

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

**Review WPMP No.17876 of 2015 in W.P No.34642 of 2014;
W.P. No. 434 of 2016 and W.P. No.5061 of 2017**

Review WPMP No.17876 of 2015 in W.P No.34642 of 2014:

Between:

M/s. Progressive Constructions Ltd., rep., by its Authorised
Representative Mr. T. Vara Prasad.

.... Review petitioner

v.

The State of Andhra Pradesh Revenue (CT)-I, Department, Rep., by
its Principal Secretary to Government, A.P. Secretariat, Hyderabad
and others.

.... Respondents

DATE OF JUDGMENT PRONOUNCED: 30.11.2017.

SUBMITTED FOR APPROVAL:

**THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

1. Whether Reporters of Local newspapers may
be allowed to see the Judgments?
2. Whether the copies of judgment may be marked
to Law Reports/Journals
3. Whether Their Ladyship/Lordship wish to see the
fair copy of the Judgment?

RAMESH RANGANATHAN, ACJ

*** THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND**

*** THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

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% Dated: 30-11-2017

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\$ The State of Andhra Pradesh Revenue (CT)-I, Department, Rep., by its Principal Secretary to Government, A.P. Secretariat, Hyderabad and others.

.... Respondents

! Counsel for Review petitioner:

^ Counsel for respondents:

< GIST:

> HEAD NOTE:

? Citations:

- 1) (2011) 40 VST 150 (AP) = (2011) 52 APSTJ 85
- 2) (1962) 13 STC 472
- 3) (1974) 2 SCC 121
- 4) (1963) 2 ALL ER 66
- 5) (2001) 6 SCC 534
- 6) (2004) 8 SCC 706
- 7) (1955) 1 SCR 117 : AIR 1954 SC 340
- 8) (2005) 7 SCC 791
- 9) (2011) 10 SCC 543
- 10) (2009) 2 SCC 315
- 11) (1979) 2 SCC 34
- 12) (2005) 12 SCC 1
- 13) (2007) 2 SCC 481
- 14) (1894) A.C. 640
- 15) [1904] A.C. 809
- 16) [1924] A.C. 185
- 17) [1924] S.C.R. 511
- 18) [1942] S.C.R. 257
- 19) (1991) 1 SCR 326, 1991 CanLII 82 (SCC)
- 20) 2010 (2) ALD 789
- 21) (2004) 9 SCC 619

- 22) (2007) 2 SCC 355
- 23) (1996) 1 SCC 435
- 24) (1970) 1 SCC 670
- 25) (2004) 1 SCC 287
- 26) (1965) 2 All ER 836
- 27) 1959 A.C. 83
- 28) (1992) 1 SCC 534
- 29) (1973) 31 STC 534
- 30) (1908) ILR 35 Cal 61, 72
- 31) (1964) 6 SCR 1001 : AIR 1964 SC 1300
- 32) (1962) 2 SCR 747 : AIR 1962 SC 199
- 33) (1841) 9 Dowl 487
- 34) 13 Indian Appeals 134
- 35) [1964] 66 P.L.R. 555, (Punjab HC FB)
- 36) AIR 1956 SC 479 = (1956) 29 ITR 717
- 37) AIR 1957 SC 397 = (1957) 31 ITR 565
- 38) (1907) 97 LT 551
- 39) (1926) 51 MLJ 742 = (1927) ILR 50 Mad 130
- 40) (1966) 18 STC 50 (PH)
- 41) (2003) EWCA Civ 511 = (2003) 2 WLR 1618
- 42) [2003] QB 104
- 43) (1980) 40 P & C.R. 336
- 44) (1956) A.C. 736, 769-770 : (1956) 2 W.L.R. 888
- 45) (1975) A.C. 295
- 46) AIR 1951 SC 217
- 47) 2004(5) ALD 180 (DB)
- 48) (1971) 3 SCC 20
- 49) (1994) 2 SCC 481
- 50) AIR 1955 S.C.425
- 51) [1976] Q.B. 540
- 52) [1940] 2 K.B. 33 (C.A)
- 53) [1979] 2 S.C.R. 561
- 54) [1980] 2 S.C.R. 1011
- 55) (1986) 4 SCC 566
- 56) [1969] 2 Q.B. 538
- 57) (1975) 1 SCC 152
- 58) (1996) 5 SCC 419
- 59) (1992) 2 SCC 598
- 60) 1994 Supp (2) SCC 195
- 61) (2008) 4 SCC 695
- 62) (1996) 11 SCC 501
- 63) (1996) 6 SCC 445
- 64) (1975) 4 SCC 578
- 65) (1979) 4 SCC 389
- 66) AIR 1963 SC 1909
- 67) (2014) 7 SCC 663
- 68) 1993 Suppl.(4) SCC 595
- 69) (2000) 6 SCC 224
- 70) (1980) 2 SCC 167
- 71) AIR 1965 SC 845
- 72) (1971) 3 SCC 189
- 73) (1971) 3 SCC 5
- 74) (1975) 1 SCC 674
- 75) (1999) 9 SCC 596
- 76) (1971) 2 SCC 200
- 77) 27 Indian Appeals 197
- 78) (2008) 8 SCC 612
- 79) 329 U.S. 296
- 80) 1994 ABCA 37 (CanLII)
- 81) 1986 CanLII 29 (SCC), (1986) 2 S.C.R. 147, 224
- 82) 1993 ABCA 75 (CanLII)
- 83) (1974) 1 All ER 520 = [1974] ICR 53 at 64
- 84) [1979] ICR 52 (CA)
- 85) 1991(1) ALT 154
- 86) 1966 (1) SCR 461



**THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

**Review WPMP No.17876 of 2015 in W.P No.34642 of 2014;
W.P. No. 434 of 2016 and W.P. No.5061 of 2017**

COMMON ORDER: (per Hon'ble the Acting Chief Justice Sri Ramesh Ranganathan)

Review WPMP No.17876 of 2015 was filed seeking review of the order passed by this Court in W.P.No.34642 of 2014 dated 21.11.2014. W.P.No.434 of 2016 was filed to declare the assessment order, passed by the Assistant Commissioner (CT)-I on 30.08.2008, as illegal and unconstitutional, and to set aside the same. A consequential direction was sought therein to the respondents not to take any coercive measures against the petitioner for recovery of the arrears of tax of Rs.12.60 crores, in the absence of a validly passed assessment order. W.P.No.5061 of 2017 was filed seeking a mandamus to declare the assessment order dated 30.08.2008 passed by the Assistant Commissioner (CT)-I, and the consequential action of the Deputy Commercial Tax Officer, Abids, Hyderabad, in issuing a public auction notice vide letter dated 03.01.2017 in relation to the petitioner's property admeasuring 2050 sq. yards situated at Khairatabad, as illegal, unconstitutional, without jurisdiction and void, and to set aside the same. The consequential direction sought therein was to direct the respondents not to take any coercive measures against the petitioner for recovery of the tax amount of Rs.12.60 crores in the absence of a validly passed assessment order.

Facts, to the limited extent necessary, are that the petitioner, a Company incorporated under the Companies Act, 1956, is, inter alia, engaged in the business of infrastructure development. They entered into a Concession Agreement dated 22.12.2005 with the

Government of India, represented by the Ministry of Shipping, Road Transport and Highways, for construction, operation and maintenance of Four Laning of the Pune-Hyderabad Section of NH-9 from Km 493/000 till Km 524/000 on Build, Operate and Transfer (BOT) basis. They claim to have commenced laying operations in January, 2006.

As the petitioner did not declare their liability to tax under the A.P. VAT Act in their monthly returns, with regards the road work at Sangareddy, their books of accounts, for the tax period August, 2006 to June, 2007, were inspected on 09.08.2007. A notice was issued on 15.04.2008 directing them to produce copies of the work order relating to the road work at Sangareddy, details of the expenditure incurred from the date of commencement of the said road work, and a copy of the RA bills received, if any, for the subject road work. A notice, in Form VAT 305A, was issued on 19.05.2008, which was served on the petitioner on 02.06.2008 wherein it was recorded that, during the period August, 2006 to June, 2007, the petitioner had, besides the Indira Sagar canal work, also executed a road work at Sangareddy; but they had failed to declare the turnover, relating to the work, in their monthly returns. By their letters dated 14.06.2008, 30.06.2008 and 17.07.2008 the petitioner sought time to submit their reply, and time was granted upto 31.07.2008. The petitioner submitted their reply, which was received in the office of the Commissioner (CT), Enforcement Wing on 31.07.2008 and 28.08.2008 respectively, to which they enclosed only a copy of the work order which disclosed the value of the subject work as Rs.144 crores.

A notice dated 20.08.2008 was issued to the petitioner to produce copies of certain documents. In reply thereto, the petitioner, vide letter dated 27.08.2008, submitted certain documents, and contended that the value of the material, at the time of incorporation, could be ascertained from the work order. They, however, failed to produce details to enable value of the material, at the time of incorporation in the works, to be determined by applying Rule 17(1)(a) of the A.P. VAT Rules. As no other information was forthcoming, the petitioner's taxable turnover was determined under Section 4(7)(a) of the Act, read with Rule 17(1) of the A.P. VAT Rules; and, after allowing them 30% standard deduction, the output tax, on the remaining 70% of the value of the work, was determined at 12.5% i.e., as Rs.12.60 crores. The tax proposed in the show cause notice was confirmed by the assessment order dated 30.08.2008, and VAT of Rs.12,60 crores/-, for the tax period August, 2006 to June, 2007, was levied in relation to the works carried out by the Petitioner under the aforementioned agreement (laying of road/widening of road).

Aggrieved thereby, the petitioner preferred a statutory appeal to the Appellate Deputy Commissioner. As the petitioner did not pay 12.5% of the disputed tax i.e., Rs.1,57,50,000/-, (as required under Section 31(1) of the A.P. VAT Act), as a precondition for an appeal to be entertained, the Appellate Deputy Commissioner issued notice dated 04.11.2008 calling upon them to deposit the said tax amount. In reply thereto the petitioner, vide letter dated 14.11.2008, informed the Appellate Deputy Commissioner that they had submitted a representation to the State Government seeking exemption from payment of tax, as VAT was not attracted

to the build, operate and transfer projects executed by them. They requested the Appellate Deputy Commissioner not to reject admission of the appeal until the matter was decided by the Government. In his order dated 03.01.2012, the Appellate Deputy Commissioner held that, since the petitioner had failed to pay 12.5% of the disputed tax as per Section 31(1) of the A.P. VAT Act, admission of their appeal was being rejected. This order of the Appellate Deputy Commissioner was not subjected to further challenge and, as a result, the assessment order dated 30.08.2008, levying VAT of Rs.12.60 crores on the petitioner, attained finality.

A demand notice dated 19.07.2011 was issued to the petitioner informing them that they were in arrears of tax of Rs.12.60 crores for the year 2006-2007. The petitioner then approached the State Government and, at their request, the then Chief Minister directed the Principal Secretary (Revenue), vide memo dated 14.08.2012, to examine the matter. The petitioner was informed by the Commissioner, (Commercial Taxes) that the Government had decided to provide them an opportunity of representation before the Commercial Taxes Department, and hence a Committee was being constituted to give them an opportunity of hearing. The petitioner requested the Commercial Tax Officer, vide letter dated 11.08.2012, not to pursue collection of tax till the Committee took up this issue.

A final notice dated 18.09.2014 was issued by the Commercial Tax Officer, Nampally informing the petitioner that further action would be taken under the provisions of the Revenue Recovery Act, and under Section 29 of the A.P. VAT Act, in case the amount due of Rs.12.60 crores was not paid. The petitioner, vide

letter dated 20.09.2014, informed the Commissioner (CT) that, since the matter was still pending before the Government, coercive steps not be taken against them. In the meanwhile, the Commercial Tax Officer, Nampally issued notice dated 18.09.2014 calling upon the petitioner to pay arrears of tax of Rs.12.60 crores. The petitioner then made a representation to the Chief Minister on 18.09.2014, the Principal Secretary to the Government, Revenue Department and others on 20.09.2014, 18.10.2014 and 22.10.2014 requesting them not to take coercive steps for recovery, contending that they did not fall within the ambit of the provisions of the VAT Act. As payment was not forthcoming, the Commercial Tax Officer, Nampally issued garnishee notices to the Bank of India, Andhra Bank and Vijaya Bank at Hyderabad seeking to recover arrears of tax from the petitioner's account in these banks.

Aggrieved thereby the petitioner filed W.P. No.34642 of 2014 seeking a mandamus to declare the action of the Commercial Tax Officer, Nampally, in issuing garnishee notices to the three banks, asking them to pay the petitioner's money kept with them to the Commercial Tax Department, as arbitrary and illegal. A consequential direction was sought to the respondents not to recover the tax amount, pursuant to the assessment order dated 30.08.2008, till a decision was taken by the Committee constituted vide memo dated 14.08.2012. In the said Writ Petition, the petitioner contended that the Committee, constituted to examine whether Build, Operate and Transfer (BOT) projects should be exempt from payment of tax under the AP VAT Act, had still not taken a decision; and, in the interregnum, the impugned garnishee notices were issued.

