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April 23.

SMT. UJJAM BAI

v.

STATE OF UTTAR PRADESH

(S. K. DAS, J. L. KAPUR, A. K. SARKAR. K. SUBBA RAO, M. HIDAYATULLAH, N. RAJAGOPALA AYYANGAR and J. R. MUDHOLKAR, JJ.)

Fundamental Right, Enforcement of—Assessment by Sales Tax Officer under a valid Act—If open to challenge on the sole ground of misconstruction of Act and Notification—Constitution of India, Arts. 19(1)(g), 32—Uttar Pradesh Sales Tax Act, 1948(U.P. XV of 1948), s.4(1)(b).

The petitioner was a partner in a firm that carried on the business of manufacture and sale of hand-made *bidis*. On December 14, 1957, the State Government issued a notification under s. 4(1)(b) of the U. P. Sales Tax Act, 1948. Section 4(1)(b) of the U.P. Sales Tax Act, 1948, provides as follows :—

"No tax shall be payable on—

(a) The sale of water, milk, salt, newspapers and motor spirit as defined in the U. P. State Motor Spirit (Taxation) Act, 1939, and of any other goods which the State Government may by notification in the Official Gazette, exempt.

(b) The sale of any goods by the All India Spinners' Association of Gandhi Ashram, Meerut, and their branches or such other persons or class of persons as the State Government may from time to time exempt on such conditions and on payment of such fees, if any, not exceeding eight thousand rupees annually as may be specified by notification in the Official Gazette."

The notification dated December 14, 1957, issued under s. 4(1)(b) was as follows:—

"In partial modification of notifications No. ST 905/X, dated March 31, 1956 and ST 418/X 902(9) 52, dated January 31, 1957, and in exercise of the powers conferred by clause (b) of sub-section (1) of section 4 of the U.P. Sales Tax Act, 1948(U.P. Act No. XV of 1948), as amended up to date, the Governor of Uttar Pradesh is pleased to order that no tax shall be payable under the aforesaid Act with effect from December 14, 1957, by the dealers in respect of the

following classes of goods provided that the Additional Central Excise Duties leviable thereon from the closing of business on December 13, 1957, have been paid on such goods and that the dealers thereof furnish proof to the satisfaction of the assessing authority that such duties have been paid.

1. .....

2. .....

3. Cigars, cigarettes, biris and tobacco, that is to say any form of tobacco, whether cured or uncured and whether manufactured or not and includes the leaf, stalks and stems of tobacco plant but does not include any part of a tobacco plant while still attached to the earth."

By a subsequent notification issued on November 25, 1958, hand-made and machine-made *bidis* were unconditionally exempted from payment of sales tax from July 1, 1958.

The Sales Tax Officer sent a notice to the firm for the assessment of tax on sale of *bidis* during the assessment period April 1, 1958, to June 30, 1958. The firm claimed that the notification dated December 14, 1957, had exempted *bidis* from payment of sales tax and that, therefore, it was not liable to pay sales tax on the sale of *bidis*. This position was not accepted by the Sales Tax Officer who passed the following order on December 20, 1958,—

"The exemption envisaged in this notification applies to dealers in respect of sales of biris provided that the additional Central Excise duties leviable thereon from the closing of business on 13. 12. 1957 have been paid on such goods. The assessees paid no such excise duties. Sales of biris by the assessees are therefore liable to sales tax".

The firm appealed under s. 9 of the Act to the Judge (Appeals) Sales Tax, but that was dismissed on May 1, 1959. The firm had however moved the High Court under Art. 226 of the Constitution before that date. The High Court took the view that the firm had another remedy under the Act and that the Sales Tax Officer had not committed any apparent error in interpreting the notification of December 14, 1957. An appeal against the order of the High Court on a certificate under Art. 133 (1)(a) was dismissed by this Court for non-prosecution and the firm filed an application for restoration of the appeal and condonation of delay. During the pendency of that appeal the present petition was filed by the petitioner under Art. 32 of the constitution for the enforcement of her fundamental right under Arts. 19(1)(g) and 31 of the constitutions. Before the Constitution Bench

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which heard the matter a preliminary objection was raised against the maintainability of the petition and the correctness of the decision of this Court in *Kailash Nath* v. *State of U.P.* A I.R. 1957 S.C. 790 relied upon by the petitioner was challenged. That Bench referred the following questions for decision by a larger Bench,—

"1. Is an order of assessment made by an authority under a taxing statute which is *intra vires* open to challenge as repugnant to Art. 19 (1) (g), on the sole ground that it is based on a misconstruction of a provision of the Act or of a notification issued thereunder ?"

2. Can the validity of such an order be questioned in a petition under Art. 32 of the Constitution ?"

Held, (*per* Das, Kapur, Sarkar, Hidayatullah and Mudholkar, JJ.) that in the case under consideration the answer to the questions must be in the negative. The *case of Kailash Nath* was not correctly decided and the decision is not sustainable on the authorities on which it was based.

Kailash Nath v. *State of U. P.*, A. I. R. 1957 S. C. 790, disapproved.

Bengal Immunity Co. Ltd. v. *State of Bihar*, (1955) 2 S. C. R. 603 and *Bidi Supply Co.* v. *Union of India*, (1956) S. C. R. 267, explained.

Per S. K. Das, J.—The right to move this Court by appropriate proceedings for the enforcement of fundamental rights conferred by Part III of the Constitution is itself a guaranteed fundamental right and this Court is not trammelled by procedural technicalities in making an order or issuing a writ for the enforcement of such rights.

There is no disagreement that in the following three classes of cases a question of the enforcement of a fundamental right may arise and if it does arise, an application under Art. 32 will lie, namely, (1) where action is taken under a statute which is *ultra vires* the Constitution; (2) where the statute is *intra vires* but the action taken is without jurisdiction; and (3) where the action taken is procedurally *ultra vires* as where a quasi-judicial authority under an obligation to act judicially passes an order in violation of the principles of natural justice.

Where, however, a quasi-judicial authority makes an order in the undoubted exercise of its jurisdiction in pursuance

of a provision of law which is *intra vires*, an error of law or fact committed by that authority cannot be impeached otherwise than on appeal, unless the erroneous determination relates to a matter on which the jurisdiction of that body depends. A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry; but it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required (i. e. has jurisdiction) to determine. In such a case, the characteristic attribute of a judicial act or decision is that it binds, whether right or wrong, and no question of the enforcement of a fundamental right can arise on an application under Art. 32.

Therefore, an order of assessment made by an authority under a taxing statute which is *intra vires* and in the undoubted exercise of its jurisdiction cannot be challenged on the sole ground that it is passed on a misconstruction of a provision of the Act or of a notification issued thereunder. The validity of such an order cannot be questioned on an application under Art. 32. The proper remedy for correcting such an error is to proceed by way of appeal or if the error is an error apparent on the face of the record, then by an application under Art. 226 of the Constitution.

Malkarjun v. *Narhari*, (1900) 5 L.R. 27 I.A. 216, *Aniyoth Kunhamina Umma* v. *Ministry of Rahabilitation*, (1962)1 S.C.R. 505, *Gulabdas & Co.* v. *Assistant Collector of Customs*, A.I.R. 1957 S. C. 733, *Bhatnagar & Co. Ltd.* v. *Union of India*, (1957) S. C. R. 701, and *Parbhani Transport Co-operative Society Ltd.* v. *Regional Transport Authority*, (1960) 3 S. C. R. 177, referred to. Case law reviewed.

Per Kapur, J.—Since the statute was constitutionally valid every part of it must be so and the determination by the Sales Tax Officer, acting within his jurisdiction under the Act, even though erroneous, was valid and legal.

An order of assessment under a statute that was *ultra vires* could not be equated with one passed under another that was *intra vires*, even though erroneous. Unlike the former the latter was a constitutional and legal Act and could not violate a fundamental right and or be impugned under Art. 32 of the Constitution.

If the Sales Tax Officer, acting quasi-judicially, misconstrued the notification, which it had jurisdiction to construe, and imposed a tax, there could be no infringement of Art. 19 (1) (g) of the Constitution

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Case law discussed.

Per Subha Rao, J.—The Constitution is the paramount law. As the Constitution declares the fundamental rights and also prescribes the restrictions that may be imposed thereon, no institution can overstep the limits directly or indirectly by encroaching upon the said rights. This Court has no more important function to perform than to preserve the fundamental rights of the people, and has been given all the institutional conditions necessary to exercise its jurisdiction without fear or favour. It is settled law that Art. 32 confers a wide jurisdiction on this Court to enforce the fundamental rights, that the right to enforce a fundamental right is itself a fundamental right, and that it is the duty of this Court to entertain an application and to decide it on merits whenever a party approaches it, irrespective of whether the question raised involves a question of Jurisdiction, Law or fact. Though the Legislature can make a law imposing reasonable restrictions on a fundamental right in the interest of the public, the Constitution does not empower the Legislature to make an order of an executive authority final so as to deprive the Supreme Court of its jurisdiction under Art. 32 of the Constitution.

The principles and procedure evolved by the courts in England in regard to the issue of prerogative writs cannot circumscribe the wide power of the Supreme Court to issue orders and directions for the enforcement of fundamental rights. The issuance of such writs can be regulated by evolving appropriate procedure to meet different situations. Whatever may be the stage at which this Court is approached this Court may in its discretion, if the question involved is one of jurisdiction or a construction of a provision, decide the question and enforce the right without waiting till the procedure prescribed by a law is exhausted; but if it finds that questions of fact or mixed questions of fact and law are involved, it may give an opportunity to the party, if he agrees, to renew the application after he has exhausted his remedies under the Act, or, if he does not agree, to adjourn the petition till after the remedies are exhausted. If the fundamental right of the petitioner depends upon the findings of fact arrived at by the administrative tribunals in exercise of the powers conferred on them under the Act, this Court may in its discretion ordinarily accept the findings and dispose of the application on the basis of those findings.

The principle of *res judicata* accepted by this court in *Daryao* v. *State of U. P.* cannot be involved in the case of orders of administrative tribunals. That apart, when

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petitioner seeks to quash the order of a tribunal, no question of *res judicata* arises, as that doctrine implies that there should be two proceedings and that in the former proceeding an issue has been decided inter-partes and therefore the same cannot be reagitated in a subsequent proceeding.

Daryao v. *State of U. P.* (1962) 1 S. C. R. 564. considered.

Whether relief can be given under Art. 32 against the order of a court or not, it is clear that administrative tribunals are only the limbs of the Executive, though they exercise quasi-judicial functions, and therefore are clearly comprehended by the expression "other authorities" in Art. 12 of the Constitution and in appropriate cases writs can be issued against them.

On a plain reading of the impugned notification it is clear that hand-made *bidis* are exempted from sales tax under the Act and therefore the Sales-tax Authorities have no power to impose sales tax thereon.

The decision of this Court in the case of *Kailash Nath* v. *State of U. P.*, was not incorrect or based on irrelevant decisions.

Kailash Nath v. *State of U. P.*, A. I. R. 1957 S. C. 790, followed.

Gulabdas & Co. v. *Assistant Collector of Customs*, A. I. R. 1957 S. C. 733, *Bhatnagara & Co. Ltd.* v. *Union of India*, (1957) S. C. R. 701 and *Pharbani Transport Co-operative Society* v. *Regional Transport Authority*, (1960) 3 S. C. R. 177, considered.

M/s. Ram Narain Sons Ltd. v. *Asstt. Commissioner of Sales Tax*, (1955) 2 S. C. R. 483, *J. V. Gokal & Co.* v. *Asstt. Collector of Sales Tax*, (1960) 2 S. C. R. 852 *and M. L. Arora* v. *Excise and Taxation Officer*, (1962) 1 S. C. R., 823, referred to.

Case-law discussed.

Per Hidayatullah, J.—Article 32 contains a guaranteed right to move the Supreme Court for enforcement of fundamental rights and any person whose fundamental rights have been invaded has a guaranteed right to seek relief from the Court without having to seek to enforce his remedies elsewhere first. But the right which he can claim is not a general right of appeal against decisions of courts and tribunals. The Supreme Court in examining such petitions would examine them

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from the narrow stand point of a breach of fundamental rights. If a petitioner fails to establish that, he will fail outright.

Taxing laws may suffer from many defects : they may be opposed to the fundamental rights, they may be made by a legislature beyond its own competence, or without observing the formalities laid down by the Constitution. If a taxing law is opposed to fundamental rights it can be challenged under Art. 32. It is not necessary to resort only to Art.265 because Art. 32 stands in no need of support from Art.265.

The taxing authorities are instrumentalities of Government. They are a part of the executive even though in assessing and levying the tax they act as quasi-judicial bodies. Their actions in demanding the tax in the ultimate analysis are executive actions. If that action is not backed by law or is beyond their jurisdiction an aggrieved person can have recourse to Art. 32 of the Constitution. Where, however, no question of *vires* of the law or jurisdiction is involved the Supreme Court would ordinarily not interfere in a petition under Art. 32 even though the interpretation be erroneous as the matter can be set right by recourse to such appeals or revisions as the law permits. This is based upon the well accepted rule that a court having jurisdiction may decide wrongly as well as rightly. If there is an error not involving jurisdiction that error can be corrected by the ordinary means of appeals and revisions including an appeal by special leave to the Supreme Court. But if the law is unconstitutional or the interpretation is about jurisdiction which is erroneous a writ under Art. 32 can be claimed. The Supreme Court will keep its two roles separate, namely, (a) as the Supreme Appellate Tribunal against the decisions of all courts and tribunals and (b) as Court of guaranteed resort for enforcement of fundamental rights. It will not act as the latter when the case is only for exercise of its power as the former. It will, however, interfere if a clear case of breach of fundamental rights is made out even though there may be other remedies open including an approach to the Supreme Court in its appellate jurisdiction.

Per Ayyangar, J.—From the fact that a statute was competently enacted and did not violate fundamental rights, it did not necessarily follow that quasi-judicial authorities created by it could not violate fundamental rights. Legislative competence covered only such action as could on a proper interpretation of the statute be taken under it. If a law did not create a liability an authority acting under it could not do so by a misinterpretation of it, for Legislative backing for

the imposition of such a liability would be plainly lacking. The answer to the question should, therefore, be that an action of a quasi-judicial authority would violate a fundamental right where by a plain and patent misconstruction of the statue such an authority affected fundamental rights. This would constitute another category besides the three others in respect of which violation of such rights was not in doubt, namely, where the statute itself was invalid or unconstitutional, where the authority exceeded its jurisdiction under the Act and where it contravened mandatory procedure prescribed by the statute or violated the principles of natural justice. The exercise of the judicial power of the State might also equally with the Legislative and Executive part involve the violation of fundamental rights guaranteed by Part III of the Constitution.

Since in the instant case the construction put upon the notification by the Sales Tax Officer was reasonable possible, it was a case of mere error of law and not a patent error or an error apparent on the face of the record which could justify the issue of a writ of *certiorari*.

Per Mudholkar, J.—The question of enforcement of a fundamental right could arise if a tax was assessed under a law which was (1) void under Art. 13 or, (2) was *ultra vires* the Constitution or, (3) where it was subordinate legislation, it was *ultra vires* the law under which it was made or inconsistent with any other law in force.

A Similar question would arise if the tax was assessed by an authority (1) other than the one empowered to do so under the taxing law or (2) in violation of the procedure prescribed by law or, (3) in colourable exercise of the powers conferred by the law.

Where a tax was assessed *bona fide* by a competent authority under a valid law and under the procedure laid down by it, no question of infringement of any fundamental right could arise, even though it was based upon an erroneous construction of law unless the tax imposed was beyond the competence of the Legislature or violated any of the fundamental rights or any other provisions of the Constitution.

A mere misconstruction of a provision of law did not render the decision of a quasi-judicial tribunal void as being beyond jurisdiction. It stood till it was corrected in the appropriate manner and if such a decision a person was held liable to pay tax he could not treat it as a nullity and contend that it was not authorised by law. The position would be

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the same even though upon a proper construction, the law did not authorise the levy.

ORIGINAL JURISDICTION : Petition No. 79 of 1959.

Petition under Art. 32 of the Constitution of India for enforcement of Fundamental Rights.

WITH

Civil Miscellaneous Petition No. 1349 of 1961.

Application for restoration of Civil Appeal No. 172 of 1960 M/s. Mohan Lal Hargovind Das v. The Sales Tax Officer, Allahabad.

M. C. Setalvad, Attorney-General of India, C. K. Daphtary, Solicitor-General of India, G. S. Pathak, S. C. Khare, S. N. Andley, Rameshwar Nath and *P. L. Vohra,* for the petitioner.

H. N. Sanyal, Additional Solicitor-General of India, M. V. Goswami and *C. P. Lal,* for the respondents.

N. A. Palkhivala, B. Parthasarathi, J. B. Dadachanji, O. C. Mathur, and *Ravinder Narain,* for Intervener (Tata Engineering and Locomotive Co., Ltd., Bombay).

A. S. R. Chari, D. P. Singh and *M. K. Ramamurthi,* for Intervener (State of Bihar).

H. N. Sanyal, Additional Solicitor-General of India, B. R. L. Iyengar and *T. M. Sen,* for Intervener (State of Mysore).

S. N. Andley, Rameshwar Nath and *Vohra,* for the petitioner (in C. M. P. No. 1349 of 1961).

H. N. Sanyal, Additional Solicitor-General of India, G. C. Mathur, M. V. Goswami for *C. P. Lal,* for the respondent (in C. M. P. No. 1349 of 1961).

