclusion made by a provision like section 18-A of the Madras Sales Tax Act or section 20 of the Bombay Sales Tax Act or section 67 of the present Act. I cannot agree with the learned Assistant Government Pleader that this question arises in the present case. The learned Assistant Government Pleader tried to argue that whether the notice u/s 34 was served or not was a decision as to a preliminary fact and, on the analogy of the aforesaid decision in Kamala Mills Ltd. he further sought to argue that such a contention could be raised only before the tax tribunals" and civil courts" jurisdiction was clearly excluded. There is a clear misconception in the argument of the learned Assistant Government Pleader in not making a distinction between the two reservations. In the present case, there was no question of any decision of any preliminary fact by the Income Tax Officer. The question was one of complying with the condition precedent before invoking the jurisdiction for assessing the escaped income u/s 34 of the Act. If such a condition precedent was not fulfilled, there was a fundamental error of procedure committed by the Income Tax Officer which made the entire order of assessment without jurisdiction, illegal and void. Such and could not claim any protection u/s 67 of the Act. In Bharat Kala Bhandar (Private) Ltd. v. Municipal Committee, Dhamangaon, the Supreme Court had considered the scope of section 84(3) of the Central Provinces Municipalities Act, 1922, which was in the following terms :

"No objection shall be taken to any valuation, assessment or levy, nor shall the liability of any person to be assessed or taxed be questioned in any other manner or by any other authority than is provided in this Act."

14. It was held at page 92 that in the said Act there was a complete absence of the provision corresponding to section 67 of the Indian Income Tax Act barring the institution of a suit in so far as refusal of a refund of a tax was concerned. The majority of the learned judges had doubted the observations of their Lordships of the privy Council in Raleigh Investment Co.'s case by observing at

page 91 that it would be difficult to appreciate how, taking into account the ultra vires provision, which in law must be regarded not being a part of the Act at all, would make the assessment as one under the Act. It was held that to give too wide a construction to the expression "under the Act" might lead to the serious consequence of attributing to the legislature, which owed its existence itself to the Constitution, the intention of affording protection to unconstitutional activities by limiting challenge to them only by resort to the special machinery provided by it in place of the normal remedies available under the Code of Civil Procedure, that is, to a machinery which could not be as efficacious as the one provided by the general law. It was observed that such a construction might necessitate the consideration of the very constitutionality of the provision which contained this expression and that aspect of the matter did not appear to have been considered in the case of Raleigh Investment Co. Ltd. In this decision, at page 92, the decision in *Secretary of State v. Mask & Co.*, was said to have been approved in *Chetty's* case. It was held that what was clearly prohibited by the Act could not be claimed to be purported to be done in pursuance of an intended execution of the Act. Finally, at page 93, it was pointed out that, even if section 84(3) of the Municipalities Act was to be interpreted in the same manner as section 67 of the Indian Income Tax Act, where there was an express prohibition in a statute against a local authority from imposing a tax, the action of a local authority or of any of its instrumentalities in transgressing that prohibition must be regarded as being in excess of its jurisdiction and a provision like section 84(3) would not bar the jurisdiction of the civil court to entertain a suit instituted by a person from whom it was collected for the repayment of the money recovered from him in excess of the permissible amount. Where the question merely was whether the assessment was made according to law, the assessing officer of the municipality having jurisdiction over the assessee, such a provision, like section 84(3), might be a bar to the suit. Where, however, the question raised was as to the jurisdiction of the assessing officer to proceed against the assessee and levy on or collect from him an amount in excess of that permitted by the Constitution, the matter would be entirely out of the bar of that provision. That decision would be clearly applicable to the facts of the present case as in the present case also the question is not whether the assessing authority followed the procedure under the Act, but whether the assessing officer had jurisdiction to make an assessment u/s 34 without following the condition precedent laid down in that section and in the absence of which he had no jurisdiction whatsoever to initiate the machinery of taxation in cases of escaped income against the assessee.

15. The distinction which has to be kept in mind is between ultra vires acts and acts which are merely wrongful acts. The present case is of an ultra vires act as the Income Tax Officer had no jurisdiction to initiate proceedings u/s 34 without serving a requisite notice. Such a case could not fall under the second reservation. The case would clearly fall under the first reservation and the error being of a fundamental nature, the assessment would clearly be a nullity and

such an assessment could not bar a civil suit. The appellate court was, therefore, right in holding that there was no bar to the suit u/s 67 of the Act.

16. Mr. Kaji wanted to urge certain other points but as the plaintiff succeeds on this ground, it is not necessary to consider any other question in this appeal.

17. In the result, this appeal must fail. I, therefore, dismiss this appeal with costs. The learned Assistant Government Pleader made an oral request for certificate being granted under clause 15 of the Letters Patent. I consider this case as a fit one for the grant of the certificate and the certificate is accordingly ordered to be issued.