During the pendency of the said Writ Petition, on the file of this Court, the petitioner filed WPMP No.44340 of 2014 in W.P. No.34642 of 2014 on 20.11.2014 to amend the prayer in the Writ Petition to include a challenge to the assessment order dated 30.08.2008. In the affidavit, filed in support of WPMP. No.44340 of 2014 in W.P. No.34642 of 2014, the petitioner stated that they had, inadvertently, omitted to challenge the assessment order dated 30.08.2008, which was confirmed in appeal by the Appellate Deputy Commissioner on 03.01.2009; the omission was neither willful nor wanton, but was purely due to inadvertence; and, therefore, leave of this Court was being sought to amend the prayer in the Writ Petition to include a challenge to the assessment order dated 30.08.2008, as confirmed in appeal by order dated 03.01.2009, as illegal, without jurisdiction, inoperative, and to set aside the same. The petitioner also sought a direction from this Court to declare the consequential action of the Commercial Tax Officer, Nampally, in issuing garnishee notices, as illegal, arbitrary and unconstitutional, and to direct the respondents not to recover the disputed tax amount from them, in furtherance of the assessment order, until a decision was taken by the Committee constituted under memo dated 14.08.2012. It is necessary to note that even in the aforesaid affidavit dated 20.11.2014, filed in support of WPMP No.44340 of 2014 in W.P. No.34642 of 2014, the contention of absence of authorization, being given to the Assistant Commissioner (CT) by the Joint Commissioner (CT), to make assessment has not been urged.

A Division bench of this Court dismissed W.P. No.34642 of 2014, by its order dated 21.11.2014, holding that the impugned

garnishee notices, for recovery of Rs.12.60 crores, was in accordance with Section 29 of the Act; the petitioner had chosen not to question the order of the Appellate Deputy Commissioner dated 03.01.2009 rejecting their request to entertain the appeal; consequently the assessment order dated 30.08.2008 had attained finality; they found no reason to entertain the inordinate and belated challenge to the assessment order, in WPMP No.44340 of 2014, more than six years after the assessment order was passed; there was no provision in the VAT Act which conferred power on the Government to grant exemption from tax; unlike Section 9 of the repealed APGST Act, which empowered the Government to grant exemption, the only power conferred on the State Government, under Section 15(1) of the VAT Act, was to grant refund of the tax paid; and as the assessment order, passed by the assessing authority under the provisions of the VAT Act, had attained finality, the mere fact that the Government had directed the respondent not to take action, for recovery of the arrears of tax for some time, did not disable the assessing authority from exercising his power, under Section 29 of the Act, to recover the amounts due under the assessment order passed, more than six years earlier, on 30.08.2008.

The petitioner then filed Review WPMP No.17876 of 2015 on 27.04.2015, seeking review of the order in W.P. No.34642 of 2014 dated 21.11.2014, contending, for the first time, that they had failed to urge the crucial aspect of lack of jurisdiction of the Assistant Commissioner (CT) - I in passing the impugned assessment order; the assessment order dated 30.08.2008 was passed by the Assistant Commissioner (CT) - I without

authorization as required under Rule 59(1) of the A.P. VAT Rules, 2005; the Assistant Commissioner (C.T - I), Enforcement Wing, in the office of the Commissioner (C.T), was not accorded authorization by the Joint Commissioner (C.T), Enforcement to make assessment; he was only accorded authorization to inspect the petitioner, and submit a report; the authorization to cause inspection did not enable the Assistant Commissioner to pass an assessment order, in view of the judgment of the Division bench of this Court in **Sri Balaji Flour Mills v. The Commercial Tax Officer**¹; and as the issue, regarding lack of jurisdiction of the authority in passing the assessment order, was relevant and crucial, and went to the root of the matter, the order in W.P.No.34642 of 2014 dated 21.11.2014 should be reviewed by this Court.

In the additional affidavit, filed in support of WPMP No.51415 of 2015 in Rev. WPMP No.17876 of 2015, the Authorised representative of the petitioner company has stated that, in the event this Court came to the conclusion that the assessment order was passed without jurisdiction and was liable to be set aside, the petitioner was agreeable for a fresh assessment, for the relevant year, to be passed without prejudice to all other contentions.

In his counter-affidavit, filed in response to the Review WPMP, the Assistant Commissioner stated that, during the period when the assessment order was passed, it was almost a normal practice to pass the assessment order without obtaining necessary authorization; it is only in **Sri Balaji Flour Mills**¹ that this Court had declared that an authorization was required for making

¹ (2011) 40 VST 150 (AP) = (2011) 52 APSTJ 85

assessment; as the assessment order related to the year 2008, long before the order of this Court in **Sri Balaji Flour Mills**¹, this contention was not available to be raised by the petitioner after undue delay.

W.P. No.434 of 2016 was filed by the petitioner seeking a mandamus to declare the assessment order dated 30.08.2008, passed by the Assistant Commissioner (CT) – I, Enforcement Wing, Hyderabad, as illegal, unconstitutional, without jurisdiction and void, to set aside the same and to direct the respondents not to take any coercive measures against the petitioner for recovery of the disputed tax of Rs.12.60 crores in the absence of a validly passed assessment order. The petitioner contended that, as the assessment order dated 30.08.2008 was passed by the Assistant Commissioner (CT – I) without obtaining the required authorisation from the competent authority under Rule 15 of the A.P. VAT Rules, and as it was void, the petitioner had preferred a review petition in W.P. No.34642 of 2014; as the property, belonging to the petitioner, was sought to be attached in order to realise the VAT amount due, the petitioner had also filed a miscellaneous application in WPMP No.17877 of 2015, in the review petition, seeking stay of the attachment notice dated 13.01.2015; thereafter the Deputy Commercial Tax Officer, Abids had issued a public auction notice dated 15.12.2015 to bring the house property, bearing Door No.F3/6-1-125, Sy. No.T.S. No.8, Block No.c, Ward No.81 of Khairatabad Mandal, Hyderabad District belonging to the petitioner, to sale in order to realise the VAT amount due and payable by the petitioner to the department; and the urgency displayed in bringing the property of the petitioner to sale by way

of auction, despite the pendency of the review petition, reflected the contumacious conduct of the respondents in trying to harass the petitioner.

In the additional affidavit, filed in WPMP No.25358 of 2017 in W.P. No.434 of 2016, the authorised representative of the petitioner company has submitted that, in the event this Court came to the conclusion that the assessment order was passed without jurisdiction and was liable to be set aside, the petitioner was agreeable for a fresh assessment order to be passed, for the relevant assessment year, without prejudice to all other contentions; and the petitioner undertook not to raise the plea of limitation, against the assessing officer, in the event the matter was remanded for fresh assessment at this stage.

A Division bench of this Court, by its order in WPMP No.542 of 2016 in W.P.No.434 of 2016 dated 06.01.2016, while holding that they saw no reason to interdict the sale scheduled to be held on 20.01.2016, directed the respondents not to confirm the sale till 10.02.2016. Though the said Writ Petition is still pending, the interim order passed on 06.01.2016 was not extended beyond 20.01.2016, and there is no interim order in force, in the said Writ Petition, ever since.

The petitioner then filed W.P. No.5061 of 2017 questioning the assessment order dated 30.08.2008, and the consequential action of the Deputy Commercial Tax Officer, Abids, Hyderabad in issuing public auction notice dated 03.01.2017, in relation to their property admeasuring 2050 square yards situated at D. No.F3/6-1-125, Sy. No. T.S. No.8, Block No.C, Ward No.81, Khairatabad Mandal, Hyderabad District, as without jurisdiction and void; and

to direct the respondents not to take any coercive measures for recovery of the disputed tax of Rs.12.60 crores. It is the petitioner's case that, despite the order of this Court not to finalise the sale pursuant to the auction, there were no bidders for the property on the date of the auction, and the auction could not go on; and the Assistant Commissioner (CT I) had, thereafter, issued a public auction notice dated 03.01.2017 proposing to auction the subject property. As the jurisdiction of the authority to pass the assessment order was subjected to challenge, a representation was submitted by the petitioner to the Commercial Tax Department on 06.02.2017 requesting them to defer auction proceedings. The petitioner requested the Commercial Tax Department to await the decision of the High Court in the review petition filed in W.P. No.34642 of 2014, and W.P. No.434 of 2016. The petitioner claims that the said representation was not even accepted by the department; the Deputy Commercial Tax Officer, Abids, Hyderabad conducted the auction on 08.02.2017; and the action of the respondents, in displaying undue urgency in bringing the property belonging to the petitioner to sale, despite pendency of the review petition, was illegal and void.

A Division bench of this Court passed the following interim order, in W.P. No.5061 of 2017, on 14.02.2017:-

“Heard Sri C.V. Mohan Reddy, Learned Senior Counsel for the petitioner.

Sri J. Anil Kumar, Learned Special Standing Counsel, takes notice for the respondents.

In view of the fact that an application for review in W.P.M.P. No.17876 of 2015 has already been entertained by the Bench which dismissed W.P. No.34642 of 2014 and also in view of a limited interim order granted by the same bench in a writ petition i.e., W.P. No.434 of 2016 challenging an auction notice, both of which are now pending for consideration, there will be an interim order permitting the respondents to proceed with the sale but not to confirm it until further orders.

Office to get appropriate orders of the Hon'ble The Acting Chief Justice to tag this Writ Petition along with the Review Application and W.P. No.434 of 2016.”

As noted hereinabove, in Review W.P.M.P. No. 17876 of 2015 in W.P No. 34642 of 2014, in W.P. No. 434 of 2016 and in W.P. No. 5061 of 2017, the petitioner has questioned the authority/jurisdiction of the Assistant Commissioner (CT - I) in passing the assessment order dated 30.08.2008, without obtaining the required authorization from the competent authority under Rule 59 of the A.P. VAT Rules, 2005, and seeks a direction to declare the said assessment order as void and a nullity. It is the petitioner's case, in short, that the Assistant Commissioner (CT - I) was accorded authorization by the Joint Commissioner (CT) Enforcement only to inspect the petitioner, and submit a report of compliance after completion of inspection; he was not authorized to make an assessment; consequently the Assistant Commissioner (CT) - I lacked jurisdiction to pass the assessment order dated 30.08.2008 levying tax of Rs.12.60 crores on the petitioner; and this issue is covered by the judgment of a Division bench of this Court in **Sri Balaji Flour Mills**¹.

The questions, which necessitate examination in these batch of cases, are mainly (i) whether absence of authorization, being given to the Assistant Commissioner (CT-I), to make assessment, renders the assessment order passed by him on 30.08.2008 null and void, in which event alone can its validity be challenged in collateral proceedings (Review WPMP No.17876 of 2015); and (ii) whether a direct challenge to the validity of the assessment order dated 30.08.2008 should be entertained after an inordinate and

unexplained delay of more than eight years (W.P. No.436 of 2016 and W.P. No.5061 of 2017).

As elaborate submissions, both oral and written, were put forth by Sri C.V. Mohan Reddy, Learned Senior Counsel and Sri Vivek Chandrasekhar, Learned Counsel appearing on behalf of the petitioners, and Sri M. Govind Reddy and Sri J. Anil Kumar, Learned Special Standing Counsel appearing on behalf of the respondents, it is convenient to examine them under different heads.

I. IS THE ASSESSMENT ORDER, PASSED WITHOUT AUTHORIZATION TO MAKE ASSESSMENT, VOID?

Sri C.V. Mohan Reddy, Learned Senior Counsel appearing on behalf of the petitioner, would submit that the assessment order, passed by the 3rd respondent, is without jurisdiction as it was passed without obtaining valid authorization from the competent authority as contemplated under Rule 59(1) Sl No. 4(ii) (b) and (d), of the A.P. VAT Rules, 2005; as a result Section 21(4) of the A.P. Vat Act and Rule 59 of the A.P. VAT Rules have been contravened, and thereby the assessment order has been rendered void; the challenge, to the assessment order dated 30.08.2008, was made in W.P. No. 34642 of 2014 after issuance of garnishee notices in the year 2014; and the challenge to the auction notices was made in W.P. No. 434 of 2016 & W.P. No. 5061 of 2017, in the years 2016 and 2017 respectively; as held in **Sri Balaji Flour Mills¹**, the assessment order, passed by the 3rd respondent, is without authority and jurisdiction; it is therefore void; and can, therefore, be challenged at any stage, including in collateral proceedings.