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1961. April 28. The above petition coming up for hearing in the first instance before the Constitution Bench consisting of S. K. Das, J. L. Kapur, M. Hidayatallah, J. C. Shah and T. L. Venkataram Ayyar, JJ., the matter was referred to the Chief Justice under O. V-A, r. 2 of the Supreme Court Rules, 1950, as amended, by a Judgment delivered by

Aiyar J.

VENKATARAMA AIYAR, J.—The petitioner is a partner in a firm called Messrs. Mohan Lal Hargovind Das, which carries on business in the manufacture and sale of biris in number of States, and is dealer registered under the U.P. Sales Tax Act 15 of 1948 with its head office at Allahabad. In the present petition filed under Art. 32 of the Constitution, the petitioner impugns the validity of a levy of sales tax made by the Sales Tax Officer, Allahabad, by his order dated December 20, 1958.

On December 14, 1957, the Government of Uttar Pradesh issued a notification under s. 4(1) (b) of the Act exempting from tax, sales of certain goods including biris, provided that the additional Central Excise duties leviable thereon had been paid. In partial modification of this notification, the Government issued another notification on November 25, 1958, exempting from tax unconditionally sales of biris, both machinemade and handmade, with effect from July 1, 1958. The effect of the two notifications aforesaid taken together is that while for the period, December 14, 1957, to June 30, 1958, the exemption of biris from tax was subject to the proviso contained in the notification dated December 14, 1957, for the period commencing from July 1, 1958, it was unconditional and absolute.

The petitioner's firm filed its return for the quarter ending June, 1958, disclosing a gross turn-

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over of Rs. 75,44,633/- and a net turnover of Rs. 111/- representing the sale proceeds of empty packages, and deposited a sum of Rs. 3.51 n.P. as sales tax on the latter. On November 28, 1958, the Sales Tax Officer, Allahabad, sent a notice to the petitioner's firm for assessment of tax on the sale of biris during the period, April 1, 1958, to June 30, 1958, and on the date of enquiry which was held on December 10, 1958, the petitioner filed a petition stating that by reason of the exemption granted under the notification No. ST-4485/X dated December 14, 1957, no tax was payable on the sale of biris. By his order dated December 20, 1958, the Sale Tax Officer rejected this contention. He observed:

> "The exemption envisaged in this notification applies to dealers in respect of Biris, provided that the additional Central Excise duties leviable thereon from the closing of business on December 13, 1957, have been paid on such goods. The assessee paid no such Excise duties. Sales of Biris by the assessee are, therefore, liable to sales tax."

Against this order, there was an appeal (Appeal No. 441 of 1959) to the Courts of the Judge (Appeals), Sales Tax, Allahabad, who, by his order dated May 1, 1959, dismissed the same on the ground that the exemption from sale tax under the notification related "to such classes of goods only on which the Additional Central Excise Duty was leviable." Under s. 10 of the Act, a person aggrieved by an order in appeal might take it up on revision before the Revising Authority, and under s. 11, the assessee has a right to require that any question of law arising out of the order of assessment be referred to the opinion of the High Court. The Petitioner did not take any proceedings under the Act against the order in appeal dated May 1, 1959, and that has become final.

While Appeal No. 441 of 1959 was pending, the petitioner also filed under Art. 226 of the Constitution a petition in the High Court of Allahabad, for a writ of *certiorari* to quash the assessment order dated December 20, 1958. That was dismissed on January 27, 1959, by the learned Judges on the ground that, as the assessee could contest the validity of the order in appropriate proceedings under the Act, and as, in fact, an appeal had been filed, there was no ground for exercising the extraordinary jurisdiction under Art. 226. In this view, the learned Judges did not decide the case on the merits, but observed that the "language of the notification might well be read as meaning that the notification is to apply only to those goods on which an additional Central excise duty had been levied and paid." The petitioner then field an application under Art. 133 of the Constitution for certificate for appeal to this Courts against the above order, and that was granted. But instead of pursuing that remedy, the petitioner has chosen to file the present application under Art. 32 challenging the validity of the order of assessment dated December 20, 1958. It is alleged in the petition that the imposition and levy of tax aforesaid "amounts to the infringement of the fundamental rights of the petitioner to carry on trade and business guaranteed by Art. 19 (1) (g) of the Constitution," and that it is further "an illegal confiscation of property without compensation and contravenes the provisions of Art. 31 of the Constitution." The prayer in the petition is that this Courts might be "pleased to issue—

(a) a writ of *certiorari* or other order in the nature of *certiorari* quashing the order of the Sales Tax Officer, Allahabad, dated 20th December 1958;

(b) a writ of *mandamus* directing the opposite parties not to realise any sales tax from the petitioner on the basis of the said order dated 20th December, 1958."

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No argument has been addressed to us that the impugned order of assessment is in contravention of Art. 31. Such a contention would be wholly untenable in view of the decision of this Court in *Ramjilal* v. *Income-tax Officer* (1) and *Laxmanappa Hanumantappa* v. *Union of India*' (2), where it has been held that when tax is authorised by law as required by Art. 265, the levy is not open to attack under Art. 31 of the Constitution. Th whole of the argument on behalf of the petitioner is that the assessment order is unconstitutional as infringing Art. 19(1)(g). It is contended in support of this position that the Sales Tax Officer has misconstrued the notification dated December 14, 1957, in holding that exemption of tax thereunder is limited to *biris* on which additional excise duty had been levied, that as a result of such misconstruction tax has been imposed which is unauthorised, and that constitutes an interference with the right of the petitioner to carry on business guaranteed by Art. 19(1)(g). That is how the jurisdiction of this Court under Art. 32 is invoked.

To this, the answer of the respondents is that the Sales Tax Officer had correctly construed the notification in limiting the exemption to goods on which additional excise duty had been paid The respondents further raise a preliminary objection to the maintainability of this petition on the ground that laws of taxation which are protected by Art. 265 fall outside the purview of Part III of the Constitution, and are not open to attack as infringing fundamental rights guaranteed therein, and that even if they are subject to the restrictions in Part III, an order of assessment made by a tribunal acting judicially under a statute which is *intra vires* such as the impugned order dated December 20 1958, does not infringe Art. 19(1)(g), and that, further, a petition under Art.32 is not maintainable

(1) [1951] S.C.R. 127, 136, 137. (2) (1955) 1 S.C.R 769, 772.

for challenging it, even if it is erroneous on the merits.

On these contentions, the points that arise for decision are whether taxation laws are subject to the limitations imposed by Part III; whether the order of assessment dated December 20, 1958, is in contravention of Art. 19(1)(g); and whether it can be impugned in a petition under Art. 32 of the Constitution. The first question that falls to be considered is whether the restrictions imposed in Part III of the Constitution have application to taxation laws. The contention of the respondents is that taxation is a topic which is dealt with separately in Part XII of the Constitution, that the governing provision is Art.265, which enacts that no tax shall be levied or collected except by authority of law, that when there is a law authorising the imposition of tax and that does not contravene any of the inhibitions in Part XII, then the levy thereunder cannot be attacked as infringing any of the fundamental rights declared in Part III. In support of this contention, the following observations in *Ramjilal's case* (1) were relied on:

> "Reference has next to be made to article 265 which is in Part XII, Chapter I, dealing with "Finance". That article provides that tax shall be levied or collected except by authority of law. There was no similar provision in the corresponding chapter of the Government of India Act, 1935. If collection of taxes amounts to deprivation of property within the meaning of Art. 31(1), then there was no point in making a separate provision again as has been made in article 265. It, therefore, follows that clause (1) of Article 31 must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, for otherwise article 265 becomes

(1) (1951) S.C.R. 127, 136, 137.

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wholly redundant. In the United States of America the power of taxation is regarded as distinct from the exercise

"of police power or eminent domain. Our Constitution evidently has also treated taxation as distinct from compulsory acquistion of property and has made independent provisition giving protection against taxation save by authority of law.....In our opinion, the protection against imposition and collection of taxes save by authority of law directly comes from article 265, and is not secured by clause (1) of Article 31. Article 265 not being in Chapter III of the Constitution, its protection is not a fundamental right which can be enforced by an application to this court under article 32. It is not our purpose to say that the right secured by article 265 may not be enforced. It may certainly be enforced by adopting proper proceedings. All that we wish to state is that this application in so far as it purports to be founded on article 32 read with article 31 (1) to this court is misconceived and must fail."

A similar decision was given in *Laxmanappa Hanumantappa* v. *Union of India* (1). Where an order of assessment made in November, 1953, was attacked in a petition under Art. 32 on the ground that the Act under which it was made, viz., the Taxation on Income (Investigation Commission) Act (30 of 1947) was void under Art. 14 of the Constitution. Rejecting this contention, Mahajan, C. J., delivering the Judgment of the Court, observed :

"The assessment orders under the Income-tax Act itself were made against the petitioner in November. 1953. In these circumstances

(1) [1955] 1 S.C.R. 769, 772.

we are of the opinion that he is entitled to no relief under the provisions of article 32 of the Constitution. It was held by this Court in *Ramjilal* v. *Income-tax Officer, Mohindergarh*(1) that as there is a special provision in article 265 of the Constitution that no tax shall be levied or collected accept by authority of law, clause (1) of article 31 must therefore be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, and inasmuch as the right conferred by article 265 is not a right conferred by Part III of the Constitution, it could not be enforced under article 32."

The argument of the respondents based on the above decisions is that a law imposing a tax enacted by a competent legislature is not open to attack under the provisions of Part III.

The contention of the petitioner, on the other hand, is that a law of taxation is also subject to the limitations prescribed in Part III of the Constitution, and the recent decision of this Court in *K. T. Moopil Nair.* v. *The State of Kerala* (2) is relied on in support of it. There, the question was whether the provisions of the Travancore-Cochin Land Tax Act 15 of 1955, as amended by the Travancore-Cochin Land Tax (Amendment) Act 10 of 1957, contravened Art. 14 of the Constitution. The Court was of the opinion that they did. Then the contention was raised that in view of Art. 265 the legislation was not open to attack under the provisions of Part III. In repelling this contention, the Court observed :

"Article 265 imposes a limitation on the taxing power of the State in so far as it provides that the State shall not levy or collect a tax, except by authority of law, that

(1) (1951) S.C.R. 127, 136, 137. (2) (1961) 3 S.C.R. 77.

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is to say, a tax cannot be levied or collected by a mere executive fiat. It has to be done by authority of law, which must mean valid law. In order that the law may be valid, the tax proposed to be levied must be within the legislative competence of the Legislature imposing a tax and authorising the collection thereof and, secondly, the tax must be subject to the conditions laid down in Art.13 of the Constitution. One of such conditions envisaged by Art. 13(2) is that the Legislature shall not make any law which takes away or abridges the equality clause in Art. 14, which enjoins the State not to deny to any person equality before the law or the equal protection of the laws of the country. It cannot be disputed that if the Act infringes the provisions of Art. 14 of the Constitution, it must be struck down as unconstitutional."

In the result, the impugned legislation was struck down as unconstitutional.

It might appear at first sight that this decision is in conflict with the decisions in *Ramjilal's* case (1) and *Laxmanapp's* case (2). But when the matter is closely examined, it will be seen that it is not so. In *Ramjilal's* case (1) and in *Laxmnappa's* case (2), the contention urged was that the tax which is duly authorised by valid legislation as required by Art. 265 will still be bad under Art. 31(1) as amounting to deprivation of property. This was negatived, and it was held that Art. 31(1) had no application to a law, which was within the protection afforded by Art. 265. There are observations in the above decisions which might be read as meaning that taxation laws are altogether outside the operation of Part III. But, in the context, they have reference to the application of Art. 31(1). In

(1) (1951) S.C.R. 127, 136, 137. (2) (1955) 1 S.C.R 769, 772.

Moopil Nair's case (1), the contention urged was that even though a taxing law might be discriminatory, it was not open to attach under Art. 14 by reason of Art. 265. In negativing this contention, this Court held that a law which authorised the imposition of a tax under Art. 265 was also a law within Art. 13, and that, therefore, if it contravened Art. 14 it was liable to be struck down. This decision is clearly an authority for the position that laws of taxation must also pass the test of the limitations prescribed in Part III of the Constitution. But it is not an authority for the position that all the provisions contained in Part III are necessarily applicable to those laws. It did not decide contrary to *Ramjilal's* case (2) and *Laxmanappa's* case,(3) that Art.31(1) would apply to a taxation law, which is otherwise valid. In our judgment. the correct position in law is that a taxation law infringes a fundamental right cannot be shut out on the ground that Art. 265 grants immunity to it from attack under the provisions of Part III, but that whether there has been infringement must be decided on a consideration of the terms of the particular Article, which is alleged to have been infringed, It is on this reasoning that taxation laws were held in *Ramjilal's* case (2) and in *Laxmanappa's* case (3) to be unaffected by Art. 31(1), whereas in *Moopil Nair's* case (1) they were held to be within the purview of Art. 14.

In this view, the question that arises for decision is whether Art. 19(1) (g), which is alleged to have been infringed, is applicable to a sales tax law which has been enacted by a competent legislature and which is not otherwise *ultra vires*. Article 19(1) (g) enacts that all citizens have the right to practise any profession or to carry on any occupation, trade or business. Is a law imposing a tax on sale by a dealer an infringement of his right to carry on trade ? We must

(1) (1961) 3 S.C.R. 77. (2) (1951) S.C.R. 127, 136, 137.
(3) (1955) 1 S.C.R. 769, 722.

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assume for the purpose of the present discussion that the sales tax statute in question is within the competence of the legislature and is not *ultra vires*. Where a law is passed by a legislature which has no competence to enact it as when a States Legislature imposes what is in substance, a tax on income, a subject which is within the exclusive competence of the Centre under Entry 82, that legislation has no existence in the eye of law and any levy of tax under the provisions of that law will not be within the protection afforded by Art. 265, and will, in consequence, be hit by Art. 19(1)(g). The same result would follow when a law though disguised as a taxation law, is, in substance a law which is intended to destroy or even burden trade and not to raise revenue. That is colourable legislation which cannot claim the benefit of Art. 265, and it must be held to contravene Art. 19(1)(g) unless saved by Art. 19(6). But where the law in within the competence of the legislature and is otherwise valid and is not colourable can it be said that it is liable to be attacked as infringing Art. 19(1)(g)? The object of the legislation is not to prevent the dealer from carrying on his business. Far from it it envisages that the trader will carry on his business and carry it on a large scale so that the State might earn the tax. It, is, therefore, difficult to conceive how a sales tax law can fall within the vision of Art. 19(1)(g). Arts. 19(1)(f) and 19(1)(g) are in the same position as Art. 31(1). They all of them enact that the citizen shall have the right to hold property or to carry on business without interference by the State. If Art. 31(1) is as held in *Ramjilal's* case (1) and *Laxamanappa's* case (2) inapplicable to taxation laws, Arts. 19(1)(f) must on the same reasoning also be held to be inapplicable to such laws.

(1) (1951) S.C.R. 127, 136, 137. (2) (1955) 1 S.C.R. 769, 772.

The question can also be considered from another standpoint. Art. 19(1) (g) and Art. 19(6) from parts of one law which has for its object the definition of the fundamental right of a citizen to carry on business. Article 19(1) (g) declares that right and Art. 19(6) prescribes its limits. The two provisions together make-up the whole of the fundamental right to carry on business. If a taxation law is within Art. 19(1) (g) it must also be capble of being upheld as a reasonable restriction under Art. 19(6). But can imposition of a tax be properly said to be a restriction on the carrying on of trade within Art. 19(6)? It is only if that is so that the question of reasonableness can arise. If the imposition of sales tax is a restriction on the carrying on of business then the imposition of income tax must be that even to a greater degree. Likewise land tax must be held to be a restriction on the right of a citizen to hold property guaranteed by Art. 18(1) (g). Indeed it will be impossible to conceive of any taxation law which will not be a restriction under Art. 19(1) (f) or Art. 19(1) (g). It is difficult to imagine that that is the meaning which the word "restriction" was intended to bear in Arts. 19(5) and (6). That this is not the correct interpretation to be put on the word "restriction" will be clear when Art. 19(6) is further examined. Under that provision, the question whether a restriction is reasonable or not is one for the determination of the Court and that determination has to be made on an appreciation of the facts established. If it is to be held that taxation laws are within Art. 19(1) (g) then the question whether they are reasonable or not becomes justiciable and how is the Court to judge whether they are so or not? Can the Court say that that the taxation is excessive and is unreasonable? What are the materials on which the matter could be decided, and what are the criteria on which the decision thereon could

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be reached ? It would, therefore, seem that the reasonableness of taxation laws is not a matter which is justiciable and therefore they could not fall within the purview of Arts. 19 (5) and (6). If it is to be held that taxation laws are within the inhibition enacted in Art. 19(2) (g), then all those laws must be struck down as unconstitutional, because they could never be saved under Art. 19(5) and Art. 12(6). It should be noted that Art. 19(1) (g) and Art. 19(6) form parts of one scheme and for a proper understanding of the one, regard must be had to the other, Article 19(1) (g) cannot operate where Art. 19(6) cannot step in and the considerations arising under Art. 19(6) being foreign to taxation laws Art. 19(1) (g) can have no application to them.