On the other hand Sri M. Govind Reddy, Learned Special Standing Counsel for Commercial Taxes, would submit that the present case is not usurpation of authority complete/total lack of jurisdiction; while lack of authorization to make assessment may amount to wrongful assumption of jurisdiction, it cannot be equated to inherent lack of jurisdiction or authority; either in the case of excessive, inherent or complete lack of jurisdiction (Fundamental nullity Ab-initio), or in a case of wrongful assumption of Jurisdiction, the aggrieved party can have recourse to the special appellate procedure provided by law within the stipulated time limit; W.P.No.34642 of 2014, filed challenging the Garnishee order, cannot be reopened on the ground that the assessment order was passed under wrongful assumption of jurisdiction, apparently a collateral proceeding; in **Central Potteries Ltd., Nagpur v. State of Maharashtra**² the Supreme Court held that an order passed by an authority with jurisdiction of the matter, which was expressed otherwise than in the mode prescribed by law, is not a nullity; at the most it may amount to wrongful assumption of jurisdiction which cannot be a ground for a collateral attack; it is not even the case of the petitioner that the respondents lacked initial jurisdiction (audit authorization), and the assessment order is a fundamental nullity and is abinitio void, or a total absence of power, questioning which the petitioner could bring a direct action in nullity under Article 226 Constitution of India; nullity exists when no chance of validation is possible, in contrast with the chances of validating the order by remanding the matter, and directing the officer to obtain authorization to make

² (1962) 13 STC 472

assessment; unlike the Assistant Commissioner (CT) –I, the Assistant Commercial Tax Officer (ACTO) cannot pass an assessment order as he is completely barred from assessing, and is incompetent to assess, dealers to tax as the statutory rule itself confers the power to assess dealers only to officers in the cadre of Deputy Commercial Tax Officers or above, either with or without approval from the superior officers; and there is no scope of the superior officer granting approval to the ACTO.

As the very foundation of the petitioner's claim, that the assessment order dated 30.08.2008 is a nullity and is *ab-initio* void, is based on **Sri Balaji Flour Mills**¹, it is necessary to refer to the contentions raised therein, and the opinion expressed by the Division Bench, in some detail. VAT dealers, in the erstwhile State of Andhra Pradesh, had challenged the validity of the Rule 59(1) of the A.P.VAT Rules, in so far as it conferred the power of assessment of Value Added Tax on Commercial Tax Officers or Deputy Commercial Tax Officers, in case of dealers in the territorial jurisdiction of the circle, and it empowered the Deputy Commissioner of the Division to authorize any officer, not below the rank of DCTO of the Division, to make assessment, as ultravires the provisions of the A.P. Value Added Tax Act, 2005.

In the cases, which formed part of the said batch, the jurisdictional Deputy Commissioners had issued authorization for audit, in accordance with the VAT Audit Manual of the Commercial Taxes department; audit was undertaken, after issuing notice of audit in Form VAT-304, by the authorized officer of the Department, namely, the Assistant Commissioner or the Commercial Tax Officer or the Deputy Commercial Tax Officer, as

the case may be; pursuant to such audit, the petitioners were served with notices of assessment of VAT in Form VAT 305-A; and the officer, authorized to audit, had passed the assessment order in Form VAT-305. It was contended before the Division Bench in **Sri Balaji flour Mills¹**, among others, that assessment by an authority, not designated as the assessing authority under Section 2(4) of the VAT Act, was illegal; and if the Deputy Commercial Tax Officer, as authorized by the Deputy Commissioner, audited and assessed the VAT dealer, who was within the pecuniary jurisdictional limits of another Commercial Tax Officer/Assistant Commissioner, the very purpose of assessment under the VAT Act would be defeated.

It is in this context that a Division bench of this Court held that, in view of Section 20(1), Section 21(1), (3) and (4) of the A.P. VAT Act, an officer, as prescribed by the Rules, could alone receive and assess the returns; when the Rules authorised or empowered such officers, no authorisation was again required under Section 2(4) of the Act; when the functions were performed by officers, in the respective territorial jurisdiction, it may not need any further authorisation either by the Commissioner or the Additional/Joint/Deputy Commissioner unless the Rules provide for such authorization; but if any officer is required to perform the functions not assigned, or outside the territorial limits (be it division or circle), the Rules required authorization by the designated higher supervisory officer including the Commissioner under Section 2(4) of the Act; Section 43 of the Act, and Rules 52 and 53 of the Rules, showed that VAT audit was part of tax administration; the Government of A.P. had issued guidelines, for

tax officers conducting audit, which was compiled as the VAT Audit Manual; these guidelines were referable to Section 76 of the Act which conferred power to remove difficulties on the Government; the Commissioner had issued VAT audit instructions vide circular dated 19.06.2006; the Additional Commissioner and Deputy Commissioners were empowered to authorize audit; no officer mentioned in Rule 59(1)(7) could take up audit without authorization; as the Audit Manual was not inconsistent with Section 43 or Rule 59(1)(7), the officers were bound to follow the instructions therein; assessment under Section 21(4), pursuant to a detailed scrutiny of the accounts of any dealer within a period of four years from the end of the period for which assessment is to be made, may be considered as one pursuant to an audit; as audit cannot be taken up without prior authorization of the Deputy Commissioner concerned as per Rule 59(1)(7), necessarily there ought to be a further authorization to undertake assessment; although under Section 21(4) the authority prescribed can take up assessment, on a reading of Section 43 of the Act and Rule 59(1)(4)(ii)(b) and (d) and 59(7) of the VAT Rules, it was clear that, unless and until there was a separate authorization to undertake assessment, an officer, authorized to audit the accounts of a VAT dealer, could not undertake assessment; and assessment, without authorization of the higher official as specified in Rule 59(1)(4)(ii)(b) and (d) of the Rules, would be without authority or jurisdiction as it would contravene not only Section 21(4) but also Rule 59(1).

The Division bench further held that, since authorisation to audit under Section 43 read with Rule 59(1)(7) by itself did not enable an audit officer to undertake assessment, all the

assessment orders and consequential orders necessitated being set aside. While remitting the matters to the respective audit officers, and directing them to submit audit reports as contemplated under Chapter VII of the VAT Audit Manual for appropriate post-audit action, the Division bench left it open to the authorizing officer or authority prescribed to undertake assessment in accordance with law if the competent controlling and/or supervising authority, like the Deputy Commissioner, issued separate orders authorizing assessment.

While the Division Bench, in **Sri Balaji Flour Mills¹**, has no doubt held that an assessment order passed, without authorisation from the competent authority, was without authority or jurisdiction, it did not declare the assessment orders, impugned therein, null and void. It is necessary, therefore, to examine whether the impugned assessment order dated 30.08.2008 is a nullity, and whether its validity can be challenged in collateral proceedings, for the review petition is filed seeking review of the order in W.P.No.34642 of 2014 wherein the garnishee notices issued to the petitioner's banks was under challenge.

The consequence which should be visited on the abuse or wrongful exercise of power is no abstract theory, but experience of life and must be solved by practical considerations woven into legal principles. (**Nawabkhan Abbaskhan v. State of Gujarat³**; **Ridge v. Baldwin⁴**). Behind the simple dichotomy of void and voidable acts (invalid and valid until declared to be invalid) lurk terminological and conceptual problems of excruciating complexity. The problems

³ (1974) 2 SCC 121

⁴ (1963) 2 ALL ER 66

which arise premise that if an act, order or decision is ultra vires in the sense of outside jurisdiction, it is said to be invalid, or null and void. If it is intra vires it is, of course, valid. If it is flawed by an error perpetrated within the area of authority or jurisdiction, it is usually said to be voidable; that is, valid till set aside in appeal or is quashed by certiorari for error of law on the face of the record.

(de Smith, Woolf and Jowell *Judicial Review of Administrative Action*, 5th Edn., para 5-044; Dhurandhar Prasad Singh v. Jai Prakash University⁵).

The distinction between an order which is void, and an order which is wrong, incorrect, irregular or not in accordance with law, cannot be overlooked or ignored. Where a court lacks inherent jurisdiction in making an order, an order passed by such Court/Tribunal would be without jurisdiction, *non est* and void *ab initio*. A defect of jurisdiction of the court/Tribunal goes to the root of the matter and strikes at the very authority of the court/Tribunal to make an order. Such defect has always been treated as basic and fundamental and an order passed by a court or an authority having no jurisdiction is a nullity. Validity of such an order can be challenged at any stage, even in collateral proceedings. **(Balvant N. Viswamitra v. Yadav Sadashiv Mule⁶).** The invalidity of an order, passed by a court/Tribunal without jurisdiction, can be set up whenever and wherever it is sought to be enforced or relied upon, even in collateral proceedings. **(Kiran Singh v. Chaman Paswan⁷; Harshad Chiman Lal Modi v. DLF**

⁵ (2001) 6 SCC 534

⁶ (2004) 8 SCC 706

⁷ (1955) 1 SCR 117 : AIR 1954 SC 340

Universal Ltd.,⁸). An order passed without jurisdiction would be a nullity. It will be a coram non iudice and non est in the eye of the law. (**Union of India v. Assn. of Unified Telecom Service Providers of India**⁹; **Chandrabhai K. Bhoir v. Krishna Arjun Bhoir**¹⁰; **Chief Justice of A.P. v. L.V.A. Dixitulu**¹¹; **Union of India v. Pramod Gupta**¹²; **National Institute of Technology v. Niraj Kumar Singh**¹³).

"Illegality" is a generic term covering any act not in accordance with the law. An *ultra vires* act is illegal, but an illegal act is not necessarily *ultra vires*. Direct action in nullity is only available if the act is *ultra vires*. In a case of illegality any taxpayer may have recourse to the special procedure provided by the law within the stipulated time limits, but where *ultra vires* acts are concerned there is always the remedy to have the Courts declare it an absolute nullity. The lack of jurisdiction brings about this absolute nullity. (**Dechène v. City of Montreal**¹⁴; **Toronto Railway Co. v. Corp. of Toronto**¹⁵; **Shannon Realities Ltd. v. Ville de St-Michel**¹⁶; **Donohue Bros. v. La Malbaie**¹⁷; **Trudeau v. Devost**¹⁸; **Immeubles Port Louis Itee v. Lafontaine (Village)**¹⁹). Acting *ultra vires* and acting without jurisdiction have essentially the same meaning, although in general the term "vires" has been employed when considering administrative decisions and subordinate legislative orders, and "jurisdiction" when considering

⁸ (2005) 7 SCC 791

⁹ (2011) 10 SCC 543

¹⁰ (2009) 2 SCC 315

¹¹ (1979) 2 SCC 34

¹² (2005) 12 SCC 1

¹³ (2007) 2 SCC 481

¹⁴ (1894) A.C. 640

¹⁵ [1904] A.C. 809

¹⁶ [1924] A.C. 185

¹⁷ [1924] S.C.R. 511

¹⁸ [1942] S.C.R. 257

¹⁹ (1991) 1 SCR 326, 1991 CanLII 82 (SCC)

judicial decisions, or those having a judicial flavour. (**De Smith, Woolf and Jowell Judicial Review of administrative Action: Fifth Edition; Campaign for Housing and Tenural Rights (Chatri), Hyderabad v. Govt. of A.P.**²⁰). When the Court has not jurisdiction of the cause, there the whole proceeding is *coram non judice*. The question whether a court, or a tribunal of limited jurisdiction, has acted without jurisdiction (*coram non judice*) can be determined by considering whether, at the outset of the proceedings, that Court/Tribunal had jurisdiction to entertain the proceedings at all. (**Dhurandhar Prasad Singh**⁵).

An order passed by a person lacking inherent jurisdiction would be a nullity. The principles of estoppel, waiver and acquiescence or even *res judicata* which are procedural in nature would have no application in a case where an order has been passed by the Tribunal/court which has no authority in that behalf. Any order passed by a court without jurisdiction, being a nullity, the same ordinarily should not be given effect to. (**L.V.A. Dixitulu**¹¹; **MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd.**²¹; **Hasham Abbas ayyad v. Usman Abbas Sayyad**²²).

As noted hereinabove, the Division Bench, in **Sri Balaji Flour Mills**¹, has only held that an assessment order, passed without obtaining authorization from the competent authority to make assessment, was without authority or jurisdiction and the assessment orders were not declared null and void. Even otherwise, it needs no emphasis that even a void order or decision

²⁰ 2010 (2) ALD 789

²¹ (2004) 9 SCC 619

²² (2007) 2 SCC 355

rendered between the parties, cannot be said to be non-existent in all cases and in all situations. Ordinarily, such an order will, in fact, be effective inter-parties until it is successfully avoided or challenged in a higher forum. Mere use of the word 'void' is not determinative of its legal impact. The word 'void' has a relative rather than an absolute meaning. It only conveys the idea that the order is invalid or illegal. It can be avoided. There are degrees of invalidity depending upon the gravity of the infirmity, as to whether it is fundamental or otherwise. (**State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth**²³).

The court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be "a nullity" and "void", but these terms have no absolute sense: their meaning is relative, depending upon the court's willingness to grant relief in any particular situation. If this principle of illegal relativity is borne in mind, the law can be made to operate justly and reasonably in cases where the doctrine of ultra vires, rigidly applied, would produce unacceptable results.' (**Administrative Law, Wade and Forsyth, 8th Edn., 2000, p. 308; Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman**²⁴; **Rafique Bibi v. Sayed Waliuddin**²⁵; **Balvant N. Viswamitra**⁶).

The expression "void" has several facets. One type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab initio void and for avoiding the same no declaration is necessary, law does not take any notice of the same, and it can

²³ (1996) 1 SCC 435

²⁴ (1970) 1 SCC 670

²⁵ (2004) 1 SCC 287

be disregarded in collateral proceeding or otherwise. Another type of void act may be which is not a nullity, but for avoiding the same a declaration has to be made. Voidable act is that which is a good act unless avoided. There may be a voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and not any day prior to it. (**Dhurandhar Prasad Singh**⁵).

It is necessary to distinguish between two kinds of invalidity. The one kind is where the invalidity is so grave that the lis is a nullity altogether in which case there is no need for an order to quash it. It is automatically null and void without more ado. The continuation orders would be nullity too, because you cannot continue a nullity. The other kind is when the invalidity does not make the lis void altogether, but only voidable. In that case it stands unless and until it is set aside. If the original order is only voidable, then it would not be automatically void. Something would have to be done to avoid it. There would have to be an application for certiorari to quash it. (**R. v. Paddington Valuation Officer, ex p Peachey Property Corp. Ltd.**²⁶; **Director of Public Prosecutions v. Head**²⁷; **Dhurandhar Prasad Singh**⁵).

A challenge to the validity of an act may be by direct action or by way of collateral or indirect challenge. A direct action is one where the principal purpose of the action is to establish the invalidity. This will usually be by way of an application for judicial review or by use of any statutory mechanism for appeal or review. Collateral challenges arise when the invalidity is raised in the

²⁶ (1965) 2 All ER 836

²⁷ 1959 A.C. 83

course of some other proceedings, the purpose of which is not to establish invalidity but where questions of validity become relevant. [**Clive Lewis *Judicial Remedies in Public Law* at p. 131; Dhurandhar Prasad Singh⁵**]. Voidable acts are those that can be invalidated in certain proceedings. These proceedings are especially formulated for the purpose of directly challenging such acts. (**Nawabkhan Abbaskhan³**). On the other hand, when an act is void, it is a nullity and can be impeached in any proceedings, before any court or tribunal and whenever it is relied upon. In other words, it is subject to 'collateral attack'. An order which is void may be directly and collaterally challenged in legal proceedings. (**Nawabkhan Abbaskhan³**). When an order is held to be invalid, or is set aside, it operates from nativity, i.e., the impugned act or order was never valid. (**Nawabkhan Abbaskhan³**). When a court holds an act to be a nullity it is not a *declaration* of nullity. It is a true annulment, an annulment with retroactive force. (**Nawabkhan Abbaskhan³**).

An order can be said to be without jurisdiction, and hence a nullity, if the court passing the decree has usurped a jurisdiction which it did not have; a mere wrong exercise of jurisdiction does not result in a nullity. The lack of jurisdiction in the court passing the order must be patent on its face in order to enable the Court/Tribunal, in collateral proceedings, to take cognisance of such a nullity based on want of jurisdiction. (**Vasudev Dhanjibhai Modi²⁴; Rafique Bibi²⁵; Balvant N. Viswamitra⁶**). Illegal assumption of jurisdiction must not be confused with mistake, legal or factual, in exercise of jurisdiction. In the former the order is void whereas in the latter it is final unless set aside by higher or

competent court or authority. An order which is void can be challenged at any time in any proceeding. (**Shrisht Dhawan (Smt) v. Shaw Bros.**,²⁸).

There is a distinction between want of jurisdiction and irregular assumption of jurisdiction. While an order passed by an authority with respect to a matter over which it has no jurisdiction is a nullity and is open to collateral attack, an order passed by an authority which has jurisdiction over the matter, but has assumed it otherwise than in the mode prescribed by law, is not a nullity. It may be liable to be questioned in those very proceedings, but subject to that it is good and not open to collateral attack. (**Central Potteries Ltd., Nagpur**²; **Devi Dass Gopal Krishan v. The State of Punjab**²⁹).

The remedy of a person aggrieved by an order suffering from illegality or irregularity of procedure, is to have it set aside in a duly constituted legal proceedings or by a superior court failing which he must obey the order. An order passed by a court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings. (**Vasudev Dhanjibhai Modi**²⁴; **Rafique Bibi**²⁵; **Balvant N. Viswamitra**⁶). All irregular or wrong orders are not *necessarily* null and void. An erroneous or illegal decision, which is not void, cannot be objected in collateral proceedings. (**Balvant N. Viswamitra**⁶). No hard and fast line can be drawn between a nullity and an irregularity; but this much is clear, that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding,

²⁸ (1992) 1 SCC 534

²⁹ (1973) 31 STC 534

or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation, for it is so essentially defective as to be of no avail or effect whatsoever, or is void and incapable of being validated. (**Ashutosh Sikdar v. Behari Lal Kirtania**³⁰; **Dhirendra Nath Gorai v. Sudhir Chandra Ghosh**³¹).

The assessment order, in the present case, was passed by the Assistant Commissioner (CT) - I, an officer higher in rank than both the Commercial Tax Officer and the Deputy Commercial Tax Officer. Rule 59(1) of the Rules, as it then stood, stipulated that, for the purpose of exercising the powers specified in column 2 of the table thereunder, the authorities specified in column 3 of the table shall be the authorities prescribed. Sub-rule (4) of Rule 59(1) related to assessment and, thereunder, assessments were classified as (i) unilateral assessment under Rule 25(1) and (ii) assessment under Rule 25(5). Rule 25(5) of the Rules stipulated that, where any VAT return filed by the VAT dealer appeared to the authority prescribed to be incorrect or incomplete, the authority prescribed should assess the tax payable, to the best of his judgment, in Form VAT 305 after affording a reasonable opportunity to the dealer in Form VAT 305A. He shall serve upon the VAT dealer an order of the tax assessed, the penalty and interest due, in Form VAT 305, and the VAT dealer shall pay the sum within the time and manner specified in the notice.

With respect to unilateral assessment under Rule 25(1), Rule 59(1)(4)(i) of the Rules stipulated the Assistant Commissioner (CT) Large Tax Payer Unit as the authority in the case of dealers in the

³⁰ (1908) ILR 35 Cal 61, 72

³¹ (1964) 6 SCR 1001 : AIR 1964 SC 1300

LTU concerned; and the Commercial Tax Officer as the authority in the case of dealers in the circle concerned. With respect to assessment under Rule 25(5), the authorities prescribed in column 3 of the table I, in terms of Rule 59(1)(4)(ii) were (i) the Assistant Commissioner (CT) Large Tax Payer Unit in case of dealers in the LTU concerned, or (ii) the Commercial Tax Officer in case of dealers in the Circle concerned; or (iii) any officer, not below the rank of Deputy Commercial Tax Officer of the Division concerned, as authorised by the Deputy Commissioner concerned, in case of the dealers in the territorial jurisdiction of the Division concerned; or (iv) any officer, not below the rank of Deputy Commercial Tax Officer in the State, as authorised by the Joint Commissioner or Additional Commissioner, empowered for this purpose by the Commissioner.

The assessment order, in the present case, falls within the ambit of Rule 25(5) of the Rules and, consequently, the Assistant Commissioner (CT) LTU with respect to LTUs, and the Commercial Tax Officer in the case of dealers in the circle concerned, were entitled to make assessment even without an authorisation for assessment. However officers, not below the rank of a Deputy Commercial Tax Officer, were also entitled to assess a dealer, within the territorial jurisdiction of the Division, on their being authorised by the Deputy Commissioner/Joint Commissioner/Additional Commissioner to do so. While the power conferred on the Deputy Commissioner, to authorise officers to make assessment, was confined to his division, no such territorial limits were prescribed for the Joint Commissioner or the Additional Commissioner, (empowered for this purpose by the Commissioner),

and they were entitled, on being so empowered by the Commissioner, to authorize any officer, not below the rank of Deputy Commercial Tax Officer, to make assessment.

Rule 59(1)(4)(ii) of the Rules prohibited all officers, below the rank of a Deputy Commercial Tax Officer, to assess a dealer to tax under Rule 25(5) of the Rules (since the authorization to make assessment can be given only to Assistant Commissioners/ Commercial Tax Officers/Deputy Commercial Tax Officers). Assessment, in the present case, was made by the Assistant Commissioner (CT) who is higher in rank not only than a Deputy Commercial Tax Officer but also a Commercial Tax Officer. The fact that, in the present case, the Assistant Commissioner (CT) was authorized, to inspect/audit the petitioner's books of accounts, is not in dispute. As he was also not authorized to make assessment, the question which necessitates examination is whether absence of authorisation being given to the Assistant Commissioner, by the Joint Commissioner (CT), to make assessment is a mere procedural irregularity, (for, on such authorization, the Assistant Commissioner (CT) - I would, admittedly, be entitled to assess the petitioner to tax under the Act), or whether it would render the assessment order null and void, as an order suffering from inherent lack of jurisdiction. If it is the former, then the fact that the petitioner subjected themselves to assessment by the Assistant Commissioner, without demur or protest, would require this Court to refrain from interference. It is only if it is the latter would this Court be required to declare, subject to other considerations, that the assessment order, passed by the Assistant Commissioner (CT)-

I, suffers from inherent lack of jurisdiction and is, therefore, null and void.

In **Central Potteries Ltd.**², the question which arose for consideration before the Supreme Court was whether the appellant therein could claim that it was not liable to pay tax under the provisions of the Central Provinces and Behar Sales Tax Act, 1947 (hereinafter called the “1947 Act”), on the ground that it had not been validly registered as a dealer under Section 8 of the said Act. The 1947 Act received the assent of the Governor-General on 23.05.1947 and came into force on 01.06.1947. A notification was issued on 27.05.1947 publishing draft rules which was proposed to be made in the exercise of the powers conferred by Section 28 of the 1947 Act. Two other notifications were issued on 27.05.1947 under Section 8 of the 1947 Act fixing 15.08.1947 as the date by or on which all dealers were liable to pay tax under the 1947 Act, and to get themselves registered. Another notification was issued, under Section 3 of the 1947 Act, appointing District Excise Officers, as Sales Tax Officers, to receive applications for registration, and for issuing certificates under Section 8 of 1947 Act.

The appellant had submitted an application to the Sales Tax Officer on 02.07.1947 to register itself as a dealer under the 1947 Act. On this application, a certificate was issued on 21.07.1947 and was delivered to the appellant on 13.09.1947. The appellant continued to submit its returns under the 1947 Act, assessments were made thereon, and taxes were paid by them for the period from 01.06.1947 to 30.06.1951. Thereafter, an idea dawned on the appellant that the proceedings taken by the respondents under

the 1947 Act were unauthorized, the assessments were illegal, and in consequence it was entitled to refund of the amounts paid as sales tax. The appellant instituted proceedings contending that the Sales Tax Officer, who issued the registration certificate to the appellant on 21.06.1947, was not authorized to do so under the 1947 Act; and that, in consequence, all the assessments and recoveries of tax were illegal and void. This contention was based on the submission that Section 3(1) of the 1947 Act conferred authority on the State Government to appoint any person to be a Commissioner of Sales Tax, and “such other persons under any prescribed designations” to assist him as it thinks fit; as the word “prescribed” was defined in Section 2(e) of the 1947 Act to mean prescribed by rules made under the 1947 Act, and as the rules finally came into force only on 15.08.1947, appointment of District Excise Officers as Sales Tax Officers, for the purpose of Section 8 of the 1947 Act, on 27.05.1947 was in contravention of Section 3(1); and, as a consequence, the issue of registration certificate on 21.07.1947 by an officer appointed under the notification was void.

It was also contended that under Section 10(1) of 1947 Act, while every registered dealer was under an obligation to make returns for the purposes of assessment, a dealer, who was not registered, became liable to send the return only if he was required to do so by the Commissioner by a notice served in the prescribed manner; Rule 22, which was framed for carrying out the purposes of Section 10(1), provided that, if the Commissioner was of the opinion that a dealer other than a registered dealer was liable to pay tax, he may send a notice to him in a form prescribed therein, requiring him to furnish returns; the jurisdiction of the Sales Tax

Officer to take proceedings for assessment with respect to non-registered dealers depended on the issue of a notice such as the one prescribed by Section 10 and Rule 22; and as no such notice was issued, in the case of the appellant, the assessment proceedings must be held to be incompetent, if the registration certificate was invalid.

While holding that they saw no force in this contention, the Supreme Court, in **Central Potteries Ltd**², observed that the taxing authorities derived their jurisdiction to make assessments under Section 3 and 11 of the Act, and not under Section 10 which was purely procedural; the appellant had itself, acting under Section 10(1), been submitting voluntarily returns on which the assessments had been made; it was now idle for it to contend that the proceedings, taken on its own returns, were without jurisdiction; there was a fundamental distinction between want of jurisdiction and irregular assumption of jurisdiction; whereas an order passed by an authority with respect to a matter over which it had no jurisdiction was a nullity and was open to collateral attack, an order passed by an authority which had jurisdiction over the matter, but had assumed it otherwise than in the mode prescribed by law, was not a nullity; it may be liable to be questioned in those very proceedings, but subject to that it was good, and not open to collateral attack; therefore, even if the proceedings for assessment were taken against a non-registered dealer, without a notice being issued to it under Section 10(1), that would be a mere irregularity in the assumption of jurisdiction; the order of assessment, passed in those proceedings, could not be held to be without jurisdiction; this must afortiori be so, when the appellant had itself submitted

to the jurisdiction and made a return; and even if registration of the appellant as a dealer under Section 8 was bad, that had no effect on the validity of the proceedings taken against it under the Act, and the assessment of tax made thereunder.