We may now refer to the decisions of this Court where the question of applicability of Art. 19(1) (g) to taxation laws has been considered. *Himmatlal Harilal Metha* v. *The State of Madhya Pradesh* (1) the question arose with reference to a sales tax which was sought to be imposed under explanation II to s. 2 (g) of the Central Provinces and Berar Sales Tax Act 21 of 1947, under which a sale was defined as a transaction by which property in goods which were actually within the State was transferred wherever the sale might have been made. That provision was held to be *ultra vires* the State Legislature. A dealer then filed an application under Art. 226 in the High Court of Nagpur questioning the *vires* of that provision and asking for appropriate writ. The State resisted the application on the ground that as there was a special machinery provided in the Act for questioning the assessment a petition under Art. 226 was not maintainable. In rejecting this contention this Court held that,

> "Explanation II to section 2 (g) of the Act having been declared *ultra vires*, any

(1) [1954] S.C.R. 1122,1127.

imposition of sales tax on the appellant in Madhya Pradesh is without the authority of law, and that being so a threat by the State by using the coercive machinery of the impugned Act to realise it from the appellant is a sufficient infringement of his fundamental right under Art. 19(1) (g) and it was clearly entitled to relief under Art. 226 of the Constitution".

This decision is a direct authority for the proposition that when a provision in a taxing statute is *ultra vires* and void any action taken thereunder is without the authority of law, as required under Art. 265 and that in that situation Art. 19 (1) (g) would be attracted.

This decision was approved in *The Bengal Immunity Company Limited* v. *The State of Bihar* (1). The facts of that case are that the appellant-Company filed a petition under Art. 226 in the High Court of Patna for a writ of prohibition restraining the Sales Tax Officer from making an assessment of sales tax pursuant to a notice issued by him. The appellant claimed that the sales sought to be assessed were made in the course of inter-State Trade that the provisions of the Bihar sales Act 19 of 1947 which authorised the imposition of tax on such sales were repugnant to Art. 286(2) and void and that, therefore, the proceedings taken by the Sales Tax Officer should be quashed. That application was dismissed by the High Court on the ground that if the Sales Tax Officer made an assessment which was erroneous the assessee could challenge it by way of appeal or revision under ss.24 & 25 of the Act and that as the matter was within the jurisdiction of the Sales Tax Officer, no writ of prohibition or *certiorari* could be issued. There was an appeal against this

(1) [1955] 2. S. C. R. 603, 619, 620.

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order to this Court and therein a preliminary objection was taken that a writ under Art. 226 was not the appropriate remedy open to an assessee for challenging the legality of the proceedings before a Sales Tax Officer. In rejecting this contention this Court observed:

> "It is however clear from article 265 that no tax can be levied or collected except by authority of law which must mean a good & valid law. The contention of the appellant company is that the Act which authorises the assessment, levying and collection of Sales tax on inter state trade contravenes & constitutes an infringement of Art. 286 and is therefore *ultra vires*, void and unenforceable. If however this contention be well founded the remedy by way of a writ must on principle and authority be available to the party aggrieved".

And dealing with the contention that the petitioner should proceed by way of appeal or revision under the Act, this Court observed:

> "The answer to this plea is short and simple. The remedy under the Act cannot be said to be adequate and is, indeed, nugatory or useless if the Act which provides for such remedy is itself *ultra vires* and void and the principle relied upon can, therefore, have no application where a party comes to Court with an allegation that his right has been or is being threatened to be infringed by a law which is *ultra vires* the powers of the legislature which enacted it and as such void and prays for appropriate relief under article 226".

It will be seen that in this case the question arose with reference to a provision in the taxing statute, which was *ultra vires*, and the decision was only that any action taken under such a provision

was without the authority of law and was, therefore, an unconstitutional interference with the right to carry on business under Art. 19(1)(g). There is nothing in these two decisions which lends any support to the contention that, where the provision of law under which assessment is made is *intra vires*, the order is liable to be impugned as contravening Art. 19(1)(g), if the order is, on the merits, erroneous. That, however, was held in the decision in *Kailas Nath* v. *State of U. P.* (1).

In that case, a petition under Art. 32 of the Constitution was filed in this Court challenging an order of assessment on the ground that the Sales Tax Officer had disallowed an exemption on a misconstruction of a notification issued under s. 4 of the U. P. Sales Tax Act, and that thereby the right of the petitioner to carry on business under Art. 19(1)(g) had been infringed. An objection was taken that, even if the Sales Tax Officer had misconstrued the notification, no fundamental right of the petitioner had been infringed, and that the petition was not maintainable, Overruling this contention, Govinda Menon, J., observed:

> "If a tax is levied without due legal authority on any trade or business, then it is open to the citizen aggrieved to approach this Court for a writ under Art. 32, "since his right to carry on a trade is violated, or infringed by the imposition and such being the case, Art. 19(1)(g) comes into play".

In support of this view, the observations in *The Bengal Immunity Company's* case (2) were relied on. The Petitioner contends that, on this reasoning, Art. 19(1)(g) must be held to be violated not merely when an assessment is made under a statute which is *ultra vires*, but also when it is made on a misconstruction of a statute, which is *intra vires*. It is

(1) A.I.R. 1957 S.C. 790, 792, 793.
(2) (1955) 2 S.C.R. 603, 619, 620.

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incontrovertible that that is the effect of the decision in *Kailash Nath's case* (1). But it is equally incontrovertible that the decision in *The Bengal Immunity Company's case* (2), which it purports to follow, does not support it. There is a fundamental distinction between an order of assessment made on a provision, which is *ultra vires*, and one made on a valid provision, which is misconstrued. Where the provision is void, the protection under Art. 265 fails, and what remains is only unauthorised interference with property or trade by a State Officer, and Arts. 19(1)(f) and (g) are attracted. But where the provision itself is valid, Art. 265 operates, and any action taken thereunder is protected by it. An authority having jurisdiction to decide a matter has jurisdiction to decide wrong as well as right, & the protection afforded by Art. 265 is not destroyed, if its decision turns out to be erroneous. To such cases, Art. 19(1)(g) has no application. Both in *Himmatlal's* case (3) and in *Bengal Immunity Company's case* (2) the decision of the Court that the proceedings constituted an infringement of the rights of the citizen under Art. 19(1)(g) was based expressly on the ground that Art. 265 did not apply to those proceedings. But this ground did not exist in *Kailash Nath's case* (6), and that makes all the difference in the legal position. The decision in Kailash Nath's case (6) which merely purported to follow The *Bengal Immunity Company's case* (2), is open to the criticism that it has overlooked this distinction.

We may now refer to two decision subsequent to the one in *Kailash Nath case* (1), which have been relied on by the petitioner. In *Tata Iron and Steel Co., Ltd.* v. *S. R. Sarkar* (4), the question arose under the Central Sales Tax Act. Under that Act, sales in the course of inter-State trade are

(1) AIR 1957 S.C. 790, 792, 793. (2) (1955) 2. S.C.R. 603, 619, 620.
(3) (1954) S.C.R. 1122, 1127 (4) (1961) 1 S.C.R. 379, 385, 402.

liable to be taxed at a single point. The petitioner was assessed to tax on certain sales falling within Act by the Central Sales Tax Officer, Bihar, and the tax was also duly paid. Thereafter, the Central Sales Tax Officer in West Bengal made an order assessing to tax the very sales in respect of which tax had been paid. The petitioner then moved this Court under Art. 32 for an order quashing the order of assessment. A preliminary objection to the maintainability of the petition was taken on behalf of the respondent State on the ground that, under the Act the petitioner could file an appeal against the order of assessment, and that proceedings under Art.32 were, therefore, incompetent. In overruling this contention, Shah, J., referred to the decisions of this Court in *Himmatlal's* case (1), *Bengal Immunity Company's case* (2) and *The State of Bombay* v. *United Motors (India) Ltd* (3) and observed;

> "In these cases, in appeals from orders passed by the High Courts in petitions under Art. 226, this Court held that an attempt to levy tax under a statute which was *ultra vires*, infringed the fundamental right of the citizens, and recourse to the High Court for protection of the fundamental right was not prohibited because of the provisions contained in Art. 265. In the case before us, the *vires* of the Central Sales Tax Act, 1956, are not challenged; but in *Kailash Nath* v. *State of U. P.*, a petition challenging the levy of a tax was entertained by this court even though the Act under the authority of which the tax was sought to be recovered was not challenged as *ultra vires*. It is not necessary for purposes of this case to decide whether the principle of *Kailash Nath's* case is inconsistent with the view expressed by this court in *Ramjilal's Case*

(1) (1954) S C.R. 1122, 1127. (2) (1955) 2 S.C.R. 603, 619, 620.
(3) (1953) S.C.R. 1069.

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The learned Judges then proceeded to hold that, as there was under the Act a single liability and that had been discharged, proceedings for the assessment of the same sales a second time to tax infringed the fundamental right of the petitioner to hold property. Dealing with this point, Sarkar, J., observed in the same case:

> "This Court held that an illegal levy of sales tax on a trader under an Act the legality of which was not challenged violates his fundamental rights under Art. 19(1) (g) and a petition under Art. 32 with respect to such violation lies. The earlier case of 1951 S. C. R. 127 does not appear to have been considered. It is contended that the decision in *Kailash Nath's* case, requires reconsideration. We do not think, however, that the present is a fit case to go into the question whether the two cases are not reconcilable and to decide the preliminary question raised. The point was taken at a last stage of the proceedings after much costs had been incurred".

It is clear from the above observations that the learned Judges were of the opinion that the decision in *Kailash Nath's case* (1) required reconsideration. The ratio of the decision in *Tata Iron and Steel Co. Ltd.* v. *S.R. Sarkar* (2) would appear to be that, as the law did not authorise the imposition of tax a second time on sales, on which tax has been levied and collected, proceedings for assessment a second time are without jurisdiction, and, therefore, Art. 19 (1) (f) is attracted. In the present case, there is no contention that the proceedings of the Sales Tax officer are without jurisdiction.

The petitioner also relied on a recent decision

(1) A.I.R. 1957 S C 790, 792, 793.
(2) (1961) 1 S.C R. 379 at 383, 402.

of this Court in *Shri Madanlal Arora* v. *The Excise and Taxation officer, Amritsar* (1). In that case, a notice for assessment was issued after the expiry of the period prescribed therefor by the Statute. The assessee thereupon applied to this Court under Art. 32 for quashing the proceedings on the ground that they were without jurisdiction, and it was held that, as the taxing authority had no power under the statute to issue the notice in question, the proceedings must be quashed. This again is a case, in which the authority had no jurisdiction under the Act to take proceedings for assessment of tax, and it makes no difference that such assumption of jurisdiction was based on a misconstruction of statutory provisions. In the present case, we are concerned with an alleged misconstruction, which bears on the merits of the assessment, and does not affect the jurisdiction of the Sales Tax Officer to make the assessment, and the two are essentially different. And we should add that the present question was not raised or decided in that case.

It remains to refer to the decision in *Moopil Nair's case* (2), which has been already discussed in connection with Art. 14. In that case, the provisions of the Travancore-Cochin Land Tax Act 15 of 1955 as amended by the Travancore-Cochin Land Tax (Amendment) Act 10 of 1957, were held to be bad as violative also of Art. 19 (1) (f). As the considerations applicable to Arts. 19 (1) (f) and 19 (1) (g) are the same, we should have to examine the ground on which this decision rests. They were thus stated:

> "Ordinarily, a taxing statute lays down a regular machinery for making assessment of the tax proposed to be imposed by the statute. It lays down detailed procedure as

(1) (1962) 1 S.C.R. 823.
(2) (1961) 3 S.C.R. 77.

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to notice to the proposed assessee to make a return in respect of property proposed to be taxed, prescribes the authority and the procedure for hearing any objections to the liability for taxation or as to the extent of the tax proposed to be levied, and finally, as to the right to challenge the regularity of assessment made, by recourse to proceeding in a higher Civil Court.....The Act being silent as to the machinery and procedure to be followed in making the assessment leaves it to the Executive to evolve the requisite machinery and procedure. The whole thing, from beginning to end, is treated as of a purely administrative character, completely ignoring the legal position that the assessment of a tax on person or property is at least of a quasi-judicial character.....It is clear, therefore, that apart from being discriminatory and imposing unreasonable restrictions on holding property, the Act is clearly confiscatory in character and effect....For these reasons, as also for the reasons for *which* the provisions of ss. 4 and 7 have been declared to be unconstitutional, in view of the provisions of Art. 14 of the Constitution, all these operative sections of the Act, namely, 4, 5A and 7, must be held to offend Art. 19 (1) (f) of the Constitution also."

From the above observations, it will be seen that the ground on which the law was held to be in contravention of Art. 19 (1) (f) was not one which had any reference to the merits of the assessment but to the procedure laid down for imposing tax. This decision is an authority only for the position that, where the procedure laid down in a taxing statute is opposed to rules of natural justice, then any imposition of tax under such a procedure must be held to violate Art. 19 (1) (f).

Reference may be made to the following passage in Willoughby's Constitution of the United States, Second Edn, Vol. 3, p. 1718 relied on for the respondents :

> "It is established that the guaranty to suitors of due process of law does not furnish to them a right to have decisions of courts reviewed upon the mere ground that such decisions have been based upon erroneous findings of fact or upon erroneous determinations of law. Such errors, if committed by trial courts, can be corrected only by ordinary appellate proceedings as provided for by law. Especially has this doctrine been declared in cases in which the Federal Courts have been asked to review the decisions of State courts".

Our attention was also invited to the decisions in *Mc Govern* v. *New York* (1) and *American Railway Express Co.* v. *Kentucky* (2). It was observed in the latter case :

> "It is firmly established that a merely erroneous decision given by a State court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law."

The above remarks support the contention of the respondent that an order of a Court or tribunal is not hit by Art. 19 (1) (g).

The result of the authorities may thus be summed up :

(1) A tax will be valid only if it is authorised by a law enacted by a competent legislature. That is Art. 265.

(1) [1913] 229 U. S. 363, L. ed, 1228.
(2) [1927] 273 U. S. 269, 71 L. ed.. 639, 642.

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(2) A law which is authorised as aforesaid must further be not repugnant to any of the provisions of the Constitution. Thus, a law which contravenes Art. 14 will be bad, *Moopil Nair's* case (1).

(3) A law which is made by a competent legislature and which is not otherwise invalid, is not open to attack under Art. 31 (1). *Ramjilal's* case (3) and *Laxmanappa's* case (2).

(4) A law which is *ultra vires* either because the legislature has no competence over it or it contravenes, some constitutional inhibition, has no legal existence, and any action taken thereunder will be an infringement of Art. 19 (1)(g) *Himmatlal's* case (4) and *Laxmanappa's* case (2) The result will be same when the law is a colourable piece of legislation.

(5) Where assessment proceedings are taken without the authority of law, or where the proceedings are repugnant to rules of natural justice, there is an infringement of the right guaranteed under Art. 19 (1)(f) and Art. 19 (1)(g): *Tata Iron & Steel Co. Ltd.* (5); *Moopil Nair's* case (1) and *Shri Madan Lal Arora's* case (6).

Now, the question is, when a law is enacted by a competent legislature and it is not unconstitutional as contravening any prohibition in the Constitution such as Art. 14, and when proceedings for assessment of tax are taken thereunder in the manner provided therein, and there is no violation of rules of natural justice, does Art. 19 (1)(g) apply, even though the taxing authority might have, in the exercise of its jurisdiction, misconstrued the legal provisions ? The decision in *Kailash Nath's* case (7) would appear to support the contention that it does; but for the reasons already given, we think

(1) (1961) 3 S.C.R. 77.
(2) (1951) S.C.R. 177, 136, 137.
(3) (1955) 1 S.C.R. 769, 792.
(4) (1954) S.C.R. 1122, 1127.
(5) (1961) 1 S.C.R. 371, 383, 402.
(6) (1962) 1 S.C.R. 823.
(7) AIR 1957 S.C. 790, 792, 793.

that its correctness is open to question and the point needs reconsideration.

There is another objection taken to the maintainability of this petition. Art. 32, under which it is presented, confers on a person, whose fundamental right guaranteed in Part III is infringed, a right to move this Court for appropriate writs for obtaining redress. The contention of the petitioner is that the order of assessment dated December 20, 1958, amounts to interference with the right of the firm to carry on business and is, therefore, in contravention of Art. 19 (1) (g), and that relief should be granted under Art. 32. Now, the objection that is taken on behalf of the respondents is that the guarantee given under Art. 19 (1) (g) is against an action of the executive or legislature of the State, that the order of assessment now in question is one passed in judicial proceedings and is, therefore, outside the purview of Art. 19 (1) (g). If this contention is well-founded, then Art. 32 will have no application and the present petition must fail on this ground.

The constitutional provisions bearing on this question are Arts. 12, 13, 19 and 32. Article 12 enacts that :

> "In this Part, unless the context otherwise requires, 'the State' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India".