In **Sri Balaji Flour Mills**¹, the Division Bench has no doubt observed that an assessment, without authorisation of the Deputy Commissioner/other officers as specified in Rule 59(1)(4)(ii)(b) and (d), would be without authority or jurisdiction, and would contravene not only Section 21(4) of the Act, but also Rule 59(1) of the Rules; and authorisation to audit, under Section 43 read with Rule 59(1)(7), by itself, does not enable the audit officer to undertake assessment. The fact, however, remains that the Division bench, in **Sri Balaji Flour Mills**¹, did not declare the assessment order null and void. The assessment orders were set aside and the matters were remitted to the respective audit officers, leaving it open to the competent authority, i.e the Deputy Commissioner/Joint Commissioner/ Additional Commissioner, to issue a separate authorization for assessment and, thereafter, for such authorised officer to undertake assessment in accordance with law.

The Division bench, in **Sri Balaji Flour Mills**¹, further observed that, when the Rules authorised or empowered such officers, no authorisation was again required; when the functions were performed by officers, in the respective territorial jurisdiction, it may not need any further authorisation; but if an officer is required to perform the functions not assigned or outside the territorial limits (be it division or circle), the rules required authorisation by the designated higher supervisory officer.

The law declared by the Division Bench, in **Sri Balaji Flour Mills¹**, is that if assessment is made by the Assistant Commissioner (CT) LTU, in respect of LTU dealers, no authorisation is required, but if the Assistant Commissioner (CT) LTU is required to make assessment, beyond his territorial jurisdiction, authorisation is required. Likewise for other Assistant Commissioners authorisation is required to make assessment for LTU and other dealers, as they lack territorial jurisdiction to do so. Similarly, while no authorisation is required for Commercial Tax Officers to make assessment within their circle, authorisation is required for them to make assessment beyond their circle as they lack territorial jurisdiction to do so.

The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity. If such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the proceedings by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity. (**Harshad Chiman Lal Modi⁸**). The objection as to local jurisdiction of a Court does not stand on the same footing as an objection to the competence of a Court to try a case. Competence of a Court to try a case goes to the very root of

the jurisdiction, and where it is lacking, it is a case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived. (**Hira Lal Patni v. Sri Kali Nath**³²). The observation of the Division Bench, in **Sri Balaji Flour Mills**¹, that the officers, who assessed dealers to tax, lacked authority or jurisdiction to do so, were made with reference to their lack of territorial jurisdiction to assess dealers to tax.

In the present case, the Assistant Commissioner (CT-I) Enforcement Wing assumed the power to make assessment, on the basis of the authorisation given to him by the competent authority to inspect the books of accounts of the petitioner, even though he did not have a specific authorisation from the competent authority to assess the petitioner to tax. As held by the Supreme Court, in **Central Potteries Ltd.**¹, there is a fundamental distinction between want of jurisdiction and irregular assumption of jurisdiction; whereas an order passed by an authority with respect to a matter over which it had no jurisdiction is a nullity and is open to collateral attack, an order passed by an authority, with respect to a matter over which it had assumed jurisdiction otherwise than in the mode prescribed by law, was not a nullity; it may be questioned in those very proceedings, but subject to that it is good, and not open to collateral attack. The challenge to the validity of the assessment order dated 30.08.2008, in Review WPMP No.17876 of 2015, is a collateral attack as what was challenged in W.P.No.34642 of 2014 (the order passed in which on 21.11.2014 is under challenge in the Review WPMP) are the

³² (1962) 2 SCR 747 : AIR 1962 SC 199

garnishee notices issued to the petitioner's banks, and not the assessment order dated 30.08.2008.

If the Division Bench, in **Sri Balaji Flour Mills¹**, was of the view that the assessment order suffered from inherent lack of jurisdiction, then the proceedings would have been declared null and void. It is only because the assessment order was held to suffer from the vice of irregular assumption of jurisdiction i.e., assumption of jurisdiction other than the mode prescribed, in that it was passed without authorisation from the Deputy/Joint Commissioner, was the matter remitted to the Audit Officer, leaving it open to him to make assessment afresh on his being authorised to do so by the Deputy/Joint/Additional Commissioner. While an assessment order passed by an officer below the rank of Deputy Commercial Tax Officer would suffer from inherent lack of jurisdiction since the Rules do not permit such an officer even to be given an authorization to make assessment, the assessment orders passed by an officer in the rank of Deputy Commercial Tax Officer and above, without authorization from the competent authority to make assessment, would, at best, constitute irregular assumption of jurisdiction which can either be waived by the dealer or cured on an authorization being given in their favour by the competent authority. While such assessment orders can be set aside in a direct challenge thereto, it cannot be subject to collateral attack in proceedings where the validity of the assessment order is not put in issue.

II. IS THE DOCTRINE OF ACQUIESCENCE OR WAIVER APPLICABLE TO THE FACTS OF THE PRESENT CASE?

Sri C.V. Mohan Reddy, Learned Senior Counsel appearing on behalf of the petitioner, would submit that the assessment order, for the tax period August, 2006 to July, 2007, was passed on 30.08.2008; the assessment order was subjected to challenge in W.P. No. 34642 of 2014, after garnishee notices were issued in the year 2014, and the auction notices were subjected to challenge in W.P. No. 434 of 2016 & W.P. No. 5061 of 2017 in the years 2016 and 2017 respectively; and the mere fact that, the petitioner had subjected itself to assessment by the Assistant Commissioner (CT-I), without knowing that he lacked authorization to make assessment, is no bar for filing the writ petition, as the assessment order was passed without authority and is void.

On the other hand, Sri M. Govind Reddy, Learned Special Standing Counsel for Commercial Taxes, would submit that a party must be held to have waived his right, when they have subjected themselves to the jurisdiction of the authority; they cannot later raise an objection to the jurisdiction of the assessing authority.

It is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity. (**Holmes v. Russell**³³; **Ashutosh Sikdar**³⁰). Consent or waiver can cure defect of jurisdiction but cannot cure inherent lack of jurisdiction. (**Hira Lal Patni**³²; **Ledgard v. Bull**³⁴). Total want of jurisdiction is an

³³ (1841) 9 Dowl 487

³⁴ 13 Indian Appeals 134

infirmity which is fatal to the proceedings, and no amount of consent can cure it. There is, however, a distinction between want of inherent jurisdiction and irregular exercise or assumption of jurisdiction. While consent cannot clothe a Tribunal with jurisdiction where none exists, irregular exercise or assumption of jurisdiction can always be waived. (**Davinder Singh v. The Deputy Secretary-cum-Settlement Commissioner, Rural Rehabilitation Department, Jullundur**³⁵; **Devi Dass Gopal Krishan**²⁹).

The maxim, which sanctions the non observance of a statutory provision, is *cuilibet licet renuntiare juri pro se introducto*. Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy. (**Maxwell 'On the Interpretation of Statutes', 11th Edn., at p. 375; Ashutosh Sikdar**³⁰). Where the Court acts without inherent jurisdiction, a party affected cannot by waiver confer jurisdiction on it, which it has not. Where such jurisdiction is not wanting, a directory provision can obviously be waived. But a mandatory provision can only be waived if it is not conceived in the public interest, but in the interests of the party that waives it. (**Ashutosh Sikdar**³⁰). If it appears that the statutory conditions were inserted by the legislature simply for the security or benefit of the parties to the action themselves, and that no public interest is involved, such conditions will not be considered as indispensable, and either party may waive them without affecting the jurisdiction of the Court. (**'Craies on Statute Law', 6th Edn., at p. 269; Ashutosh**

³⁵ [1964] 66 P.L.R. 555, (Punjab HC FB)

Sikdar³⁰). No public interest is involved in the prescription that, in order to make assessment, a separate authorization is required from the competent authority, apart from the authorization to inspect/audit the books of accounts of a dealer.

Where the court has jurisdiction over the particular subject-matter of the claim of the particular parties and the only objection is whether, in the circumstances of the case, the court ought to exercise jurisdiction, the parties may agree to give jurisdiction in their particular case; or a person who submits without protest or by taking steps in the proceedings, may waive his right to object to the court taking cognizance of the proceedings. No answer, however, can give jurisdiction to a limited court, nor can a private individual impose on a judge the jurisdiction or duty to adjudicate on a matter. (**Halsbury's Laws of England, (4th Edn.), Reissue, Vol. 10, para 317; Harshad Chiman Lal Modi**⁸).

In **Bidi Supply Co. v. Union of India**³⁶, the Income Tax Officer, District III, Calcutta assessed the petitioner for the year 1950-51. On 25.01.1955 the petitioner received a letter from the Income Tax Officer, District-III, Calcutta informing them that, pursuant to orders passed under Section 5(7-A) of the Income Tax Act, their assessment records were being transferred from his office to the Income Tax Officer, Special Circle, Ranchi. A petition was filed before the Supreme Court seeking a writ to restrain the Income Tax Officer, Special Circle, Ranchi from taking up and proceeding with the assessment of the petitioner and the Supreme Court held that it was implicit in Section 5(7-A) that the Commissioner of Income-Tax or the Central Board of Revenue

³⁶ AIR 1956 SC 479 = (1956) 29 ITR 717

should, before making an order of transfer of any case, apply his or its mind to the necessity or desirability of the transfer of that particular case; and the order of transfer, which was expressed in general terms, without reference to any particular case and without any limitation as to time, was beyond the competence of the Central Board of Revenue; the Income Tax Authorities had, by an executive order, and unsupported by law, picked out the petitioner and transferred all his cases by an omnibus order unlimited in point of time; this order was calculated to inflict considerable inconvenience and harassment on the petitioner; and the petitioner, as compared with other Bidi merchants who were similarly situated, was denied equality before law.

After the judgment, in **Bidi Supply Co**³⁶, the petitioners, in **Pannalal Binjraj v. Union of India**³⁷, on their cases being transferred from Patna to Calcutta, challenged the validity of Section 5(7-A) of the Income tax Act as ultra-vires Articles 14 and 19(1)(g) of the Constitution of India, and the Supreme Court observed that none of the petitioners had earlier raised any objection to their cases being transferred; they had, in fact, submitted to the jurisdiction of the Income-tax Officers to whom their cases had been transferred; it was only after the decision in **Bidi Supply Co**.³⁶, was pronounced, that these petitioners woke up and asserted their alleged rights; as they had acquiesced in the jurisdiction of the Income-tax Officers to whom their cases were transferred, they were certainly not entitled to invoke the jurisdiction of the Supreme Court under Article 32; such conduct of the petitioners disentitled them to any relief at the hands of the

³⁷ AIR 1957 SC 397 = (1957) 31 ITR 565

Supreme Court (**Halsbury's Laws of England'**, Vol. II, 3rd Ed., p. 140, para 265; **Rex v. Tabrum, Ex Parte Dash**³⁸; **O. A. O. K. Lakshmanan Chettiar v. Commissioner, Corporation of Madras and Chief Judge, Court of Small Causes, Madras**³⁹); and the orders of transfer made by the Commissioner of Income- tax, or the Central Board of Revenue, against the petitioners cannot, therefore, be challenged by them as unconstitutional and void.

In **Devi Dass Gopal Krishan**²⁹, Sri K.K. Uppal, the assessing authority of Punjab, took cognizance and issued a notice under Section 11(2) of the Punjab General Sales Tax Act, 1948. It was contended, before the Punjab and Haryana High Court, that Sri K.K.Uppal, who issued the notice, lacked jurisdiction to take cognizance of the matter or to issue a notice; the notice issued by him was illegal as he was not the assessing authority before whom the returns were filed, and he was not entrusted specifically to deal with the case; the proceedings before him were without jurisdiction, and was a nullity; the returns were filed before the Excise and Taxation Officer, Ferozepore, and he was the only appropriate assessing authority to take any action under the Act; there was no order by which the proceedings had been transferred from the appropriate Assessing Authority, Ferozepore to Sri K.K.Uppal; Sri K.K.Uppal had no jurisdiction to take cognizance of the matter; the subsequent proceedings which were started by Sri Sarbjit Singh, Assessing Authority, by issuing a notice again, was barred by time as the period of three years had elapsed; and in the absence of any specific rule to transfer cases, the general power of

³⁸ (1907) 97 LT 551

³⁹ (1926) 51 MLJ 742 = (1927) ILR 50 Mad 130

superintendence conferred on the Commissioner did not enable him to transfer proceedings from one authority to another. It was contended on behalf of the State that the assessee had submitted to the jurisdiction of Sri K.K.Uppal; it was not a case of inherent lack of jurisdiction; and Section 11(2) of the Act authorised the assessing authority to serve a notice on the assessee regarding the correctness or completeness of the returns, and thereafter to make assessment under Section 11(3) of the Act. It is in this context that the Division Bench of the Punjab and Haryana High Court, following its earlier judgment in **Kishan Chand & Co. v. K.K. Opal, Excise and Taxation Officer, (Enforcement), Amritsar**⁴⁰, observed that Sri K.K.Uppal had the jurisdiction to make assessment inspite of the fact that no order had been passed by any authority to transfer those proceedings to him; there was no lack of inherent jurisdiction in him, and his orders could not be said to be void; at the most, it was irregular assumption of jurisdiction by him; and, in such an eventuality, the orders passed by him cannot be said to be a nullity.

In the present case also, the Assistant Commissioner (CT-I) Enforcement Wing had passed the assessment order, for the tax period August, 2006 to June, 2007, on 30.08.2008. While he was given an authorisation to inspect the books of the petitioner, he was not given a separate authorisation to make assessment. More than two years, after the assessment order was passed on 30.08.2008, a Division Bench of this Court declared the law, in **Sri Balaji Flour Mills**¹, on 30.12.2010 that a separate authorisation to make assessment was necessary, and absence of authorisation

⁴⁰ (1966) 18 STC 50 (PH)

was without authority or jurisdiction. Even in W.P.No.34642 of 2014, filed on 13.11.2014, the petitioner did not question the order of assessment nor was any contention raised therein that the Assistant Commissioner lacked authorisation to make assessment. It was more than four years after the judgment in **Sri Balaji Flour Mills¹**, that Review WPMP No.17876 of 2015 was filed on 27.04.2015 raising this plea.

As was the case before the Supreme Court in **Pannalal Binjraj³⁷**, the petitioner herein had also submitted to the jurisdiction of the Assistant Commissioner (CT-I) Enforcement Wing to make assessment; it is four years, after the judgment of the Division Bench in **Sri Balaji Four Mills¹**, that the petitioner woke up and asserted their rights; and as they had acquiesced to the jurisdiction of the Assistant Commissioner (CT-I) Enforcement Wing, they are not entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution of India, even less its review jurisdiction, to question the order of assessment dated 30.08.2008.

III. CAN THE DEFACTO DOCTRINE BE APPLIED TO THE PRESENT CASE?

Sri M. Govind Reddy, Learned Special Standing Counsel for Commercial Taxes, would submit that, during the period when the assessment order was passed, i.e., on 30.08.2008, it was almost a normal practice, prevailing in the department, that an authorization for audit would normally imply an authorization to pass an assessment order without obtaining a separate authorization for assessment; and this practice prevailed till the Judgment in **Sri Balaji Flour Mills Ltd¹** was passed on 30.10.2010; declaration of the law by the Division Bench, in **Sri Balaji Flour Mills Ltd¹**, was 2 years after the assessment order, in

the present case, was passed on 30.08.2008; and the respondent authorities neither knew, nor could they have known, that a separate authorization was required for the purpose of assessment when the assessment order, in the present case, was passed on 30.08.2008.

Till the Division Bench of this Court declared the law in **Sri Balaji Flour Mills¹**, that, apart from an authorization to inspect/audit the books of accounts of a dealer, a separate authorization to make assessment was also required to be given to these officers (who were given an authorization to inspect/audit the books of accounts) to also make assessment, assessments were being made by Assistant Commissioners/Commercial Tax Officers/Deputy Commercial Tax Officers on the basis of authorization given to them by the Deputy/Joint/Additional Commissioners to inspect/audit the books of accounts of a dealer. In the present case the Assistant Commissioner (CT-I) passed the assessment order on 30.08.2008 more than two years before the judgment in **Sri Balaji Flour Mills¹** was pronounced by the Division Bench on 30.10.2010. Till the Division bench, in **Sri Balaji Flour Mills¹**, declared the law, an officer, who was authorised to inspect/audit, also used to assess a dealer to tax under the premise that no separate authorization for assessment was required. The petitioner herein never questioned the validity of the assessment orders on this ground earlier; and, as noted hereinabove, the assessment order has attained finality.

When he passed the assessment order on 30.08.2008, the Assistant Commissioner (CT-I) Enforcement could not have known that absence of a separate authorization to make assessment, in

addition to the authorization to inspect/audit the books of accounts of a dealer, was a flaw in his appointment disabling him from making assessment. Where there is some unknown flaw in the appointment or authority of some officer or judge, the acts of the officer or judge may be held to be valid even though his own appointment is invalid and, in truth, he has no legal power at all. The defacto doctrine has been extended to offices which have been exercised by persons later held not to have lawfully occupied them. The central requirement, for the operation of the doctrine, is that the person exercising the office must have been reputed to hold it.

(Wade and Forsyth, *Administrative Law* (8th edition, 2000, 291–2; Edgar John Coppard v. HM Customs and Excise⁴¹).

In **Fawdry and Co v Murfitt**⁴² it was held: -

“.....The statute law which authorises some judges, in virtue of their appointment, to exercise one aspect only of the High Court's jurisdiction and requires them to be given separate authority to exercise other aspects of it, is piecemeal and complicated. It is unfortunate but unsurprising that Judge Seymour assumed that his appointment to the TCC, a limb of the High Court, gave him power to sit elsewhere in the High Court without further authorisation. It certainly did not amount, in our judgment, either to knowledge of his own incapacity or to wilful blindness to it.

....We hold that Judge Seymour neither knew nor ought to have known, in the sense that he was ignoring the obvious or failing to make obvious inquiries, that he was not authorised to sit as a judge of the High Court. There is uncontested evidence that, but for an oversight in the Department, he would have been formally authorised. He was well qualified to sit. This is therefore not a case of usurpation, nor of lack of the requisite competence or qualification. On established principles of law, Judge Seymour was a judge-in-fact of the High Court and his judgment therefore a judgment of the High Court....” (emphasis supplied)

As the assessment order was passed on 30.08.2008 by the Assistant Commissioner (C.T-I) Enforcement on the basis of an authorization to inspect/audit the books of accounts, the over-

⁴¹ (2003) EWCA Civ 511 = (2003) 2 WLR 1618

⁴² [2003] QB 104

sight in formally authorizing him to make assessment would not render the assessment order a nullity as it is not a case of usurpation of power by the Assistant Commissioner (CT-I) but is, at most, a case of irregular assumption of jurisdiction.

IV: REMEDY, UNDER ARTICLE 226, IS PURELY DISCRETIONARY:

Sri M. Govind Reddy, Learned Special Standing Counsel for Commercial Taxes, would submit that the remedy under Article 226 is purely discretionary; and unless the order passed is fundamentally void, or is a nullity ab-initio, this Court would, normally, refuse the relief to an applicant upon finding the petitioner guilty of approaching the Court with unreasonable delay.

The erosion of the distinction between jurisdictional errors and non-jurisdictional errors has correspondingly eroded the distinction between void and voidable decisions. Courts have become increasingly impatient with the distinction, to the extent that all official decisions are presumed to be valid until set aside or otherwise held to be invalid by a Court of competent jurisdiction.

(Judicial Review of Administrative Action, De Smith, Woolf and Jowell, 1995 Edn. at pp. 259-60; M.K. Kunhikannan Nambiar Manjeri Manikoth²³). Even if a decision is “void” or a “nullity”, it remains in being unless and until some steps are taken before the courts to have it declared void. **(Lovelock v. Minister of Transport⁴³).** Even if an act is wrong and lacking in jurisdiction, it however subsists and remains fully effective unless and until it is set aside by a court of competent jurisdiction. Until its validity is challenged, its legality is preserved. **(Halsbury’s**

⁴³ (1980) 40 P & C.R. 336

Laws of England, 4th Edn., (Re-issue) Vol. 1(1) in para 26, p. 31; M.K. Kunhikannan Nambiar Manjeri Manikoth²³).

The only way to resist unlawful action is by recourse to the law. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders. **(Wade and Forsyth in Administrative Law, Seventh Edn., 1994; Smith v. East Elloe Rural District Council⁴⁴; F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry⁴⁵; Lovelock⁴³; M.K. Kunhikannan Nambiar Manjeri Manikoth²³).** Even where the brand of invalidity is plainly visible, there also the order can effectively be resisted in law only by obtaining the decision of the Court. **(M.K. Kunhikannan Nambiar Manjeri Manikoth²³).** If a court acts without jurisdiction, its decision can be challenged in the same way as it would have been challenged if it had acted with jurisdiction, i.e., an appeal would lie to the court to which it would lie if its order was with jurisdiction **(Janardhan Reddy v. State of Hyderabad⁴⁶; M.K. Kunhikannan Nambiar Manjeri Manikoth²³).**

The argument that, if the act is regarded as *ultra vires*, the nature of the acts committed does not allow the Superior Court to do anything but find an absolute nullity to exist, ignores, first, the distinction between the right and the remedy, and second, the nature of the direct action in nullity, which like the prerogative Writs

⁴⁴ (1956) A.C. 736, 769-770 : (1956) 2 W.L.R. 888

⁴⁵ (1975) A.C. 295

⁴⁶ AIR 1951 SC 217

comes within the inherent superintending and reforming power of the Superior Court, the exercise of which is by its very nature discretionary. (**Immeubles Port Louis Itee**¹⁹). A writ of mandamus is not a writ of course or a writ of right but is, as a rule, discretionary. (**C.R. Reddy Law College Employees' Association, Eluru, W.G. District v. Bar Council of India, New Delhi**⁴⁷). A writ of certiorari is also discretionary, and is not issued merely because it is lawful to do so. (**Champalal Binani v. CIT**⁴⁸). One of the principles inherent is that the exercise of discretionary power should be for the sake of justice. (**State of Maharashtra v. Prabhu**⁴⁹). One of the limitations imposed by this Court, on itself, is that it would not exercise jurisdiction unless substantial injustice has ensued or is likely to ensue. It would not allow itself to be turned into a court of appeal to set right mere errors of law which do not occasion injustice. (**Sangram Singh v. Election Tribunal, Kotah**⁵⁰).

The criticism regarding exercise of judicial discretion to deny the remedy, where the order is without jurisdiction, has generally viewed the discretion as an attempt by a court to apply or impose its own code of morality. This, however, denies or overlooks the very history of prerogative Writs, like Mandamus and Certiorari, an extraordinary and discretionary remedy. To say that the Writ is universally available where the rights of an individual are adversely affected by the action of some public authorities taken in excess of jurisdiction, or in some circumstances where an error of law has been committed in the course of the exercise of its jurisdiction, is not

⁴⁷ 2004(5) ALD 180 (DB)

⁴⁸ (1971) 3 SCC 20

⁴⁹ (1994) 2 SCC 481

⁵⁰ AIR 1955 S.C.425

to say that the reviewing Court must slavishly apply the rules surrounding the issuance of mandamus or certiorari, and automatically respond to the application of the person affected without any further scrutiny. The principles upon which such Writs have been issued have long included the principle of disentitlement where a Court, because of the conduct of the applicant, will decline the grant of the discretionary remedy. (**Immeubles Port Louis Itee**¹⁹).

Like *certiorari*, the direct action in nullity derives from an essentially discretionary power. It was originally used to control abuse of power by the lower courts/Tribunals. Such a discretionary power may make inroads upon the rule of law, and must therefore be exercised with the greatest care. In any normal case the remedy accompanies the right. But the fact that a person aggrieved is entitled to certiorari *ex debito justitiae* does not alter the fact that the Court has the power to exercise its discretion against him, as it may in the case of any discretionary remedy. This means that he may have to submit to some act which is *ex hypothesi* unlawful, for a void act is in effect a valid act if the Court will not grant relief against it. (**Wade Administrative Law (6th ed. 1988), at pp. 695-96; Immeubles Port Louis Itee**¹⁹).

An applicant, for a prerogative Writ, is not in the position of a litigant who seeks to assert some right to which he claims he is entitled. He is rather a suppliant who seeks to invoke those remedial measures on the ground that the High Court would wish to correct some irregularity in the administration of justice, which has caused him to be aggrieved, so that justice may be done. Whether the order sought will be granted or refused is a matter wholly within

the court's discretion. Prerogative orders are not to be claimed as of right. (**Regina v. Herrod, Ex parte Leeds City District Council**⁵¹; **Immeubles Port Louis Itee**¹⁹).

Ex debito justitiae literally means "as of right", by opposition to "as of grace" (**P. G. Osborne, A Concise Law Dictionary, 5th ed.; Black's Law Dictionary, 4th ed.**). A writ cannot at once be a writ of grace and a writ of right. To say in a case that the writ should issue *ex debito justitiae* simply means that the circumstances militate strongly in favour of the issuance of the writ rather than for refusal. But the expression cannot change a writ of grace into a writ of right nor destroy the discretion even in cases involving lack of jurisdiction. A *fortiori* does the discretion remain in cases not of lack of jurisdiction, but of excess or abuse of jurisdiction such as those involving a breach of natural justice. (**Immeubles Port Louis Itee**¹⁹).

The order for the issue of the Writ is, except in cases where it goes as of course, strictly in all cases a matter of discretion. It is perfectly true to say that if no special circumstances exist, and if all that appears is a clear excess of jurisdiction, then a person aggrieved by that is entitled *ex debito justitiae* to his order. That merely means this - that the Court in such circumstances will exercise its discretion by granting the relief. In all discretionary remedies it is settled that, in certain circumstances, the Court, although nominally it has a discretion, if it is to act according to the ordinary principles upon which judicial discretion is exercised, must exercise that discretion in a particular way. But when once it is established that, in deciding whether or not a particular remedy shall be granted, the

⁵¹ [1976] Q.B. 540

Court is entitled to inquire into the conduct of the applicant, and the circumstances of the case, in order to ascertain whether it is proper or not proper to grant the remedy sought, the case must be one of discretion. (**Rex v. Stafford Justices, Ex parte Stafford Corporation**⁵²; **Regina**⁵¹; **Immeubles Port Louis Itee**¹⁹).