Article 13 (3) (a) defines 'law' as follows :

> " 'law includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;"

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Article 19 (1) enacts that the citizen shall have the seven rights mentioned therein, and Arts. 19 (2) to 19 (6) save laws, whether existing or to be made, which impose reasonable restrictions on the exercise of those rights, subject to the conditions laid down therein. Article 32 (1) guarantees "the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part". Then we have Art. 32 (2), which is as follows :

> "The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, which ever may be appropriate, for the enforcement of any of the rights conferred by this Part".

It will be convenient now to set out the contentions of the parties urged in support of their respective positions. The contention of the respondents based upon Art. 12 is that the word "State" in Part III means only the Executive and the Legislature, that the Judiciary is excluded therefrom, and that, therefore, no question of a fundamental right can arise with reference to an order passed by an authority discharging judicial functions. The answer of the petitioner to this is that the word "State" comprehends all the three organs, the Executive, the Legislature and the Judiciary, that the express mention of the Government and the Legislature in Art. 12 cannot be construed as excluding the Judiciary, that the use of the word "includes" shows that the enumeration which followsis not exhaustive, and that, therefore, the ordinary and the wider connotation of the word "State' is not cut down by Art. 12.

It is true that the word "includes" normally signifies that what is enumerated as included is not

exhaustive. But the question ultimately is, what is the intention of the Legislature, and that has to be gathered on a reading of the enactment as a whole. It is possible that in some context the word "includes" might import that the enumeration is exhaustive. The following observations of Lord Watson in *Dilworth* v. *Commissioner of Stamps* (1) were relied upon :

> "The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include,' and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."

Now, when the Legislature wants to enlarge the sense in which an expression is generally, used so as to take in certain other things, it does so by using the word "includes". Therefore, it may be argued that the word "includes" would be appropriate only when the expression, the connotation of which is sought to be extended by the word "includes", does not, in its ordinary sense, include what is sought to be "included", and that as the

(1) [1899] A. C. 99, 105, 106.

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Executive and the Legislature of a State are, according to all accepted notions, understood as included in the word "State", the use of the word "includes" with reference to them would make no sense. The Article also provides that the word "State" is to include "all local or other authorities". With reference to them, the use of the word "includes" will be quite appropriate, because they would not in the ordinary sense of the words "the State", be understood as included therein. A reading of the Article, as a whole, would seem to show that the intention of the Legislature was, on the one hand, to restrict the accepted connotation of the word "State", and, on the other hand, to extend it by including "local or other authorities". There is much to be said in favour of the contention of the respondents that in the context the word "includes" must to be read as "means and includes".

In further support of the contention that orders of Courts and Tribunals are not, in general, within the purview of Part III, the respondents rely on the definition of 'law' in Art. 13(3). Judgments and orders made in the course of judicial proceedings do not fall within that definition. It is contended that the scheme of the Constitution is that, whenever there is an infringement of a fundamental right by the Executive or the Legislature, the person aggrieved has a right of resort to this Court under Art. 32, that being the consequence of the definition of 'State' under Art. 12 and of 'law' under Art. 13(3); that Courts and Tribunals are not law-making bodies in the sense in which law is defined in Art. 13(3), their function being to interpret law; and that it will, therefore, be inappropriate to bring them within Part III, which enacts limitations on power to make laws.

It is urged that the scheme of the Constitution does no contemplate judicial orders being brought up before this Court in a petition under

Art. 32. Whenever a fundamental right is infringed, it is said, the party aggrieved has a right to resort to the Civil Courts either in their ordinary jurisdiction or under Art. 226, and the decisions of the Courts will ultimately come up to this Court on appeal under Arts. 132 to 136. Thus, when executive and legislative action infringes fundamental rights, the Supreme Court can deal with it under Art. 32, whereas orders of Courts and Tribunals, in which questions of infringement of fundamental rights are decided, will come up for review before the Supreme Court under Arts. 132 to 136.

We may now refer to the decisions where this question has been considered by this Court. In *Bashesher Nath* v. *The Commissioner of Income-tax* (1) occur the following observations. relied on for the respondents:

> "In the third place it is to be observed that, by virtue of Art. 12, 'the State' which is, by Art. 14, forbidden to discriminate between persons includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Article 14, therefore, is an injunction to both the legislative as well as the executive organs of the State and the other subordinate authorities. As regards the legislative organ of the State, the fundamental right is further consolidated and protected by the provisions of Art. 13...That apart, the very language of Art. 14 of the Constitution expressly directs that 'the State', by which Art. 12 includes the executive organ, shall not deny to any person equality before the law or the equal protection of the law. Thus Art. 14

(1) [1959] Supp. (1) S.C.R. 528 551, 552.

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protects us from both legislation, and executive tyranny by way of discrimination." The above remarks are based on the view that the words "the State" in Art. 12 comprehend only the Executive and the Legislature.

A more direct decision on this point is the one in *S. S. Md. Amirabbas Abbasi* v. *State of Madhya Bharat* (1). There, the facts were that one Amirabbas Abbasi applied to the Court of the District Judge at Ratlam for an order that he should be appointed guardian of the person and properties of his two children. The application was rejected by the District Judge, who appointed another person, Sultan Hamid Khan, as the guardian. An appeal against this order to the High Court was also dismissed. Amirabbas Abbasi then filed a petition in this Court under Art. 32 of the Constitution, challenging the validity of the order of the District Court on the ground that it was discriminative and violative of Art. 14 of the Constitution. In dismissing this petition, this Court observed:

> "The second respondent was appointed guardian of the minors by order of a competent court, and denial of equality before the law or the equal protection of the laws can be claimed against executive action or legislative process but not against the decision of a competent tribunal. The remedy of a person aggrieved by the decision of a competent judicial tribunal is to approach for redress a superior tribunal, if there be one."

The following observations in *Ratilal* v. *State of Bombay* (2) are also relied on for the respondents:

> "The second observation which must be made is that the protection afforded by the

(1) [1960] 3. S. C. R. 138, 142.
(2) A.I.R. [1959] Bom. 242, 253,

> Constitution to fundamental rights is against executive, or legislative interference. A decision of a regularly constituted Court cannot however be challenged as an interference with fundamental rights in the abstract. The Court in the very nature of things adjudicates upon conflicting claims and declares rights and does not by the operation of its own order seek to infring any Fundamental rights."

These observations would appear to apply with equal force to judicial proceedings before tribunals, as they cannot be regarded as representing the executive or the legislative function of the State.

It is next contended for the petitioner that the Sales Tax Officer will at least fall within the category of "other authorities" in Art. 12. The meaning of the expression "other authorities" was considered in *The University of Madras* v. *Shantha Bai* (1). There, the question was as to whether the University of Madras was "other authority" within that Article. In deciding that it was not, it observed that the words "other authorities" must be construed *ejusdem generis* with what had been enumerated in the Article, nemely, the Government or the Legislature. This clearly supports the respondents.

It is contended for the petitioner that even if Courts could not be held to be "other authorities", *quasi* judicial tribunals must be regarded as falling within that expression, and that Sales Tax Officers are at best only *quasi* judicial officers, and they cannot be put on the same footing as regular Courts. It is argued that sales tax authorities are Officers of Government to whom is entrusted the work of levy and collection of taxes, that that is primarily an executive function, that the officers have, no doubt, to act judicially in determining the

(1) I.A.R. 1954 Mad. 67.

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tax payable but that that is only incidental to the discharge of what is essentially an administrative act, that, at best, the assessment proceedings are *quasi*-judicial in character, and that accordingly an Officer imposing a tax must be held to be "other authority" within Art. 12. In this view, it is urged, the assessment order dated December 20, 1958, falls within the purview of Part III.

The respondents dispute the correctness of this contention. They concede that a Sales Tax Officer has certain functions of an administrative character, but urge that the proceedings with which we are concerned, are entirely judicial. In this connection, it will have to be borne in mind that it is a feature well-known in the Government of this country that both executive and judicial functions are vested in the same Officer, and because of the undesirable results which followed from this combination, Art. 50 of the Constitution has enacted as one of the Directive Principles that,

> "The State shall take steps to separate the judiciary from the executive in the public services of the State".

When an authority is clothed with two functions, one administrative and the other judicial, proceedings before it which fall under the latter category do not cease to be judicial by reason of the fact that it has got other non-judicial functions. What has to be seen is the capacity in which the authority acts with reference to the impugned matter. It will, therefore, be necessary to examine the character in which the Sales Tax Officer functions when he takes proceedings for assessment of tax. Under the provisions of the Act, the Sales Tax Officer has to issue notice to the assessee, take evidence in the matter, hear him and then decide, in accordance with the provisions of the statute, whether tax is payable, and if so, how much. Against his order, there is an

appeal in which again the parties have to be heard and a decision given in accordance with law. The legality or propriety of an order passed in an appeal is again open to consideration on revision by a Revising Authority who must be "a person qualified under clause (2) of Art. 217 of the Constitution for appointment as Judge of a High Court". Section 11, which is on the same lines as s. 66 of the Indian Income-Tax Act, provides that the Revising Authority might refer for the opinion of the High Court any question of law arising out of its order, and under s. 11(4), the assessee has a right to move the High Court for an order that the Revising Authority do refer the question of law arising out of the order, if there has been an erroneous refusal to refer. Now the respondents contend that the proceedings commencing with a notice issued by the Sales Tax Officer and ending with a reference to the High Court are entirely judicial, that it is in that view that petitions for *certiorari* and prohibition are entertained against orders of assessment under Art. 226 of the Constitution, and appeals against such orders are entertained by this Court under Art. 136. It will be inconsistent, it is urged, to hold, on the one hand, that the orders passed in these assessment proceedings are open to appeal under Art. 136 on the footing that they are made by Tribunals, and, on the other, that they are open to attack under Art. 32 of the footing that they are made by executive authorities.

It is also contended for the petitioner that the definition of "State" in Art. 12 is to govern Part III "unless the context otherwise required", and that in the context of Art. 32; "The State" would include Courts and Tribunals exercising judicial functions. Article 32, it will be noticed; confers on the Court jurisdiction to issue among others, writs of *Certiorari* and prohibition. The argument is that as these writs are issued only with reference to judicial proceedings, the restricted

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definition of "the State" in Art. 12 as excluding them must give way to the express language of Art. 32. It is accordingly contended that even on the footing that the order of assessment is judicial in character, the present petition for issue of *certiorari* is within Art. 32. It is true argue the respondents, that *certiorari* and prohibition lie only in respect of judicial and not administrative acts, and it must, therefore, be taken that Art. 32 does envisage that there could be a petition under that Article with respect to judicial proceedings. It is also true, as held by this Court, that the right of an aggrieved party to resort to this court under that Article is itself a fundamental right under Art. 32. But the right of resort to this Court under Art. 32(1) is only when there is an infringement of a fundamental right which had been guaranteed in Part III, that it is Articles 14 to 31 that declare what those, fundamental rights are, for the breach of which remedy can be had under Art. 32-(2), and that what has to be seen, therefore, is whether there is anything in the Article which is said to have been infringed, which is repugnant to the definition of "the State" in Art. 12. Examining, it is said, Art.19(1)(g) which is alleged to have been violated, there is nothing in it which is repugnant to the restricted connotation of the expression "the State" in Art.12, and judicial proceedings therefore cannot be brought within it. It is further argued that Art.19(2) to 19(6) clearly show that it is only laws existing and to be made that are within their purview, and judicial pronouncements not being law cannot fall within the ambit of those provisions. In the result, it is contended that the definition of "State" in Art. 12 stands and an order made by a Court or tribunal cannot be held to infringe Art. 19(1) (g) read along with Art. 12.

If that is the true position, replies the petitioner, then what purpose is served by the provi-

sion in Art. 32 that this Court might issue writs of *certiorari* or prohibition ? The answer of the respondents is that among the substantive enactments forming Arts. 14 to 31, there are some which are specially, directed against judicial proceedings, and the writ of *certiorari* or prohibition will lie in respect of them. One such, for example, is Art. 20, which is as follows:

> "20. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
>
> (2) No person shall be prosecuted and punished for the same offence more than once.
>
> (3) No person accused of any offence shall be compelled to be a witness against himself."

This Article clearly applies to prosecutions and convictions for offences. It has reference, therefore, to judicial proceedings, and the restricted definition of "State" in Art. 12 is, in the context, excluded. And proceedings contemplated by Art. 20 being judicial, writs of *certiorari* and prohibition can issue. In this connection, the respondents rely upon the expression "whichever may be appropriate" occurring in Art. 32(2). It means, it is said, that when once an infringement of a fundamental rights is established, the writ which the Court can issue must depend upon the nature of the right involved. It is accordingly contended that Art. 19(1)(g) is, on its terms inapplicable to judicial proceedings, and no writ of *certiorari* can issue for the infringement of a right under that Article.

It was also argued for the petitioner that

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under the American law *certiorari* lies against decisions of the State Courts when they are repugnant to the provision of the Constitution, and the decision in *National Association for the Advancement of Colored People* v. *State of Alabama* (1) was relied support of this position. There the question related to the validity of a provision in a statute of Alabama requiring foreign corporations to disclose, among other things, the names and addresses of their local members and agents. The appellant-Corporation having made default in complying with this provision, the State instituted an action for appropriate relief, and the Court granted the same. Then the Corporation moved the Supreme Court for a writ of *certiorari* on the ground that the provision in the statute was an invasion of the right to freely assemble, guaranteed by the Constitution. One of the grounds on which the State resisted the application was that no *certiorari* will lie for quashing an order of Court. In rejecting this contention, the Court observed :

> "It is not of moment that the State has there acted solely through its judicial branch for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize."

It is unnecessary to refer to other decisions in which similar views have been taken. The principle on which all these decisions are based was thus stated in *Virginia* v. *Rives* (2) :

> "It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities ; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether

(1) (1958) 2 L. ed. 2d. 1488, 1500, 357 U. S. 449.
(2) (1880) 100 U.S 313, 318: 25 Sl. ed. 667, 669.

it be action by one of these agencies or by another."

These decisions have no bearing on the point now under consideration, which is not whether a writ of *certiorari* will lie under the general law against decisions of Courts—on that, there could be and has been no controversy—but whether, on the terms of Art. 12, that will lie against an order a of Court or Tribunal.

The above is a *resume* of the arguments addressed by both sides in support of their respective contentions. The question thus debated is of considerable importance on which there has been no direct pronouncement by this Court. It seems desirable that it should be authoritatively settled. We accordingly direct that the papers be placed before the Chief Justice for constituting a larger Bench for deciding the two following question :—

1. Is an order of assessment made by an authority under a taxing statute which is *intra vires*, open to challenge as repugnant to Art. 19(1) (g), on the sole ground that it is based on a misconstruction of a provision of the Act or of a notification issued thereunder ?

2. Can the validity of such an order be questioned in a petition under Art. 32, of the constitution ?

1962. April 10. The matter was finally heard by a larger Bench consisting of S. K. Das, J. L. Kapur, A. K. Sarkar, K. Subba Rao, M. Hidayatullah, N. Rajagopala Ayyangar and J. R. Mudholkar, JJ. and

The following Judgments were delivered

S. K DAS, J.—The facts of the case have been stated in the judgment of my learned brother

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Kapur J., and it is not necessary for me to restate them. I have reached the same conclusion as has been reached by my learned brother. But in view of the importance of the question raised, I would like to state in my own words the reasons for reaching that conclusion.

The two questions which have been referred to this larger Bench are:

> 1. Is an order of assessment made by an authority under a taxing statute which is *Intra vires*, open to challenge as repugnant to Art. 19 (1) (g), on the sole ground that it is based on a misconstruction of a provision of the Act or of a notification issued there under ?
>
> 2. Can the validity of such an order be questioned in a petition under Art. 32 of the Constitution ?

These two questions are inter-connected and substantially relate to one matter: is the validity of an order made with jurisdiction under an Act which is *Intra vires* and good law in all respects, or of a notification properly issued thereunder, liable to be questioned in a petition under Art. 32 of the Constitution on the sole ground that the provisions of the Act, or the terms of the notification issued thereunder, have been misconstrued ?

It is necessary, perhaps, to start with the very Article, namely, Art. 32, with reference to which the question has to be answered.

> "32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
>
> (2) The Supreme Court shall have power to issue directions or orders or writs,

including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

The Article occurs in Part III of the Constitution headed 'Fundamental Rights'. It is one of a series of articles which fall under the sub-head, "Right to Constitutional Remedies". There can be no doubt that the right to move the Supreme Court by appropriate proceedings for the enforcement of the right conferred by Part III is itself a guaranteed fundamental right. Indeed, cl. (1) of the Article says so in express terms. Clause (2) says that this Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari,* whichever may be appropriate, for the enforcement of any of the rights conferred by Part III. Clause (4) makes it clear that the right guaranteed by the Article shall not be suspended except as otherwise provided for by the Constitution. Article 359 of the Constitution states that where a Proclamation of Emergency is in operation the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III as may be mentioned in the order and all proceedings pending

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in any court for the enforcement of the rights so mentioned shall remain suspended etc. It is clear, therefore, that so long as no order is made by the President to suspend the enforcement of the rights conferred by Part III of the Constitution every person in India, citizen or otherwise, has the guaranteed right to move the Supreme Court for enforcement of the rights conferred on him by Part III of the Constitution and the Supreme Court has the power to issue necessary directions, orders or writs which may be appropriate for the enforcement of such rights. Indeed, this Court has held in more than one decision that under the Constitution it is the privilege and duty of this Court to uphold the fundamental rights, whenever a person seeks the enforcement of such rights. The oath of office which a Judge of the Supreme Court takes on assumption of office contains *inter alia* a solemn affirmation that he will "uphold the Constitution and the laws".