When the remedy lies *ex debito justitiae*, it means that the Court will normally exercise its discretion in the applicant's favour. It does not mean that the Court has no discretion to withhold the remedy, for example, where there has been undue delay. (**Wade Administrative Law** (6th ed. 1988), at pp. 695-96; **Immeubles Port Louis Itee**¹⁹). The Judge may also examine the behaviour of the parties, and the existence of alternative remedies, and dismiss the action without even taking a decision on merits. (**Harekin v. University of Regina**⁵³; **Homex Realty and Development Co. v. Corporation of the Village of Wyoming**⁵⁴; and **Immeubles Port Louis Itee**¹⁹). It is precisely because they are discretionary that action for judicial review must be promptly prosecuted (**Dussault and Borgeat**, at p. 468; **Evans et al., Administrative Law: Cases, Text, and Materials** (3rd ed. 1989), at pp. 1074-78); **Immeubles Port Louis Itee**¹⁹). Notwithstanding the fact that the Assistant Commissioner (CT-I) Enforcement Wing had irregularly assumed jurisdiction, in that he passed the assessment order dated 30.08.2008 without a specific authorisation from the competent authority to make assessment, this Court, in the exercise of its jurisdiction under Article 226 of the Constitution of India, has the discretion to withhold the relief after examining the behaviour of

⁵² [1940] 2 K.B. 33 (C.A)

⁵³ [1979] 2 S.C.R. 561

⁵⁴ [1980] 2 S.C.R. 1011

the parties, or if it is satisfied that there has been inordinate and explained delay in invoking its jurisdiction. Let us now examine whether the petitioner is guilty on this score.

V. DELAY AND LACHES:

Sri C.V. Mohan Reddy, Learned Senior Counsel appearing on behalf of the petitioner, would submit that the test for determining delay and laches is whether a parallel/third party right is created, and not the physical efflux of time. On the other hand Sri M. Govind Reddy, Learned Special Standing Counsel for Commercial Taxes, would submit that, while the provisions of the Limitation Act may not strictly apply in “lack of jurisdiction issues”, the maximum period fixed by the legislation may be treated as a reasonable period for availing the remedy; the petitioner has approached this Court with considerable delay, and is otherwise guilty of laches; alternatively, if absence of authorization is held to be a purely legal issue, error or ignorance of law does not postpone the limitation period.

In the affidavit, filed in support of W.P.No.434 of 2016, the petitioner has merely stated that, subsequent to the dismissal of W.P.No.34642 of 2014 dated 21.11.2014, he reliably learnt that the assessment order dated 30.08.2008 was passed by the Assistant Commissioner (CT-I), Enforcement Wing, without obtaining the required authorization of the competent authority under Rule 59 of the A.P. VAT Rules, 2005; and, the said assessment order being void, the petitioner had preferred review petition in W.P.No.34642 of 2014. Even in the affidavit filed in support of W.P.No.5061 of 2017, this fact is alone reiterated, and no other explanation is forthcoming as to why the petitioner chose

not to question the assessment order dated 30.08.2008 for more than seven years after it was passed.

The application, in Review WPMP No.17876 of 2015, seeking review of the order in W.P.No.24642 of 2014 dated 21.11.2014, was filed on 27.04.2015 more than six years after the assessment order was passed, W.P No.434 of 2016 was filed on 04.01.2016 more than eight months thereafter, and W.P.No.5061 of 2017 was filed on 13.02.2017 nearly two years after Review WPMP was filed before this Court. It is for the first time, in these two Writ Petitions (WP Nos.434 of 2016 and 5061 of 2017), has the petitioner sought a writ of mandamus to declare the assessment order passed by the Assistant Commissioner (CT-I) on 30.08.2008 as illegal, unconstitutional, without jurisdiction and void. No explanation is forthcoming for the inordinate delay of more than seven years in questioning the validity of the assessment order dated 30.08.2008 or, for that matter, the failure to question the said order soon after filing the Review WPMP No.17876 of 2015 on 27.04.2015.

The power of the High Court to issue a Writ under Article 226 of the Constitution is discretionary and the High Court, in the exercise of its discretion, does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner in filing a writ petition, and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. The evolution of this rule of laches or delay is premised upon a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy under the writ jurisdiction because it is likely to cause confusion

and public inconvenience and bring in its train new injustices. Where there is inordinate and unexplained delay, and third party rights are created in the intervening period, the High Court would decline to interfere, even if the State action complained of is unconstitutional or illegal. (**State of M.P. v. Nandlal Jaiswal**⁵⁵). This rule of laches or delay is not a rigid rule which can be cast in a strait jacket formula. Cases where the demand of justice is so compelling that the High Court would be inclined to interfere inspite of delay, or creation of third party rights, would, by their very nature, be few and far between. Ultimately it would be a matter within the discretion of the court; ex hypothesi every discretion must be exercised fairly and justly so as to promote justice and not to defeat it. (**Nandlal Jaiswal**⁵⁵).

If a person comes to the High Court to quash the decision of an inferior tribunal, he should act promptly. If he has been guilty of any delay, it is for him to get over it and not for the other side. (**Regina**⁵¹; **Immeubles Port Louis Itee**¹⁹). The time factor is decisive. The prerogative remedies are exceptional in their nature, and should not be made available to those who sleep upon their rights. (**Regina v. Aston University Senate, Ex parte Roffey**⁵⁶; **Immeubles Port Louis Itee**¹⁹).

Even though there is no period of limitation for Courts to exercise their powers under Article 226, nor is the High Court disabled from interference in a matter after passage of a certain length of time, it would nonetheless be a sound and wise exercise of discretion for the High Courts to refuse to exercise their

⁵⁵ (1986) 4 SCC 566

⁵⁶ [1969] 2 Q.B. 538

extraordinary powers under Article 226 in favour of a person who does not approach it expeditiously for relief, stands by and allows things to happen, then approaches the Court to put forward stale claims, and tries to unsettle settled matters. (**P.S. Sadasivaswamy v. State of T.N.**,⁵⁷). The lapse of a long period of time, prior to the filing of the writ petition, is sufficient to decline relief. (**Central Bank of India v. S. Satyam**⁵⁸).

The rule, which says that the Court may not enquire into belated and stale claims, is not a rule of law but a rule of practice based on sound and proper exercise of discretion. Each case must depend upon its own facts. The principle on which the relief to the party, on the grounds of laches or delay, is denied is that the rights, which have accrued to others by reason of the delay in filing the petition, should not be allowed to be disturbed unless there is a reasonable explanation for the delay. The real test to determine delay in such cases is that the petitioner should come to the Court before a parallel right is created, and the lapse of time is not attributable to any laches or negligence. The test is not as to physical running of time. Where the circumstances justifying the conduct exist, the illegality which is manifest cannot be sustained on the sole ground of laches. (**Dehri Rohtas Light Rly. Co. Ltd. v. District Board, Bhojpur**⁵⁹).

In **Lovelock**⁴², it was held that, as a result of consent having been given, the Minister of Transport had gone through all the machinery leading to the making of the compulsory purchase orders; he had given all the notices in the newspapers; he had held

⁵⁷ (1975) 1 SCC 152

⁵⁸ (1996) 5 SCC 419

⁵⁹ (1992) 2 SCC 598

an inquiry lasting for many, many days; eventually, he made the orders; tenders had been put out for the work to be done; all this had been done in the belief that the consent was valid—as, indeed, it was unless and until it was set aside; that having been done, it seemed impossible now to challenge the orders on the ground that the statutory procedures or requirements were not satisfied; Miss Lovelock should have applied, soon after the consent was given on April 5, 1978, to get it quashed; if she had got it quashed then, that would have been the end of the matter; but that was not done, and, everything having been done on the faith of the consent being valid, it seems that, if there was anything wrong with it, it was far too late to challenge it—or quarrel with it—now; it was far too late for the point to be taken now.

While no third party rights have accrued in the present case, it is settled law that, merely because no third party rights have intervened on account of laches on his part, and by granting relief to the petitioner no other person's rights are going to be affected, does not justify interference as this plea ignores the fact that the said consideration is only one of the considerations which the Court will take into account while determining whether a Writ Petition suffers from laches. It is not the only consideration. It is a well-settled policy of law that the parties should pursue their rights and remedies promptly and not sleep over their rights. That is the whole policy behind the Limitation Act and other rules of limitation. If they choose to sleep over their rights and remedies for an inordinately long time, the court may well choose to decline to interfere in its discretionary jurisdiction under Article 226 of the

Constitution of India. (**Ex. Capt. Harish Uppal v. Union of India**⁶⁰).

When there is inordinate delay in filing the writ petition, and when all steps taken in the proceedings have become final, the Court should be loath to quash the proceedings. The discretionary powers under Article 226 of the Constitution, to quash the proceedings, should be exercised taking all relevant factors into pragmatic consideration. The fact that no third-party rights were created in the case is hardly a ground for interference. (**Swaika Properties (P) Ltd. v. State of Rajasthan**⁶¹; **Municipal Corpn. of Greater Bombay v. Industrial Development Investment Co. (P) Ltd.**⁶²; **State of Rajasthan v. D.R. Laxmi**⁶³).

Article 226 is not a blanket power, regardless of temporal and discretionary restraints. If a party is inexplicably insouciant and unduly belated due to laches, the Court may ordinarily deny redress. In the present case, long years have elapsed after the impugned order. If relief on ground of laches is refused, the Court cannot be said to have exercised its discretion arbitrarily or improperly. (**Raja Jagdambika Pratap Narain Singh v. Central Board of Direct Taxes**⁶⁴).

As noted hereinabove while the assessment order was passed by the Assistant Commissioner (CT)-I on 30.08.2008, the judgment in **Sri Balaji Flour Mills**¹ was pronounced more than two years thereafter on 30.12.2010. It was nearly seven years after the assessment order was passed, and more than four and

⁶⁰ 1994 Supp (2) SCC 195

⁶¹ (2008) 4 SCC 695

⁶² (1996) 11 SCC 501

⁶³ (1996) 6 SCC 445

⁶⁴ (1975) 4 SCC 578

half years after the judgment was pronounced in **Sri Balaji Flour Mills¹**, has this contention, of absence of authorization in favour of the Assistant Commissioner (CT)-I, to make assessment, been raised for the first time in Review WPMP No.17876 of 2015 on 27.04.2015. There is no explanation, much less one that is satisfactory, for that delay. That being so, the High Court would be fully justified in refusing to exercise its discretion under Article 226 of the Constitution in favour of the petitioner.

VI. SHOULD THE REVIEW PETITION BE ENTERTAINED?

Sri M. Govind Reddy, Learned Special Standing Counsel for Commercial Taxes, would submit that Order XLVII Rule 1 refers to discovery of fact or knowledge of an important matter or evidence which the petitioner could not reasonably gather at the time of filing the Writ petition; the issue of authorization was a purely factual issue which the petitioners ought to have discovered by the exercise of reasonable diligence; the petitioner has not established that they had made efforts to ascertain, at any time from the date of passing the assessment order till the date of filing the review petition, whether the officer who passed the assessment order lacked jurisdiction to do so, or was not authorized to do so; the petitioner has neither fulfilled the due diligence test, nor have they shown that they were not capable of ascertaining whether or not such authorization, was granted to the respondent, to assess the petitioner; shortly, or immediately, after passing the assessment order the petitioner was pursuing the remedies before the Government; although a faint attempt was made by filing an appeal before the appellate authority, which was dismissed for non-payment of 12½% tax, the petitioner has not revealed how he

came to know that the respondent was not authorized to assess the petitioners, or how he came to know of the absence of authorisation at the time of filing the review petition; the review petition, under Order XLVII Rule 1, is liable to be dismissed solely on the ground of non-disclosure of how the petitioner came to know that the respondent lacked authorization to assess the petitioner to tax; as the petitioner claims to have found out, regarding absence of authorization, when they filed the Review M.P; they could have easily found this out earlier, even at the time of filing their reply to the assessment show cause notice denying the authority of the Assistant Commissioner (CT) – I to proceed with the assessment, or at least thereafter before the appellate authority; they could have also have approached the High Court, shortly or immediately after the appeal was dismissed; the petitioner has not spelt out why they were unable to discover the fact of absence of authorization earlier, or when they realized the effect of absence of authorization after the judgment was pronounced in **Sri Balaji Flour Mills Ltd.**¹ on 30.12.2010; when W.P. No.34642 of 2014, challenging the Garnishee Order, was pending before this Court, W.P.M.P. No.44340 of 2014 was filed to amend the prayer challenging both the assessment and the Garnishee orders; this Court dismissed W.P. No.34642 of 2014, and all the consequential M.Ps; the petitioner has filed Review W.P.M.P. No 1767 of 2015 to review the orders passed in W.P.No.34642 of 2014, but has failed or ignored to file a petition, or a formal application, to restore the amendment petition in W.P.M.P. No. 44340 of 2014; even if it is presumed that the assessment order was passed under wrong-full assumption of

jurisdiction, (unlike an order which is a fundamental nullity ab-initio void), the petitioner cannot question the garnishee notice (which is in the nature of a collateral proceeding) unless the petitioner files a petition to restore W.P.M.P. No.44340 of 2014; and, having failed to do so, the collateral challenge to the Garnishee notice is impermissible.