The controversy before us centres round the expression "enforcement of the rights conferred by this Part" which occurs in cls. (1) and (2) of the Article. It has not been disputed before us that this Court is not trammelled by technical considerations relating to the issue of writs *habeas corpus*, *mandamus*, Prohibition, *quo warranto* and *certiorari*. This Court said in *T. C. Basappa* v. *T. Nagappa* (1).

> "In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges. We can make an order or issue a writ in the nature of *certiorari* in all appropriate case and in appropriate manner,

(1) [1955] 1 S.C.R. 250. 256.

> so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

Therefore, apart altogether from all technical considerations, the broad question before us is—in what circumstances does the question of enforcement of the rights conferred by Part III of the Constitution arise under Art. 32 of the Constitution, remembering all the time that the constitutional remedy under Art. 32 is itself a fundamental right? On behalf of the petitioner it has been submitted that whenever it is *prima facie* established that there is violation of a fundamental right, the question of its enforcement arises; for example, (a) it may arise when the statute itself is *ultra vires* and some action is taken under such a statute, or (b) it may also arise when some action is taken under an *intra vires* statute, but the action taken is without jurisdiction so that the statute though *intra vires* does not support it; or (c) it may again arise on misconstruction of a statute which is *intra vires*, but the misconstruction is such that the action taken on the misconstrued statute results in the violation of a fundamental right. It has been argued before us that administrative bodies do not cease to come within the definition of the word "State" in Art. 12 of the Constitution when they perform quasi-judicial functions and in view of the true scope of Art. 32, the action of such bodies whenever such action violates or threatens to violate a fundamental right gives rise to the question of enforcement of such right and no distinction can be drawn in respect of the three classes of cases referred to above. As to the case before us the argument is that the taxing authorities misconstrued the terms of the notification which was issued by the State Government on December 14, 1957 under s. 4(1)(b) of the United Provinces Sales Tax Act, U.P. Act No. XV of 1948 and as a result of the misconstruction, they

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have assessed the petitioner to sales tax on the sum of Rs. 4,71,541.75 nP. which action, it is submitted, has violated the fundamental right guaranteed to the petitioner under Art. 19(1)(f) and (g) and Art. 31 of the Constitution.

The misconstruction, it is argued, may lead to a transgression of constitutional limits in different ways; for example, in a case where an inter-State transaction of sale is sought to be taxed despite the constitutional prohibition in Art. 286 of the Constitution as it stood previously, by wrongly holding that the transaction is intra-State, there is a transgression of constitutional limits. Similarly, where a quasi-judicial authority commits an error as to a fact or issue which the authority has complete jurisdiction to decide under the statute, but the error is of such a nature that it affects a fundamental right, there is again a transgression of constitutional limits. The argument is that there is no distinction in principle between these classes of misconstruction of a statute, and the real test, it is submitted, should be the individuality of the error, namely, whether the error impings on a fundamental right. If it does, then the person aggrieved has a right to approach this Court by means of a petition under Art. 32 of the Constitution.

On the contrary, the contention of the respondents which is urged as a preliminary objection to the maintainability of the petition in that on the facts stated in the present petition no question of the enforcement of any fundamental right arises and the petition is not maintainable. It is stated that the validity of the Act not being challenged in any manner, every part of it is good law; therefore, the provision in the Act authorising the Sales-tax Officer as a quasi-judicial tribunal to assess the tax is a valid provision and a decision made by the said tribunal strictly acting in exercise of the quasi-judicial power given to it must necessarily be a fully

valid and legal act. It is pointed out that there is no question here of the misconstruction leading to a transgression of constitutional limits nor to any error relating to a collateral fact. The error which is complained of, assuming it to be an error, is in respect of a matter which the assessing authority has complete jurisdiction to decide; that decision is legally valid irrespective of whether it is correct or otherwise. It is stated that a legally valid act cannot offend any fundamental right and the proper remedy for correcting an error of the nature complained of in the present case is by means of an appeal or if the error is an error apparent on the face of the record, by means of a petition under Art. 226 of the Constitution.

Before I proceed to consider these arguments it is necessary to clear the ground by standing that certain larger questions were also mooted before us, but I consider it unnecessary to examine or decide them. Such questions were: (1) whether taxation laws are subject to the limitations imposed by Part III, particularly Art. 19 therein, (2) whether the expression "the State" in Art. 12 includes "courts" also, and (3) whether there can be any question of the enforcement of fundamental rights against decisions of courts or the action of private persons. These larger questions do not fall for decision in the present case and I do not consider it proper to examine or decide them here. I should make it clear that nothing I have stated in the present judgment should be taken as expressing any opinion on these larger questions. It is perhaps necessary to add also that this writ petition could have been disposed of on the very short ground that there was no misconstruction of the notification dated December 14, 1957 and the resultant action of the assessing authority did not affect any fundamental right of the petitioner. That is the view which we have expressed in the connected appeal of M/s. Chhotabhai Jethabhai Patel & Co. *v.* The Sales Tax Officer,

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Agra and another (Civil Appeal No. 99 of 1961) in which Judgment is also being delivered to-day.

The writ petition, however, has been referred to a larger Bench for the decision of the two important constitutional questions relating to the scope of Art. 32, which I have stated earlier in this judgment. It is, therefore, necessary and proper that I should decide those two questions which undoubtedly arise as a preliminary objection to the maintainability of the writ petition.

I now proceed to a consideration of the main arguments advanced before us. On some of the aspects of the problem which has been debated before us there has been very iittle disagreement. I may first delimit the filed where there has been agreement between the parties and then go on to the controversial area of disagreement. It has not been disputed before us that where the statute or a provision thereof is *ultra vires*, any action taken under such *ultra vires* provision by a quasi-judicial authority which violates or threatens to violate a fundamental right does give rise to a question of enforcement of that right and a petition under Art. 32 of the Constitution will lie. There are several decisions of this Court which have laid this down. It is unnecessary to cite them all and a reference need only be made to one of the earliest decisions on this aspect of the case, namely, *Himmatlal Harilal Mehta* v. *The State of Madhya Pradesh* (1). A similar but not exactly the same position arose in the *Bengal Immunity Company Limited* v. *The State of Bihar* (2). The facts of the case were that the appellant company filed a petition under Art. 226 in the High Court of Patna for a writ of prohibition restraining the Sales Tax Officer from making an assessment of sales tax pursuant to a notice issued by him. The appellant claimed that the sales

(1) [1954] S.C.R. 1122.
(2) [1955] 2 S.C.R. 603, 619, 620.

sought to be assessed were made in the course of inter-State trade, that the provisions of the Bihar Sales Tax Act, 1947 (Bihar Act 19 of 1947) which authorised the imposition of tax on such sales were repugnant to Art. 286(2) and void, and that, therefore, the proceedings taken by the Sales Tax Officer should be quashed. The application was dimissed by the High Court on the ground that if the Sales Tax Officer made an assessment which was erroneous, the assessee could challenge it by way of appeal or revision under ss. 24 and 25 of that Act, and that as the matter was within the jurisdiction of the Sales Tax Offcer, no writ of prohibition or *certiorari* could be issued. There was an appeal against this order to this Court and therein a preliminary objection was taken that a writ under Art. 226 was not the appropriate remedy open to an assessee for challenging the legality of the proceedings before a Sales Tax Officer. In rejecting the contention, this Court observed:

> "It is, however, clear from article 265 that no tax can be levied or collected except by authority of law which must mean a good and valid law. The contention of the appellant company is that the Act which authorises the assessment, levying and collection of Sales tax on inter-State trade contravenes and constitutes an infringement of Article 286 and is, therefore, *ultra vires*, void and unenforceable. If, however, this contention by well founded, the remedy by way of a writ must, on principle and authority, be available to the party aggrieved."

And dealing with the contention that the petitioner should proceed by way of appeal or revision under the Act, this Court observed:

> "The answer to this plea is short and simple. The remedy under the Act cannot

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be said to be adequate and is, indeed, nugatory or useless if the Act which provides for such remedy is itself *ultra vires* and void and the principle relied upon can, therefore, have no application where a party comes to Court with an allegation that his right has been or is being threatened to be infringed by a law which is *ultra vires* the powers of the legislature which enacted it and as such void and prays for appropriate relief under article 226."

It will be seen that the question which arose in that case was with reference to a provision in the taxing statute which was *ultra vires* and the decision was that any action taken under such a provision was without the authority of law and was, therefore, an unconstitutional interference with the right to carry on business under Art. 19 (1)(f). In circumstances somewhat similar in nature there have been other decision of this Court which the violation of a fundamental right was taken to have been established when the assessing authority sought to tax a transaction the taxation of which came within a constitutional prohibition. Such cases were treated as on a par with those cases where the provision itself was *ultra vires*.

The decision in *Bidi Supply Co.* v. *The Union of India* (1) arose out of a somewhat different set of facts. There the Central Board of Revenue transferred by means of a general order certain cases of the petitioner under s. 5 (7-A) of the Indian Income-tax Officer, District III, Calcutta, to the Income-tax Officer, Special Circle, Ranchi. It was held that an omnibus wholesale order of tranfer as was made in the case was not contemplated by the sub-section and, therefore, the impugned order of transfer which was expressed in general terms without reference to any particular case and

(1) [1956] 2 S.C.R. 67.

without any limitation as to time was beyond the competence of the Central Board of Revenue. It was also held that the impugned order was discriminatory against the petitioner and violated the fundamental right guaranteed by Art. 14 of the Constitution. This decision really proceeded upon the basis that an executive body cannot, without authority of law, take action violative of a fundamental right and if it does, an application under Art. 32 will lie. In that case no question arose of the exercise of a quasi-judicial function in the discharge of undoubted jurisdiction; on the contrary, the ratio of the decision was that the order passed by the Central Board of Revenue was without jurisdiction. The decision was considered again in *Pannalal Binjraj* v. *Union of India* (1) after further amendments had been made in s. 5 (7-A) of the India Income-tax Act, 1922 and it was pointed out that s. 5 (7-A) as amended was a measure of administrative convenience and constitutionally valid and an order passed thereunder could not be challenged as unconstitutional.

There are other decisions which proceeded on a similar basis, namely that if a quasi-judicial authority acts without jurisdiction or wrongly assumes jurisdiction by committing an error as to a collateral fact and the resultant action threatens or violates a fundamental right, the question of enforcement of that right arises and a petition under Art. 32 will lie. (See *Tata Iron and Steel Co. Ltd.* v. *S. R. Sarkar* (2); and *Madan Lal Arora* v. *The Excise and Taxation Officer, Amritsar* (3). In *Tata Iron and Steel Co. Ltd.* v. *S.R. Sarkar*(2) the question arose under the Central Sales Tax Act, 1956. Under that Act sales in the course of inter-State trade are liable to be taxed at a single point. The petitioner was assessed to tax on certain sales

(1) [1957] S.C.R. 233. (2) [1961] 1 S.C.R. 379, 383.
(3) [1962] 1 S.C.R. 843.

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falling within the Act by the Central Sales Tax Officer' Bihar, and the tax was also duly paid. Thereafter the Central Sales Tax Officer in West Bengal made an order assessing to tax the very sales in respect of which tax had been paid. The petitioner then moved this Court under Art. 32 for an order quashing the assessment. A preliminary objection to the maintainability of the petition was taken on behalf of the respondent State on the ground that under the Act the petitioner could file an appeal against the order of assessment and that proceedings under Art. 32 were, therefore, incompetent. In overruling this contention Shah, J., referred to the decisions of this Court in *Himmatlal Harilal Mehta's case* (1), *Bengal Immunity's Company's case*(2) and *the State of Bombay* v. *United Motors (India) Ltd.* (3) and observed:

> "In these cases, in appeals from orders passed by the High Courts in petitions under Art. 226, this Court held that an attempt to levy tax under a statute which was *ultra vires* infringed the fundamental right of the citizens and recourse to the High Court for protection of the fundamental right was not prohibited because of the provisions contained in Art. 265. In the case before us, the *vires* of the Central Sales Tax Act, 1956, are not challenged; but in *Kailash Nath* v. *The State of Uttar Pradesh* (4) a petition challenging the levy of a tax was entertained by this Court even though the Act under the authority of which the tax was sought to be recovered was not challenged as *ultra vires*. It is not necessary for purposes of this case to decide whether the principal of *Kailash Nath's case*(4) is inconsistent with the view expressed by this Court in *Ramjilal* v. *Income-tax Officer, Mohindargarh* (5)."

(1) [1954] S.C.R. 1122. (2) [1955] 2 S.C.R. 603, 619, 620.
(3) [1963] S.C.R. 1969. (4) A.I.R 1957 S.C. 790.
(5) [1951] S.C.R. 127.

The learned Judge then proceeded to hold that as there was under the Act a single liability and that had been discharged, there could be no proceedings for the assessment of the same sales a second time to tax. The ratio of the decision would appear to be that as the law did not authorise the imposition of tax a second time on sales on which tax had been levied and collected, proceedings for assessment a second time were without jurisdiction. In *Madan Lal Arora's case*(1) a notice for assessment was issued after the expiry of the period prescribed therefore by the statute. The assessee thereupon applied to this Court under Art. 32 for quashing the proceedings for assessment on the ground that they were without jurisdiction and it was held that as the taxing authority had no power under the statute to issue the notice in question the proceedings were without jurisdiction and must be quashed. This again was a case in which the authority had no jurisdiction under the Act to take proceedings for assessment of tax and it made no difference that such assumption for jurisdiction was based on a misconstruction of statutory provision.

It is necessary perhaps to refer here to another class of cases which have sometimes been characterised as cases of procedural *ultra vires*. When a statute prescribes a manner or from in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must, therefore, formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory in which case disobedience will render void or voidable what has been done, or as directory in which case disobedience will be treated as a mere irregularity not affecting the validity of what has been done. A quasi-judicial authority is under an obligation to act judicially. Suppose, it does not

(1) (1962) 1 S. C. R. 823.

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so act and passes an order in violation of the principles of natural justice. What is the position then? There are some decisions, particularly with regard to customs authorities, where it has been held that an order of a quasi-judicial authority given in violation of the principles of natural justice is really an order without jurisdiction and if the order threatens or violates a fundamental right, an application under Art. 32 may lie. (*See Sinha Govindji* v. *The Deputy Controller of Imports & Exports, Madras*(1)). These decisions stand in a class by themselves and really proceed on the footing that the order passed was procedurally *ultra vires* and therefore without jurisdiction.

So far I have dealt with three main classes of cases as to which there is very little disagreement: (1) where action is taken under an *ultra vires* statute; (2) where the statute is *intra vires,* but the action taken is without jurisdiction; and (3) where the action taken is procedurally *ultra vires.* In all these cases the question of enforcement of a fundamental right may arise and if it does arise, an application under Art. 32 will undoubtedly lie. As to these three classes of cases there has been very little disagreement between the parties before us.

Now, I come to the controversial area. What is the position with regard to an order made by a quasi-judicial authority in the undoubted exercise of its jurisdiction in pursuance of a provision of law which is admittedly intra vires ? It is necessary first to clarify the concept of jurisdiction. Jurisdiction means authority to decide. Whenever a judicial or quasi-judicial tribunal is empowered or required to enquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on an application for *certiorari* but are binding until

(1) 1962) 1 S. C. R. 540.

reversed on appeal. Where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion whether it is wrong in law or in fact. The question, whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to enquire, or upon the correctness of its findings on these facts, but upon their nature, and it is determinable "at the commencement, not at the conclusion, of the inquiry'. (*Rex* v. *Bolten*(1)) Thus, a tribunal empowered to determine claims for compensation for loss of office has jurisdiction to determine all questions of law and fact relating to the measure of compensation and the tenure of the office, and it does not exceed its jurisdiction by determining any of those questions incorrectly but it has no jurisdiction to entertain a claim for reinstatement or damages for wrongful dismissal, and it will exceed its jurisdiction if it makes an order in such terms, for it has no legal power to give any decision whatsoever on those matters. A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required (i. e.,) has jurisdiction to determine. The strength of this theory of jurisdiction lies in its logical consistency. But there are other cases where Parliament when it empowers an inferior tribunal to enquire into certain facts intend to demarcate two areas of enquiry, the tribunal's findings within one area being conclusive and with in the other area impeachable. "The jurisdiction of an inferior tribunal may depend upon the fulfilment of some condition precedent or upon the existence of some particular fact. Such a fact is collateral to the actual matter which the tribunal has to try and the determination whether it exists

(1) [1841] 1 Q. B. 66, 74.

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or not is logically prior to the determination of the actual question which the tribunal has to try. The tribunal must itself decide as to the collateral fact when, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether it will act or not, and for that purpose to arrive at some decision on whether it has jurisdiction or not. There may be tribunals which, by virtue of legislation constituting them, have the power to determine finally the preliminary facts on which the further exercise of their jurisdiction depends; but, subject to that an inferior tribunal cannot, by a wrong decision with regard to a collateral fact, give itself a jurisdiction which it would not otherwise possess." (Halsbury's Laws of England, 3rd Edn. Vol. 11 page 59). The characteristic attribute of a judicial act or decision is that it binds, whether it be right or wrong. An error of law or fact committed by a judicial or quasi-judicial body cannot, in general, be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends. These principles govern not only the findings of inferior courts *stricto sensu* but also the findings of administrative bodies which are held to be acting in a judicial capacity. Such bodies are deemed to have been invested with power to err within the limits of their jurisdiction; and provided that they keep within those limits, their decisions must be accepted as valid unless set aside on appeal. Even the doctrine of *res judicata* has been applied to such decisions. (*See Livingstone* v. *Westminister Corporation* (1); *Re Birkenhead Corporation* (2) *Re 56 Denton Road Twickenham* (3) *Society of Medical Officers of Health* v. *Hope*(4). In *Burn & Co., Calcutta* v. *Their Employees*(5)

(1) [1904] 2 K B. 109. (2) (1952) Ch. 359.
(3) [1953] Ch. 51. (4) [1959] 2 W.L.R. 377, 391, 396, 397, 402.
(5) [1956] S. C. R. 781.

this Court said that although the rule of *res judicata* as enacted by s. 11 of the Code of Civil Procedure did not in terms apply to an award made by an industrial tribunal its underlying principle which is founded on sound public policy and is of universal application must apply. In *Daryao* v. *The State of U. P.* (1) this Court applied the doctrine of *res judicata* in respect of application under Art. 32 of the Constitution. It is perhaps pertinent to observe here that when the Allahabad High Court was moved by the petitioner under Art. 226 of the Constitution against the order of assessment, passed on an alleged misconstruction of the notification of December 14, 1957, the High Court rejected the petition on two grounds. The first ground given was that the petitioner had the alternative remedy of getting the error corrected by appeal the second ground given was expressed by the High Court in the following words:

> "We have, however, heard the learned counsel for the petitioner on merits also, but we are not satisfied that the interpretation put upon this notification by the Sales Tax Officer contains any obvious error in it. The circumstances make the interpretation advanced by the learned counsel for the petitioner unlikely. It is admitted that even handmade biris have been subject to Sales Tax since long before the date of the issue of the above notification. The object of passing the Additional Duties of Excise (Goods of Special Importance) Central Act No. 58 of 1957, was to levy an additional excise duty on certain important articles and with the concurrence of the State Legislature to abolish Sales Tax on those articles. According to the argument of the learned counsel for the petitioner during the period 14th December, 1957, to

(1) [1961] [2] S. C. A. 591.

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30th June, 1958, the petitioner was liable neither to payment of excise duty nor to payment of Sales Tax. We do not know why there should have been such an exemption. The language of the notification might well be read as meaning that the notification is to apply only to those goods on which an additional Central excise duty had been levied and paid."

If the observations quoted above mean that the High Court rejected the petition also on merits, apart from the other ground given, then the principle laid down in *Daryao* v. *The State of U. P.* (1) will apply and the petition under Art. 32 will not be maintainable on the ground of *res judicata*. It is, however, not necessary to pursue the question of *res judicata* any further, because I am resting my decision on the more fundamental ground that an error of law or fact committed by a judicial body cannot, in general, be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends.

In *Malkarjun Narhari* (2) the Privy Council dealt with a case in which a sale took place after notice had been wrongly served upon a person who was not the legal representative of the judgment-debtor's estate, and the executing court had erroneously decided that he was to be treated as such representative. The Privy Council said :

"In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right;

(1) 1961 2 S.C.A. 591. (2) [1950] L.R. 279, A, 216, 225.

and if that course is not taken the decision, however wrong, cannot be disturbed".

The above view finds support from a number of decisions of this Court.

1. *Aniyoth Kunhamina Umma* v. *Ministry of Rehabilitation* (1). In this case it had been held under the Administration of Evacuee Property Act, 1950, that a certain person was an evacuee and that certain plots of land which belonged to him were, therefore, evacuee property and vested in the Custodian of Evacuee Property. A transferee of the land from the evacuee then presented a petition under Art. 32 for restoration of the lands to her and complained of an infringement of her fundamental right, under Art. 19 (1) (f) and Art. 31 of the Constitution by the aforesaid orders under the Administration of Evacuee Property Act. The petitioner had been a party to the proceedings resulting in the declaration under that Act earlier mentioned. This Court held that as long as the decision under the Administration of Evacuee Property Act which had become final stood, the petitioner could not complain of any infringement of any fundamental right. This Court dismissed the petition observing :

> "We are basing our decision on the ground that the competent authorities under the Act had come to a certain decision, which decision has now become final the petitioner not having moved against that decision in an appropriate court by an appropriate proceeding. As long as that decision stands, the petitioner cannot complain of the infringement of a fundamental right, for she has no such right".

2. *Gulabdas & Co.* v. *Assistant Collector of Customs* (2) In this case certain imported goods had been assessed to customs tariff. The assessee contenued in a petition under Art. 32 that the duty

(1) [1962] 1 S.C.R. 505. (2) A.I.R. [1957] S.C. 733, 736.

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should have been charged under a different item of that tariff and that its fundamental right was violated by reason of the assessment order charging it to duty under a wrong item in the tariff. This Court held that there was no violation of fundamental right and observed :

> "If the provisions of law under which impugned orders have been passed are with jurisdiction, whether they be right or wrong on fact, there is really no question of the infraction of a fundamental right. If a particular decision is erroneous on facts or merits, the proper remedy is by way of an appeal".

3. *Bhatnagar & Co. Ltd.* v. *The Union of India*(1) In this case the Government had held that the petitioner had been trafficking in licences and in that view confiscated the goods imported under a licence. A petition had been filed under Art. 32 challenging this action. It was held :

> "If the petitioner's grievance is that the view taken by the appropriate authority in this matter is erroneous, that is not a matter which can be legitimately agitated before us in a petition under Art. 32".

4, *The Parbhani Transport Co-operative Society Ltd.* v. *Regional Transport Authority, Aurangabad* (2). In this case it was contended that the decision of the Transport Authority in granting a permit for a motor carriage service had offended Art. 14 of the Constitution. This Court held that the decision of a quasi-judicial body, right or wrong, could not offend Art. 14.

There are, however, two decisions which stand out and must be mentioned here. A contrary view was taken in *Kailash Nath* v. *The State of U. P.* (3)

(1) [1957] S.C.R. 701, 702. (2) [1960] 3 S C.R. 177.
(3) A.I.R. [1957] S.C. 790.

There a question precisely the same as the one now before us had arisen. A trader assessed to sales tax had claimed exemption under certain notification and this claim had been rejected. Thereupon he had moved this Court under Art. 32. It was contended that the right to be exempted from the payment of tax was not a fundamental right and therefore, the petition under Art. 32 was not competent. This Court rejected that contention basing itself on *Bengal Immunity Company's case*(1) and *Bidi Supply Co's case* (2). The two cases on which the decision was rested had clearly no application to the question decided. I have shown earliar that in both those cases the very statute under which action had been taken was challenged as *ultra vires*. In *Kailash Nath's case* (3) the question was not considered from the point of view in which it has been placed before us in the present case and in which it was considered in the four cases referred to above. Therefore, I am unable to agree with the view taken in *Kailash Nath's case* (3).

In *Ramavatar Budhai Prasad* v. *Assistant Sales Tax Officer* (4) the question raised was whether betel leaves were exempted from sales tax under certain provisions of the C. P. & Berar Sales Tax Act. This Court agreed with the view of the assessing authority that they were not exempted. The question as to the maintainability of the application under Art. 32 was neither raised nor was it decided. This decision cannot, therefore, be taken as an authority for holding that an application under Art. 32 is maintainable even in respect of orders which are made in the undoubted exercise of jurisdiction by a quasi-judicial authority.

Certain other decisions were also cited before us, namely, *Thakur Amar Singhji* v. *State of Rajasthan* (5); *M/s. Mohanlal Hargovind Dass* v. *The State*

(1) [1955] 2 S.C.R. 603, 619, 620.
(2) [1956] S.C.R. 267.
(3) A.I.R. [1957] S.C. 790.
(4) [1962] 1 S.C.R. 279.
(5) [1955] 2 S.C.R. 303.

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of Madhya Pradesh (1); *Y. Mahaboob Sheriff* v. *Mysore State Transport Authority* (2), *J. V. Gokal & Co. (Private) Ltd.* v. *The Assistant Collector of Sales-tax (Inspection)* (3); *and Universal Imports Agency* v. *Chief Controller of Imports and Exports* (4). These decisions fall under the category in which an executive authority acts without authority of law, or a quasi-judicial authority acts in transgression of a constitutional prohibition and without jurisdiction. I do not think that these decisions support the contention of the petitioner.

In my opinion, the correct answer to the two questions which have been referred to this larger Bench must be in the negative. An order of assessment made by an authority under a taxing statute which is *intra vires* and in the undoubted exercise of its jurisdiction cannot be challenged on the sole ground that it is passed on a misconstruction of a provision of the Act or of a notification issued thereunder. Nor can the validity of such an order be questioned in a petition under Art. 32 of the Constitution. The proper remedy for correcting an error in such an order is to proceed by way of appeal, or if the error is an error apparent on the face of the record, then by an application under Art. 226 of the Constitution. It is necessary to observe here that Art. 32 of the Constitution does not give this Court an appellate jurisdiction such as is given by Arts. 132 to 136. Article 32 guarantees the right to a constitutional remedy and relates only to the enforcement of the rights conferred by Part III of the Constitution. Unless a question of the enforcement of a fundamental right arises, Art. 32 does not apply. There can be no question of the enforcement of a fundamental right if the order challenged is a valid and legal order, in spite of the allegation that it is erroneous. I have, therefore, come to the conclusion that no question of the

(1) [1955] 2 S.C.R. 509.
(2) [1960] 2 S.C.R. 146.
(3) [1960] 2 S. C. R. 852.
(4) [1960] 1 S.C.R. 905.

enforcement of a fundamental right arises in this case and the writ petition is not maintainable.

It is necessary to refer to one last point. The petitioner's firm had also filed an appeal on a certificate of the Allahabad High Court against the order of that Court dismissing their petition under Art. 226 of the Constitution. The appeal against that order was dismissed by this Court for non-prosecution on February 20, 1961. In respect of that order of dismissal the petitioner's firm has filed an application for restoration on the ground that it had been advised that in view of a rule having been issued under Art. 32 of the Constitution, it was not necessary to prosecute the appeal. The petitioner's firm has prayed for condonation, of delay in filing the application for restoration of appeal. In my opinion no sufficient cause has been made out for allowing the application for restoration. The petitioner's firm had deliberately allowed the appeal to be dismissed for non-prosecution and it cannot now be allowed to get the dismissal set aside on the ground of wrong advice.

Furthermore, in the appeal filed on behalf of M/s. Chhotabhai Jethabhai Patel & Co. v. The Sales Tax Officer, Agra and another (Civil Appeal No. 99 of 1961) we have decided the question on merits and have held that the assessing authorities did not put a wrong construction on the notification in question.

Kapur J.

KAPUR, J.—In this petition under Art. 32 of the Constitution which is directed against the order passed by the Sales Tax Officer, Allahabad, dated December 20, 1958, the prayer is for a writ of *certiorari* or other order in the nature of *certiorari* quashing the said order, a writ of *mandamus* against the respondents to forbear from realizing the sales tax imposed on the basis of the said

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order and such other writ or direction as the petitioner may be entitled to.

The petitioner is a partner in the firm M/s. Mohanlal Hargovind Das which carried on the business of manufacture and sale of handmade biris, their head office being in Jubbalpore in the State of Madhya Pradesh. They also carry on business in U. P., and in that State their principal place of business is at Allahabad.

Under s. 4 (1) of the U. P. Sales Tax Act (Act XV of 1948) hereinafter called the 'Act', the State Government is authorised by a notification to exempt unconditionally under cl. (a) and conditionally under cl. (b) any specified goods. On December 14, 1957, the U. P. Government issued a notification under s. 4(1)(b) of the Act exempting cigars, cigarettes, biris and tobacco provided that the additional Central Excise Duties leviable under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (Act 58 of 1957) had been paid. This notification was subsequently modified and on November 25, 1958, another notification was issued unconditionally exempting from sales tax biris both handmade and machine-made with effect from July 1, 1958. The exemption of biris from sales tax was conditional under the notiffcation dated December 14, 1957, for the period December 14, 1957, to June 30, 1958, but was unconditional as from July 1, 1958.

The petitioner's firm submitted its return for the quarter beginning April 1, 1958, to June 30, 1958, showing a gross turnover of Rs. 75,44,633 and net turnover of Rs. 111. The firm claimed that as from December 14, 1957, biris had been exempted from payment of sales tax which had been replaced by the additional central excise duty and therefore no tax was leviable on the sale of biris. The requisite sales tax of Rs. 3.51 nP on the turnover of Rs. 111

was deposited as required under the law. The petitioner's firm also submitted its return for the periods December 14, 1957, to December 31, 1957, and from January 1, 1958, to March 31, 1958. For the subsequent periods returns were made but those are not in dispute as they fell within the notification of November 25, 1958. The Sales Tax Officer on November 28, 1958, sent a notice to the petitioner's firm for assessment of tax on sale of biris during the assessment period April 1, 1958, to Jund 30, 1958. On December 10, 1958, the petitioner's firm submitted an application to the Sales Tax Officer stating that no sales tax was exigible under the Act on the sale of biris because of the notification dated December 14, 1957. This place was rejected by the Sales Tax Officer and on December 20, 1958, he assessed the sales of the petitioner's firm to sales tax amounting to Rs. 4,71,541-75nP. In his order the Sales Tax Officer held:—

> "The exemption envisaged in this notification applies to dealers in respect of sales of biris provided that the additional Central Excise duties leviable thereon from the closing of business on 13-12-1957 have been paid on such goods. The assessees paid no such Excise duties. Sales of biris by the assessees are therefore liable to sales tax".

Against this order the firm took an appeal under s. 9 of the Act to the Judge (Appeals) Sales Tax, Allahabad, being Appeal No. 441 of 1959, but it was dismissed on May 1, 1959.

The petitioner's firm filed a petition under Art. 226 of the Constitution in the High Court of Allahabad challenging the validity of the order of assessment and demand by the Sales Tax Officer. This was Civil Miscellaneous Writ No. 225 of 1959 which was dismissed on January 27, 1959 on the ground that there was another remedy open to the

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petitioner under the Act. The High Court also observed:—

> "We have come to the conclusion that the Sales Tax Officer has not committed any apparent or obvious error in the interpretation of the notification of 14th December 1957".

Against the order of the High Court an appeal was brought to this Court on a certificate under Art. 133(1)(a). During the pendency of the appeal this petition under Art. 32 was filed and rule was issued on May 20, 1959. Subsequently the appeal which had been numbered C-A. 572/60 was dismissed by a Divisional Bench of this Court for non-prosecution. An application has been filed in this Court for restoration of the appeal and for condonation of delay. That matter will be dealt with separately.

In the petition under Art. 32 the validity of the order of assessment dated December 20, 1958, is challenged on the ground that the levy of the tax amounts to "infringement of the fundamental right of the petitioner to carry on trade and business guaranteed by Art. 19(1)(g)" and further that it is an "illegal confiscation of property without payment of compensation and contravenes the provisions of Art. 31 of the Constitution". The prayers have already been set out above.

As before the Constitution Bench which heard the petition a preliminary objection against the competency of the petitioner's right to move this court under Art. 32 of the Constitution, was raised and the correctness of the decision in *Kailash Nath* v. *The State of U.P.*,[1] was challenged, the Constitution Bench because of that decision and of certain other decisions of this court and because of the importance of the question raised made the following order:

(1) A.I.R. 1957 S.C. 790.

"The question thus debated is of considerable importance on which there has been no direct pronouncement by this court. It seems desirable that it should be authoritatively settled. We accordingly direct that the papers be placed before the Chief Justice for constituting a larger Bench for deciding the two following questions:

1. Is an order of assessment made by an authority under a taxing statute which is *intra vires* open to challenge as repugnant to Art. 19(1)(g), on the sole ground that it is based on a misconstruction of a provision of the Act or of a notification issued thereunder?".

2. Can the validity of such an order be questioned in a petition under Art. 32 of the Constitution?"

That is how this matter has come up before this bench.

Before examining the rival contentions raised and the controversy between the parties it is necessary to state that (i) in the present case we are not called upon to decide whether cls. (f) and (g) of Art. 19 are applicable to a taxing statute or to express our preference for the view of this court as expressed in a group of cases beginning with *Ramjilal* v. *Income-tax Officer, Mohindergarh*(1) over the later view taken in the *second Kochunni* (2) case or *K. T. Moopil Nair* v. *State of Kerala* (3), (2) whether the word "State" in Art. 12 of the Constitution Comprises judicial power exercised by courts and (3) the wider question whether Art. 32 is applicable in the case of infringement of rights by private parties. The controversy in the present case in this; the petitioner contends that an erroneous order, in this

(1) (1951) S.C.R. 127, (2) (1960) 3 S.C.R. 887.
(3) (1961) 3 S.C.R. 77.