After referring to the assessment order dated 30.08.2008, to the rejection of their appeal on 03.01.2009, to the garnishee notice issued to the banks for recovery of Rs.12.60 crores, and to the dismissal of W.P. No.34642 of 2014 by order dated 21.11.2014, the petitioner contended, in the affidavit filed in support of Review WPMP No.17876 of 2015, that, at the time of hearing of the Writ Petition, a very crucial aspect, regarding lack of jurisdiction of the authority to pass the assessment order, was relevant and crucial, and went to the root of the matter; and the order passed in W.P. No.34642 of 2014 dated 21.11.2014 was liable to be reviewed. They further stated that, taking undue advantage of the order passed in W.P. No.34642 of 2014 dated 21.11.2014, the authorities had sought to attach the properties belonging to the petitioner; and unless the attachment was stayed, they would be subjected to great financial loss.

In the grounds, urged by them seeking review, the petitioner contended that the Assistant Commissioner (CT)-I was accorded authorization by the Joint Commissioner (CT) Enforcement only to inspect the petitioner and submit a report of compliance after completion of inspection, and not to make an assessment; the Assistant Commissioner (CT)-I did not have authorization to pass the assessment order dated 30.08.2008; without requisite

authorization from the concerned authority, the assessment order, as passed by him, was without jurisdiction and was liable to be set aside in terms of the judgment of the Division Bench of this Court in **Sri Balaji Flour Mills**¹; the Assistant Commissioner (CT)-I had usurped the power to pass an assessment order, his action was contrary to the statute; and the assessment order, passed by the Assistant Commissioner (CT)-I, was without jurisdiction, and was a nullity in the eye of law.

There is nothing in Article 226 of the Constitution which precludes a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. (**Aribam Tuleshwar Sharma v. Aribam Pishak Sharma**⁶⁵; **Shivdev Singh. v. State of Punjab**⁶⁶). Whilst exercising the power of review, the High Court cannot be oblivious of the provisions contained in Order 47 Rule 1 of CPC. (**Usha Bharti v. State of U.P.**⁶⁷).

Courts, and even Statutes, lean strongly in favour of finality of decisions legally and properly made. Exceptions, both statutorily and judicially, have been carved out to correct accidental mistakes or miscarriage of justice or to avoid abuse of process. (**Usha Bharti**⁶⁷; **S. Nagaraj v. State of Karnataka**⁶⁸). A party is not entitled to seek a review of a judgment merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a

⁶⁵ (1979) 4 SCC 389

⁶⁶ AIR 1963 SC 1909

⁶⁷ (2014) 7 SCC 663

⁶⁸ 1993 Suppl.(4) SCC 595

substantial and compelling character make it necessary to do so. The Court may also reopen its judgment if a manifest wrong has been done, and it is necessary to pass an order to do full and effective justice. (**Lily Thomas v. Union of India**⁶⁹; **Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi**⁷⁰; **Sajjan Singh v. State of Rajasthan**⁷¹; **G.L Gupta v. D.H. Mehta**⁷²; **O.N. Mohindroo v. Dist. Judge, Delhi**⁷³).

A review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility'. (**Chandra Kante v. Sheikh Habib**⁷⁴; **Lily Thomas**⁶⁹). The power of review can be exercised for correction of a mistake, and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. Once a review petition is dismissed no further petition of review can be entertained. (**Lily Thomas**⁶⁹).

There are definitive limits to the exercise of power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the person seeking the review, or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be

⁶⁹ (2000) 6 SCC 224

⁷⁰ (1980) 2 SCC 167

⁷¹ AIR 1965 SC 845

⁷² (1971) 3 SCC 189

⁷³ (1971) 3 SCC 5

⁷⁴ (1975) 1 SCC 674

exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of appeal. A power of review is not to be confused with the appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court. (**Aribam Tuleshwar Sharma**⁶⁵).

A review cannot be claimed, or asked for, merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it. (**Ajit Kumar Rath v. State of Orissa**⁷⁵; **Raja Shatrunji v. Mohammad Azmat Azim Khan**⁷⁶). The review of an order is not authorized, which was right when it was made, on the ground of the happening of some subsequent event. (**Raja Shatrunji**⁷⁶; **Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkatrama Rao**⁷⁷).

Order 47 Rule 1 CPC, (the provisions of which this Court should be conscious of while exercising jurisdiction under Article 226 of the Constitution of India), enables an aggrieved person to apply for review of a judgment on the discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge, and could not be produced by him when the order was made. Mere discovery of new or important matter or evidence is not sufficient ground for review *ex debito justitiae*. The party seeking review must also show that

⁷⁵ (1999) 9 SCC 596

⁷⁶ (1971) 2 SCC 200

⁷⁷ 27 Indian Appeals 197

such additional matter or evidence was not within its knowledge and, even after the exercise of due diligence, the same could not be produced before the Court earlier. (**State of West Bengal v. Kamal Sengupta**⁷⁸).

The affidavit filed in support of Review WPMP does not disclose how and when the petitioner came to know that the Assistant Commissioner (CT)-I Enforcement was not given authorization, by the Joint Commissioner (CT), to make assessment. The affidavit is also silent as to how this fact, of absence of authorization to make assessment, was discovered by the petitioner. No details are furnished by them regarding the due diligence exercised by them in this regard and why, despite exercise of due diligence by them, this factual contention could not be urged at the time when the order, in W.P.No.34642 of 2014 dated 21.11.2014, was made. The petitioner has failed to satisfy the due diligence test prescribed under Order 47 Rule 1 to review the earlier order.

The words "any other sufficient reason", in Order 47 of the Code, would mean a reason sufficient on grounds analogous to those specified immediately previously in that order. (**Raja Shatrunji**⁷⁶; **Ajit Kumar Rath**⁷⁵). The only ground for seeking review is the absence of authorization to the Assistant Commissioner (CT)-I Enforcement to make assessment. As this contention must fail on the ground that the petitioner has failed to satisfy the due diligence test, it cannot be brought within the analogous ground of "any other sufficient reason" under Order 47 Rule 1 CPC.

⁷⁸ (2008) 8 SCC 612

The limitation prescribed to make assessment, under Section 21(4) of the Telangana VAT Act, is four years from the end of the period for which the assessment is to be made. The tax period, in the present case, is from August 2006 to June, 2007. The four year period, prescribed to make assessment, ended by the 30th of June, 2011, long before which the assessment order came to be passed on 30.08.2008. The limitation for preferring an appeal against an order of assessment is, under Section 31(1) of the Telangana VAT Act and its proviso, 60 days from the date on which the assessment order was served on the petitioner. As noted hereinabove, in the present case, the assessment order was passed on 30.08.2008 and the appeal preferred thereagainst was also rejected by the Appellate Authority by order dated 03.01.2009 on the ground that the petitioner had failed to pay 12½% of the differential tax in terms of the second proviso to Section 31(1) of the VAT Act. The limitation prescribed for preferring an appeal, against the order passed by the Appellate Deputy Commissioner, to the VAT Appellate Tribunal is 120 days under Section 33(1) and (2) of the VAT Act. As the Appellate Deputy Commissioner rejected the appeal in January, 2009, the appeal to the VAT Tribunal should have been preferred by the petitioner in the year 2009, which remedy the petitioner failed to avail. Consequent on the rejection of the appeal, by order dated 03.01.2009, the assessment order dated 30.08.2008 attained finality.

As limitation is applicable in the field of taxation, the taxpayer sometimes gets an advantage and at other times the Government gets them. **(Rothensies, Collector of Internal**

Revenue v. Electric Storage Battery Co.⁷⁹). Limitation, like the equitable doctrine of laches, in its conclusive effect, is designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation, and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.’ (**Rothensies**⁷⁹). Where the assessments are final, and limitation has long ago run out; not being a fringe area for judicial activism to play, the submission must suffer rejection. (**Raja Jagdambika Pratap Narain Singh**⁶⁴).

As noted hereinabove, except for a bald averment that, subsequent to the dismissal of W.P.No.34642 of 2014 on 21.11.2014, they reliably learnt that the assessment order dated 30.08.2008 was passed by the Assistant Commissioner (CT-I) without obtaining requisite authorization, no explanation is forthcoming as to when and how the petitioner came to know of this fact. It is only on discovery of an important matter of evidence which, after exercise of due diligence was not within the petitioner’s knowledge and could not be produced by them when the order in W.P.No.34642 of 2014 was passed on 21.11.2014, is the petitioner entitled to seek review of the said order. Discoverability refers to facts, not law. (**Royal Canadian Legion Norwood (Alberta) Branch 178 v. Edmonton (City)**⁸⁰). It suffices, for the discoverability rule of limitation to apply, that “the material

⁷⁹ 329 U.S. 296

⁸⁰ 1994 ABCA 37 (CanLII)

facts on which (the cause of action) is based ought to have been discovered by the petitioner by the exercise of reasonable diligence. (**Central Trust v. Rafuse**⁸¹; **Hill v. Alberta (Registrar of Land Agents)**⁸²).

If the claimant is saying that he did not know of his rights, the relevant questions would be what were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would be inappropriate to disregard it. It is “practicable” to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance. (**Dedman v. British Building and Engineering Appliances**⁸³; **Wall's Meat Co Ltd v Khan**⁸⁴). It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights— or ignorance of the time limit—is not just cause or excuse unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences. (**Wall's Meat Co Ltd**⁸⁴).

The impediment for the performance of an act, i.e the presentation of a complaint may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential

⁸¹ 1986 CanLII 29 (SCC), (1986) 2 S.C.R. 147, 224

⁸² 1993 ABCA 75 (CanLII)

⁸³ (1974) 1 All ER 520 = [1974] ICR 53 at 64

⁸⁴ [1979] ICR 52 (CA)

matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the prescribed period, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him. (**Wall's Meat Co Ltd**⁸⁴). Failure on the part of the petitioner to show that they had exercised due diligence, despite which they or their legal advisors could not discover the fact that the Assistant Commissioner (CT-I) was not given authorization to make assessment, is fatal, and would require this Court to refrain from exercising its discretionary jurisdiction, under Article 226 of the Constitution, to interfere.

VII: OTHER CONTENTIONS:

Placing reliance on **M. Narayana @ Narayanamurthy v. The State of A.P.**⁸⁵, Sri M.Govind Reddy, Learned Standing counsel for Commercial Taxes, would submit that, except stating that there was no authorization to assess the petitioner, no submission has been made on whether or not prejudice has been caused to the petitioner because of absence of authorization to pass the assessment order. Likewise, Sri C.V. Mohan Reddy, Learned Senior Counsel, would submit that the petitioner has also filed an affidavit in Review W.P.M.P. No. 17876 of 2015 in W.P. No. 34642 of 2014, as well as in W.P. No. 434 of 2016 and W.P. No. 5061 of

⁸⁵ 1991(1) ALT 154

2017, stating that, in the event this Court came to the conclusion that the Assessment Order was passed without authority and jurisdiction, and the Assessment Order is liable to be set-aside, the petitioner was willing to undergo a fresh assessment for the relevant years without prejudice to all the other contentions.

As we are satisfied that the petition seeking review, and both the Writ Petitions must fail for the reasons stated hereinabove, we see no reason to examine the contentions urged under this head. Suffice it to observe that if, as is contended by Sri C.V. Mohan Reddy, Learned Senior Counsel, the assessment order dated 30.08.2008 is a nullity, then the petitioner's consent to subject themselves to a fresh assessment, would be of no avail as consent would not confer jurisdiction. *A defect of jurisdiction strikes at the very authority of the court/tribunal to pass any order, and such a defect cannot be cured even by consent of parties.* (**Kiran Singh⁷; Harshad Chiman Lal Modi⁸**). Neither consent nor waiver nor acquiescence can confer jurisdiction upon a court/Tribunal, otherwise incompetent to try the proceedings. Where a court/Tribunal takes upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing. An order passed by a court having no jurisdiction is *non est* and is *coram non judice*. (**Bahrein Petroleum Co. v. Pappu⁸⁶; Harshad Chiman Lal Modi⁸**).

Since limitation to make assessment, for the tax period August, 2006 to June, 2011, expired by 30th June, 2011, a fresh assessment order cannot be passed thereafter unless a specific direction is issued by this Court in this regard. It is only because the Assistant Commissioner (CT-I) had irregularly assumed

⁸⁶ 1966 (1) SCR 461

jurisdiction without adhering to the prescribed procedure, and as the petitioner had subjected themselves to his jurisdiction to make assessment, has this Court refrained from interference, that too because there was inordinate delay and laches on the part of the petitioner in invoking its jurisdiction under Article 226 of the Constitution of India.

VIII. CONCLUSION:

For the reasons above mentioned, Review WPMP No.17876 of 2015, and both W.P.No.434 of 2016 and W.P.No.5061 of 2017 fail and are, accordingly, dismissed. However, in the circumstances, without costs. Miscellaneous Petitions in all these proceedings, if any pending, are also dismissed.

(RAMESH RANGANATHAN, ACJ)

(M.SATYANARAYANA MURTHY, J.)

Date: 30-11-2017.

Note: L.R. copy to be marked.

B/o
MRKR/CS