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case, of assessment resulting from a misconstruction of a notification issued under a statute by a quasi-judicial authority like the Sales Tax Officer even if the statute is *intra vires* is an infringement of the fundamental right to carry on trade under Art. 19(1)(g) on the ground that the essence of the right under that Article is to carry on trade unfettered and that such a right can be infringed as much by an executive act of an administrative tribunal as by a quasi-judicial decision given by such a tribunal. The petitioner mainly relies on the decision of this Court in *Kailash Nath* v. *State of U.P.* (1).

The submission of the respondent, which was urged as a preliminary objection to the maintainability of this petition, was that the impugned decision of the Sales tax Officer does not violate any fundamental right. The respondent argued that if the constitutionality of the Act is not challenged then all its provisions must necessarily be constitutional and valid including the provisions for the imposition of the tax and procedure for assessment and appeals against such assessments and revisions therefrom would be equally valid. A decision by the Sales tax Officer exercising quasi-judicial power and acting within his powers under the Act and within his jurisdiction must necessarily be valid and legal irrespective of whether the decision is right or wrong. Therefore an order of the Sales tax Officer even if erroneous because of misconstruction of notification issued thereunder remains a valid and legal order and a tax levied thereunder cannot contravene fundamental rights and cannot be challenged under Art. 32. An aggrieved party must proceed against the decision by way of appeal etc. as provided under the statute or in appropriate cases under Art. 226 of the Constitution and finally by appeal to this Court under Art. 136. For the order to

be valid and immune from challenge under Art. 32, it is necessary therefore that (1) the statute is *intra vires* in all respects; (2) the authority acting under it acts quasi-judicially ; (3) it acts within the powers given by the Act and within jurisdiction; and (4) it does not contravene rules of natural justice.

In *Mulkarjun Bin Shidramappa Pasare* v. *Narhari Bin Shivappa* (1), Lord Hobhouse while dealing with an erroneous order of a court said:

> "The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied. It did issue notice to Ramlingappa. He contended that he was not the right person, but the Court, having received his protest, decided that he was the right person, and so proceeded with the execution. It made a sad mistake it is true; but a Court has jurisdiction to decide wrong as well as right. If it decided wrong, the wronged party can only take the course prescribed by law for setting matters right ; and if that course is not taken the decision, however wrong, cannot be disturbed."

In an earlier case dealing with the revisional powers of the Court, Sir Barnes Peacock in *Rajah Amir Hassan Khan* v. *Sheo Baksh Singh* (2) said :—

> "The question then is, did the judges of the Lower Courts in this case, in the exercise of their jurisdiction, act illegally or with material irregularity. It appears that they had perfect jurisdiction to decide the question which was before them, and they did decide it. Whether they decided it rightly or wrongly they had jurisdiction to decide the case ; and even if they decided wrongly, they did not exercise their jurisdiction illegally or with material irregularity".

(1) [1900] L.R. 27 I.A. 216. (2) [1884] L.R. 11 I.A. 237, 239.

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This principle has been accepted by this Court in cases to which reference will be made later in this judgment. Although these cases were dealing with the decisions of Courts they are equally applicable to decisions of quasi-judicial tribunals because in both cases where the authority has jurisdiction to decide a matter it must have jurisdiction to decide it rightly or wrongly and if the decision is wrong the aggrieved party can have recourse to the procedure prescribed by the Act for correcting the erroneous decision.

Now Art. 32 is a remedial provision and is itself a fundamental right which entitles a citizen to approach this court by an original petition in any case where his fundamental right has been or may be infringed. The relevant part of the Article provides:—

> Art. 32 (1) "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
>
> (2) The Supreme Court shall have power to issue directions or orders or writs in the nature of *habeas corpus, mandamus,* prohibition, *que warranto* and *certiorari,* whichever may be appropriate for the enforcement of any of the rights conferred by this Part".

Under Art. 32 (1) a citizen can approach this Court when his fundamental rights guaranteed under Part III of the Constitution are invaded the remedy for which is provided in cl. (2) of Art. 32. Thus the remedy under Art. 32 is not available unless the fundamental rights of a citizen are invaded.

In my opinion the contention raised by the respondents is well founded. If the statute and its constitutionality is not challenged then every par-

of it is constitutionally valid including the provisions authorising the levying of a tax and the mode and procedure for assessment and appeals etc. A determination of a question by a Sales tax Officer acting within his jurisdiction must be equally valid and legal. In such a case an erroneous construction, assuming it is erroneous, is in respect of a matter which the statute has given the authority complete jurisdiction to decide. The decision is therefore a valid act irrespective of its being erroneous.

An order of assessment passed by a quasi-judicial tribunal under a statute which is *ultra vires* cannot be equated with an assessment order passed by that tribunal under an *intra vires* statute even though erroneous. The former being with out authority of law, is wholly unauthorised and has no existence in law and therefore the order is an infringement of fundamental rights under Art. 19(1) (f) & (g) and can be challenged under Art. 32. The latter is not unconstitutional and has the protection of law being under the authority of a valid law and therefore it does not infringe any fundamental right and cannot be impugned under Art. 32. To say that the doing of a legal act violates a fundamental right would be a contradiction in terms. It may be pointed out that by an erroneous decision of the quasi-judicial authority the wronged party is not left without a remedy. In the first place under the Act before an assessment is made the Sales tax Officer is required to give notice and hear objections of a taxpayer and give decision after proceeding in a judicial manner that is after considering the objections, and such evidence as is led. Against the order of assessment an appeal is provided by s. 9 of the Act and against such an appellate order a revision can be taken under s. 10 of the Act under s. 11 a reference to the High Court on a question of law

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is provided and if the revising authority refuses to make a reference then the High Court can be moved to direct the revising authority to state a case and then an appeal would lie under Art. 136 of the Constitution of India and it may be added that a petition under Art. 226 would lie to the High Court in appropriate cases against which an appeal will lie to this Court under Art. 136. It may here be added that the procedure prescribed by the Act shows that the Sales tax Officer has to determine the turnover after giving the taxpayer a reasonble opportunity of being heard and such an assessment is a quasi-judicial act *Province of Bombay* v. *Kusaldas S., Advani* (1). If a Sales tax Officer acts as a quasi-judicial authority then the decision, whether right or wrong, is a perfectly valid act which has the authority of an *intra vires* statute behind it. Such a decision, in my opinion, does not infringe any fundamental right of the petitioner and any challenge to it under Art. 32 is unsustainable.

Before giving the reasons for any opinion I think it necessary to refer to the constitutional provisions dealing with the power to tax. This subject is dealt with in Part XII of Constitution and Art. 265 therein which is the governing provision provides :—

> "No tax shall be levied or collected except by authority of law."

Therefore a taxing law enacted by a legislature, which it is not competent to enact, will have no existence in the eye of law and will be violative of Art. 19 (1)(g). The same result will follow if the law is a colourable piece of legislation e.g., a law disguised as a taxing law but really law but confiscatory measure the object of which is not to raise revenue but confiscation. Similarly, if a tax is assessed by an authority which has no jurisdict-

(1) [1950] 1 S.C.R. 621, 725.

tion to impose it will also be outside the protection of law being without authority of law. The same will be the case where an Executive authority levies an unauthorised tax. Then there are cases like the present one where a quasi-judicial tribunal imposes a tax by interpreting a notification under a taxing provision and the objection taken is that the interpretation is erroneous. The cases relied upon by counsel for the appellant and the respondent fall within one or other of these categories.

As I have said above, the submission of the learned Additional Solicitor General is well founded. It has the support of the following decisions of this Court which I shall now deal with. In *Gulabdas* v. *Assistant Collector of Custom* (1) it was held that if the order impungned is made under the provisions of a statue which is *intra vires* and the order is within the jurisdiction of the authority making it then whether it is right or wrong, there is no infraction of the fundamental rights and it has to be challenged in the manner provided in the Statute and not by a petition under Art. 32. In that case the petitioner was aggrieved by the order of the Assistant Collector of Customs who assessed the goods imported under a licence under a different entry and consequently a higher Excise Duty was imposed. The petitioners feeling aggrieved by the order filed a petition under Art. 32 and the objection to its maintainability was that the application could not be sustained because no fundamental right had been violated by the impugned order it having been properly and correctly made by the authorities competent to make it. The petitioner there contended that the goods imported, which were called 'Lyra' brand Crayons were not crayons at all and therefore imposition of a higher duty by holding them to be crayons was an infringement of fundamental

(1) A.I.R. 1957 S.C. 733, 736.

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right under Art. 19(1)(f) & (g). This contention was repelled. Delivering the judgment of the Court, S. K. Das, J., observed at p. 736 :—

> "What, after all, is the grievance of the petitioners? They do not challenge any of the provisions of the India Traiff Act, 1934 (XXXII of 1934) or any of the provisions of the Sea Customs Act, 1878 (VIII of 1878). It is for the Customs authorities to determine under the provisions of the said Acts what duty is payable in respect of certain imported articles. The Customs authorities came to a decision, right or wrong, and the petitioners pursued their remedy by way of an appeal to the Central Board of Revenue.
>
> The Central Board of Revenue dismissed the appeal. Unless the provisions relating to the imposition of duty are challenged as unconstitutional, or the orders in question are challenged as being in excess of the powers given to the Customs authorities and therefore without jurisdiction it is difficult to see how the question of any fundamental right under Art. 19(1) cls. (f) & (g) of the Constitution can at all arise.
>
> If the provisions of law under which the impugned orders have been passed are good provisions and the orders passed are with jurisdiction, whether they be right or wrong on facts, there is really no question of the infraction of a fundamental right. If a particular decision is erroneous on facts or merits, the proper remedy is by way of an appeal.
>
> All that is really contended is that the orders are erroneous on merits. That surely does not give rise to the violation of any

fundamental right under Art. 19 of the Constitution."

The second case is *Bhatnagar Co. Ltd.* v. *The Union of India* (1). In that case the Sea Customs authorities ordered the confiscation of goods on the ground that the petitioner had been trafficking in licenses under which the goods had been imported. This order was challenged under Art. 32. It was held that the order of confiscation made as a result of investigation, which the Customs Authorities were competent to make, was not open to challenge in proceedings under Art. 32 of the Constitution on the ground that the conclusions were not properly drawn. It was observed :—

> "If the petitioner's grievance is that the view taken by the appropriate authorities in this matter is erroneous that is not a matter which can be legitimately agitated before us in a petition under Art. 32. It may perhaps be, as the learned Solicitor General suggested, that the petitioner may have remedy by suit for damages but that is a matter with which we are not concerned. If the goods have been seized in accordance with law and they have been seized as a result of the findings recorded by the relevant authorities competent to hold enquiry under the Sea Customs Act, it is not open to the petitioner to contend that we should ask the authorities to exercise discretion in favour of the petitioner and allow his licences a further lease of life. Essentially the petitioner's grievence is against the conclusions of fact reached by the relevant authorities."

The third case is *The Parbhani Transport Co-operative Society Ltd.* v. *The Regional Transport Authority, Aurangabad* (2) where the

(1) (1957) S.C.R. 701, 712. (2) [1960] 3 S.C.R. 177, 188.

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decision of a Transport Authority in granting a motor carriage permit was challenged as a contravention of Art. 14. The Court held that the Regional Transport Authority acts in a quasi-judicial capacity in the matter of granting permits, and if it comes to an erroneous decision the decision is not challengeable under Art. 32 of the Constitution because the decision right or wrong could not infringe Art. 14. Sarkar J., said at p. 188:—

> "The decision of respondent No. 1 (Regional Transport Authority) may have been right or wrong.....but we are unable to see that the decision offends Art. 14 or any other fundamental right of the petitioner. The respondent No. 1 was acting as a quasi-judicial body and if it has made any mistake in its decision there are appropriate remedies available to the petitioner for obtaining relief. It cannot complain of a breach of Art. 14".

Lastly reliance was placed on an unreported judgement of this Court in *Aniyoth Kunhamina Umma* v. *The Ministry of Rehabilitation, Government of India, New Delhi* (1) The petitioner in that case was a reprssentative-in-interest of her husband who had been declared an evacuee by the Custodian of Evacuee property. Her appeals first to the Deputy Custodian and then to the Custodian General were unsuccessful. She then field a petition under Art. 32 of the Constitution. It was held that the appropriate authorities of competent jurisdiction under the Administration of Evacuee Property Act 1950 having determined that the husband was an evacuee within that Act and the property was evacuee property it was not open to the petitioner to challenge the decision of the Custodian

(11) [1962] 1 S.C.R. 505.

General under Art. 32 of the Constitution. S. K. Das, J., delivering the judgment of the Court observed :—

> "Where, however, on account of the decision of an authority of competent jurisdiction the right alleged by the petitioner has been found not to exist, it is difficult to see how any question of infringement at right can arise as a ground for a petition under Art. 32 of the Constitution unless the decision on the right alleged by the petitioner is held to be a nullity or can be otherwise got rid of. As long as that decision stands, the petitioner cannot complain of any infringement of a fundamental right. The alleged fundamental right of the petitioner is really dependent on whether Kunhi Moosa Haji was an evacuee property. Is the decision of the appropriate authorities of competent jurisdiction cannot be otherwise got rid of, the petitioner cannot complain of her fundamental right under Arts. 19(1)(f) and 31 of the Constitution".

These authorities show (1) that if a statute is *intra vires* than a competent order under it by an authority acting as a quasi-judicial authority is equally *intra vires* (2) that the decision whether right or wrong is not violative of any fundamental right and (3) that if the order is erroneous then it can be questioned only under the provisions of that statute because the order will not amount to an infringement of a fundamental right as long as the statute is consititutional. In appropriate case it may be challenged under Art. 226 and in both cases an appeal lies to this Court.

I may now examine decisions of this Court relied upon by the learned Attorney General in which the operation of taxation laws as violating Art. 19(1)(g) was considered and the procedure by

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which this Court was approached. In support of his case the Attorney General mainly relied on *Kailash Nath* v. *State of U.P.*[1] and tried to buttress that decision by certain cases decided before and subsequent to it. He submitted that a misconstruction of a provision of law even by a quasi-judicial tribunal is equally an infringement of fundamental rights under Art. 19(1)(f) & (g) because as a consequence of such misconstruction the tax is an illegal imposition. In *Kailash Nath's* case it was contended before the Sales tax Authorities that cloths, on which Excise duty had already been paid and which was then processed, hand-printed and exported, no sales tax was leviable as it was exempt under the notification under s. 4 of the U. P. Sales Tax Act. The Sales tax Authorities however held the exemption to be applicable only to cloth which had not been processed and hand-printed and was in the original condition. A petition under Art. 32 was filed against that order and it was contended that the rights of the assessee under Art. 19(1)(g) were infringed by the order misinterpreting the notification. The Court said:—

> "If a tax is levied without due legal authority on any trade or business, then it is open to the citizen aggrieved to approach this court for a writ under Art. 32 since his right to carry on trade is violated or infringed by the imposition and such being the case, Art. 19(1)(g) comes into play".

The objection there taken on behalf of the State was in the following terms:—

> "That the imposition of an illegal tax will not entitle the citizen to invoke Art. 32 but he must resort to remedies available under ordinary law or proceed under Art. 226 of the Constitution, in view of the fact that the right

(1) A.I.R. 1957 S.C. 790.

to be exempted from the payment of tax cannot be said to be a fundamental right which comes within the purview of Art. 32".

This contention was repelled because of the following observations in the *Bengal Immunity Co. Ltd.* v. *State of Bihar* (1):

> "We are unable to agree the above conclusion. In reaching the conclusion the High Court appears to have overlooked the fact that the main contention of the appellant company, as set forth in its petition, is that the Act, in so far as it purports to tax a non-resident dealer in respect of an inter-State sale or purchase of goods, is *ultra vires* the Constitution and wholly illegal....."

The other cases referred to in that judgment were *Mohammad Yasin* v. *Town Area Committee, Jalalabad*(2); *State of Bombay* v. *United Motors* (3); *Himmatlal Harilal Mehta* v. *State of Madhya Pradesh* (4) and *Bidi Supply Co.* v. *Union of India* (5). Thus the decision in that case was based on decisions none of which supports the proposition that a misconstruction by a quasi-judicial tribunal of a notification under the provision of a statute which is *intra vires* is a violation of Art. 19(1)(g). On the other hand they were all cases where the imposition of tax or license fee or executive action was sought to be supported by an *ultra vires* provision of the law and was therefore void and violative of Art. 19 (1)(g). As this distinction was not kept in view the remedy by way of petition under Art. 32 was held to be available. The question as now raised was not argued in *Kailash Nath's* case.

The distinction between a competence order of assessment made under a provision of law which is *intra vires* even if it is erroneous and an order made

(1) [1955] 2 S. C. R. 603, 618. (2) [1952] S. C. R. 572.
(3) [1953] S.C.R. 1069, 1077. (4) [1954] S. C. R. 1122.
(5) [1956] S.C.R. 257, 271, 277.

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under a provision of law which is *ultra vires* in fundamental in the matter of applicability of Art.32. In the former case the provision of law being valid the order will be protected as being under the authority of a valid law and therefore it will not be violative of Art. 19(1)(g) and Art. 32 is not available to challenge that order. In the latter case, the provisions of law being void the protection of law does not operate and the order is an unauthorised interference with the rights of a citizen under Art. 19(1)(g). It can therefore be challenged under Art. 32. This distinction does not seem to have been kept in view in *Kailash Nath's* case (1). That case is further open to the criticism that it is based on decisions which were not cases of erroneous interpretations of notifications under *intra vires* statutes but were cases where an unconstitutional provision of law was sought to be used to support a tax. For the reasons I have given *Kailash Nath's* case(1) cannot be accepted as well founded".

In yet another case where the remedy under Art. 32 was sought to challenge the decision of a Sales tax Officer is *Ramavtar Budhaiprasad etc.* v. *Assistant Sales tax Officer, Akola* (2). There a Sales tax Officer on a construction of a Schedule of the Sales tax Act had held that betel leaves were subject to sales tax as they were not vegetables which were exempt from that tax and this Court upheld that decision. The question as to the availability of Art. 32 was not raised.

Besides *Kailash Nath's* case which I have dealt with above the other case relied upon by the learned Attorney General fall within the following categories in none of which the question as now argued arose or was considered.

(1) Where the tax imposed or action taken is under a statute which is unconstitutional.

(1) A.I.R. 1957 S.C. 790. (2) [1963] 1 S.C.R. 279.

(2) Where the Executive action is without authority of law.

(3) Where the taxing authority imposes a tax or acts without authority of law.

(4) Where the quasi-judicial authority without having jurisdiction determines a fact or gives a decision.

I shall now discuss the cases which fall in the first category i.e. where action is taken under a statute which is unconstitutional. The action taken thereunder must necessarily be unconstitutional which is challengeable by an aggreived party under Art. 32.

In *Himmatlal Harilal Mehta* v. *The State of Madhya Pradesh* (1) sales tax was neither levied nor demanded but apprehending that an illegal sales tax may be assessed and levied a petition under Art. 226 was filed in the High Court which was dismissed and an appeal was brought to this Court and thus it was not a petition under Art. 32. In that case the sales tax under explanation II to s. 2(g) of the Central Provinces & Berar Sales tax Act (Act 2 of 1947) was held *ultra vires* of the State Legislature because it offended Art. 286(1)(a) and its imposition or threat of imposition was held without authority of law and therefore infringement of the constitutional right guaranteed under Art. 19(1)(g) entitling the petitioner to apply under Art. 226 of the Constitution. This case therefore decided that a tax under an Act which is unconstitutional, *ultra vires* and void is without authority of law under Art. 265 and is an infringement of Art. 19 (1) (g). This case and *Ramjilal's* case (2) received approval in *The Bengal Immunity Co.* case (3). In the *Bengal Immunity* case also the right infringed was by an Act which was *ultra vires*

(1) (1954) S.C.R. 1122. (2) (1951) S.C.R. 127.
(3) (1953) 2 S.C.R. 603, 618.

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and the remedy under the Act was held to be inadequate, nugatory or useless. The facts of that case were that the appellant company filed a petition under Art. 226 in the High Court of Patna for a writ of prohibition restraining the Sales tax Officer from making an assessment of sales tax pursuant to a notice issued by him. The appellant claimed that sales sought to be assessed were made in the course of inter-State trade, that the provisions of the Bihar Sales Tax Act, 1947 (Bihar Act 19 of 1947) which authorised the imposition of tax on such sales were repugnant to Art. 286 (2) and void, and that, therefore, the proceedings taken by the Sales tax Officer should be quashed. The application was dismissed by the High Court on the ground that if the Sales tax Officer made an assessment which was erroneous, the assessee could challenge it by way of appeal or revision under ss. 24 and 25 of the Act and that as the matter was within the jurisdiction of the Sales tax Officer, no writ of prohibition or *certiorari* could be issued. There was an appeal against this order to this Court and therein a preliminary objection was taken that a writ under Art. 226 was not the appropriate remedy open to an assessee for challenging the legality of the proceedings before a Sales tax Officer. In rejecting this contention, this Court observed :—

> "It is, however, clear from article 265 that no tax can be levied or collected except by authority of law which must mean a good and valid law. The contention of the appellant company is that the Act which authorises the assessment, levying and collection of sales tax on inter-State trade contravenes and constitutes an infringement of Art. 286 and is, therefore, *ultra vires*, void and unenforceable. If, however, this contention be well founded, the remedy by way of a writ

must, on principle and authority, be available to the party aggrieved."

And dealing with the, contention that the petitioner should proceed by way of appeal or revision under the Act, this Court observed :—

> "The answer to this plea is short and simple. The remedy under the Act cannot be said to be adequate and is, indeed nugatory or useless if the Act which provides for such remedy is itself *ultra vires* and void and the principle relied upon can, therefore, have no application were a party comes to Court with an allegation that his right has been or is being threatened to be infringed by a law which is *ultra vires* the powers of the legislature which enacted it and as such void and prays for appropriate relief under article 226." (p. 620).

It will be seen that the question which arose in that case was with reference to a provision in a taxing statute which was *ultra vires* and the decision was only that action taken under such a provision was without the authority of law and was, therefore, an unconstitutional interference with the right to carry on business under Art. 19(1)(g).

In *Mohmmad Yasin* v. *The Town Area Committee, Jalalabad* (1) the imposition of the license fee was without authority of law and was therefore held to be challengeable under Art. 32 because such a license fee on a business not only takes away the property of the licensee but also operates as on unreasonable restriction on the right to carry on business. In *Balaji* v. *The Income Tax Officer, Special Investigation Circle, Akola* (2) the Income tax Officer included, after the registration of a firm, the income of the wife and of the minor children who had been admitted to partnership.

(1) (1952) S.C.R. 572. (2) (1952) 2 S.C.R. 993.

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The assessee attacked the constitutionality of s. 16(3)(a)(i)(ii) of the Income tax Act. The first question there raised was of the legislative competence of Parliament to enact the law and that Parliament was held competent to enact. Secondly the constitutionality of the provision was questioned on the ground that it violated the doctrine of equality before the law under Art. 14 of the Constitution and that ground was also repelled and it was held that the legislature had selected for the purpose of classification only that group of persons who in fact are used as a cloak to perpetuate fraud on taxation. The third ground of attack was based on Art. 19(1)(f) & (g) of the Constitution. Relying upon the case of *Mohd. Yasin* v. *Town Area Committee*(1) which was a case of license fees and *Himmatlal Harital Mehta's* case (2) in which there was no determination by any tribunal but there was a threat of an illegal imposition, the court held that not only must a law be valid in the sense of there being legislative competence, it must also not infrings the fundamental rights declared by the Constitution. This again was not a case of a determination of a question by a taxing authority acting quasi-judicially but the constitutionality and *vires* of the statute were challenged.

The second category of cases is were the Taxing Authority imposes a tax or acts without authority of law and the assessment made by the Taxing Authority is without jurisdiction. *Tata Iron & Steel Co., Ltd.*, v. *S. R. Sarkar* (3) was a case under the Central Sales Tax Act under which sales in the course of inter-State trade are liable to be taxed only once and by one State on behalf of the Central Government. The petitioner company in that case was assessed to tax of certain sales falling within that Act by the Central Sales tax Officer, Bihar, and the tax was paid. They were again taxed by the

(1) (1952) S.C.R. 572. (2) (1954) S.C.R. 1122.
(3) (1961) 1 S.C.R. 379, 402.

Central Sales tax Officer, West Bengal who held that under the statute that was the "Appropriate State" to levy the tax as the situs of sale was in West Bengal and that was assailed under Art. 32. The objection to the maintainablity of the petition on the ground that an appeal against the order of assessment could be taken and that proceedings under Art. 32 were incompetent was overruled. Shah J., in delivering the judgment of the majority referred to the decision of this Court in *Himmatlal Harilal Mehta's* case, (1); *The Bengal Immunity Co. case*(2) and the *State of Bombay* v. *United Motors India Ltd.* (3) and observed as follows :—

> "In these cases, in appeal from orders passed by the High Courts in petitions under Art. 226, this Court held that an attempt to levy tax under a statute which was *ultra vires* infringed the fundamental right of the citizen and recourse to the High Court for protection of the fundamental right was not prohibited because of the provisions contained in Art. 265. In the case before us, the vires of the Central Sales Tax Act, 1956, are not challenged; but in *Kailash Nath* v. *The State of Uttar Pradesh* A. I. R. 1957 S.C. 790 a petition challenging the levy of a tax was entertained by this Court even though the Act under the authority of which the tax was sought to be recovered was not challenged as *ultra vires*. It is not necessary for purposes of this case to decide whether the principle of *Kailash Nath's* case is inconsistent with the view expressed by this Court in *Ramjilal's* case [1951] S. C. R. 127".

The learned Judges also held that the statute made it impossible to levy two taxes on the same sale and only one tax being payable it could be collected on behalf of the Government of India by one

(1) (1954) S.C.R. 1122. (2) (1955) 2. S.C.R. 603, 618.
(3) [1958] S.C.R. 1069, 1077.

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State only and one sale could not be taxed twice. It having been collected once the threat to recover it again was *Prima facie* an infringement of the fundamental right of the petitioner. Sarkar J., who gave the minority judgment observed:—

> "In *Kailash Nath* v. *The State of U. P.*, A.I.R. 1947 S. C. 790, this Court held that an illegal levy of sales tax on a trader under an Act the legality of which was not challenged violates his fundamental rights under Art. 19(1)(g) and a petition under Art. 32 with respect to such violation lies. The earlier case of *Ramjilal* v. *Income tax Officer, Mohindergarh* [1951] S.C.R. 127 does not appear to have been considered. It is contended that the decision in *Kailash Nath's* case requires reconsideration. We do not think however that the present is a fit case to go into the question whether the two cases not reconcilable and to decide the preliminary question raised. The point was taken as a late stage of proceedings after much costs had been incurred. The question arising on this petition is further of general importance a decision of which is desirable in the interest of all concerned. As there is at least one case supporting the competence of the petition, we think it fit to decide this petition on its merits on the footing that it is competent".

It cannot be said that this case is an authority which supports the contention of the petitioner. Apart from the fact that *Kailash Nath's* case (1) did not receive approval it was decided on the ground of the Central Sates tax being a tax, which could be collected on a sale once and by one State on behalf of the Government of India, and having been imposed and paid once could not be imposed a second time. In other words it was

(1) A.I.R. 1957 S.C. 790.

a tax which was without jurisdiction and therefore fell within Art. 12(1)(f).

A similar case also relied upon by the petitioner is *J. V. Gokal & Co. (Private) Ltd.* v. *The Assistant Collector of Sales Tax (Inspection)* (1). The There the petitioner had entered into contracts with the Government of India for the supply of certain quantities of foreign sugar. When the goods were on the high seas the petitioner delivered to the Government shipping documents pertaining to the goods and received the price. On their arrival they were taken possession of by the Government of India after paying the requisite customs duty. For the assessment year 1954-55 the petitioner was assessed to sales tax in calculating which the price of the sales made to the Government of India deducted. The Assistant Collector of Sales tax issued a notice to the petitioner proposing to review the said assessment passed by the Sales tax Officer. Objections were filed but were rejected and it was held by the Assistant Collector that sales tax was payable in respect of the two transactions. Against this order a petition was filed under Art. 32 which was supported by the Union Government. It was contended by the petitioner that the sales in question were not liable to sales tax inasmuch as they took place in the course of import of goods into India. This Court held that the property in the goods passed to the Government of India when the shipping documents were delivered against payment and that the sales of goods by the petitioner to the Government took place when the goods were on the high seas and were therefore exempt from sales tax under Art. 286 (1)(b) of the Constitution. This was also a case of lack of legislative authority and jurisdiction to impose the sales tax.

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Then there are cases where the Executive action is without authority of law. One such case is *Bombay Dyeing Manufacturing Co. Ltd.* v. *The State of Bombay* (1) which was not a petition under Art. 32 but an appeal against can order under Art. 226. In that case under the Bombay Labour Welfare Fund Act, which authorised the constituting of a fund for financing labour welfare, notices were served upon the appellant company to remit the fines and unpaid accumulations in its custody to the Welfare Commissioner. The appellant company questioned in a petition under Art. 226 the validity of that Act as a contravention of Art. 31(2). The High Court held that Act *intra vires* and dismissed the petition. On appeal against that judgment this Court held that the unpaid accumulations of wages and fines were the property of the Company and any direction for the payment of those sums was a contravention of Art. 31(2) and therefore invalid. It was also held that assuming that the money was not property within the meaning of Art. 31(2)and Art. 19(1)(f) applied that Article would also be of no help to the Welfare Commissioner because it could not be supported under Art. 19(5) of the Constitution. Moreover this was not a case of a determination by a quasi-judicial tribunal but was a case of executive action without authority of law.

In *Bidi Supply Co.* v. *The Union of India* (2) an order passed by Central Board of Revenue transferring the assessment records and proceedings of the petitioner from Calcutta to Ranchi under s. 5 (7A) of the Income tax Act was challenged under Art. 32 as an infringement of the fundamental rights of the petitioner under Arts. 14, 19(1)(g) and 31 of the Constitution. The impugned order by the Central Board of Revenue was made acting in its executive capacity and this

(1) (1958) S.C.R. 1122. (2) (1956) S.C.R. 257, 271, 277.

Court, without deciding the question whether the order could be supported on the ground of reasonable classification held that the order expressed in general terms without any reference to any particular case and without any limitation as to time was not contemplated or sanctioned by sub-s. 7(A) of s. 5 and therefore the petitioner was entitled to the benefit of the provisions of sub-ss. 1 and 2 of s. 64 of Indian Income tax Act. The question decided therefore was that the Central Board of Revenue acting under s. 5(7A) was not empowered to pass an "omnibus wholesale order of transfer". It was not a quasi-judicial order of an administrative tribunal acting within its jurisdiction but an unauthorised executive order of an administrative tribunal acting in its administrative capacity. Section 5(7A) was subsequently amended and in a somewhat similar case *Pannalal Binjraj* v. *Union of India* (1) it was held that the amended s. 5(7A) was a measure of administrative convenience and was constitutional and an order passed thereunder was equally constitutional.

In *Thakur Amar Singhji* v. *State of Rajasthan*(2) the State of Rajasthan passed orders assuming certain jagirs under Rajasthan Land Reforms and Resumption of Jagirs Act. In the case of one of the jagirs it was held by this Court that the notification, by which the resumption was made, was bad as regards properties comprised in that petition because the properties were not within the impugned Act, and being dedicated for religious purposes was exempt under s. 207 of the Act. This again was not a case of any quasi-judicial decision but it was a notification issued by the executive Government in regard to properties not within the Act which was challenged in that case.

(1) [1957] S. C. R. 233. (2) [1955] 2 S. C. R. 303.

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A case strongly relied upon by the petitioner was *M/s. Mohanalal Hargovind Das, Jabalpur* v. *The State of Madhya Pradesh* (1). The petitioners there were called upon to file their returns of the total purchase of tobacco made by them out of Madhya Pradesh with a view to assess and levy purchase tax. The return was filed under protest and the Sales tax Authorities, as it was required under the law, called upon the petitioners to deposit the purchase tax. No quasi-judicial determination was made, no decision was given after hearing the taxpayer, but deposit was asked to be made as that was a requirement of the statute. In a petition under Art. 32 of the Constitution for a writ of *mandamus* restraining the State of Madhya Pradesh from enforcing Madhya Pradesh Act against the petitioners it was contended that the transactions were in the course of inter-State trade. The nature of the transaction was that finished tobacco which was supplied to the petitioners by the suppliers moved from the State of Bombay to the State of Madhya Pradesh and the transactions which were sought to be taxed were therefore in the course of inter-State trade and were not liable to tax by the State. That was not a case of misconstruction of any statue by any quasi-judicial authority but that was a case in which the very transaction was outside the taxing powers of the State and any action taken by the taxing authorities was one without authority of law. The statue did not give jurisdiction to the Authority to decide an inter-State transaction was an intra-State sale. If it had so done the statute would have been unconstitutional under Art. 286(1)(a).

In *Madanlal Arora* v. *The Excise Taxation Officer Amritsar* (2), notices were issued to the assessee enquiring him to attend with the documents and

(1) [1955] 2 S. C. R. 509. (2) [1962] 1 S.C.R. 823.

other evidence in support of his returns. In the last of these notices it was stated that on failure to produce the documents and evidence the case will be decided "on best judgment assessment basis". The petitioner did not comply with the notices but filed a petition under Art. 32 of the Constitution chellenging the right of the authority to make a "best judgment assessment" on the ground that at the date of the last notice the sales tax authority had no right to proceed to make any "best judgment assessment" as the three years within which alone such assessment could be made had expired. This contention was held to be well founded. Indeed the respondent conceded that he could not contend to the contrary. This therefore was a case in which the taxing authority had no jurisdiction to take proceeding for assessment of tax because of the expiry of three years which had to be counted from the end of the each quarter in respect of which the return had been filed. The question was one of lack of jurisdiction and it made no difference that the Sales tax Officer had misconstrued the provision.

Y. Mahaboob Sheriff v. *Mysore State Transport Authority* (1). was a case under the Motor Vehicles Act. The petitioners' application for the renewal of the permits were granted by the Regional Transport Authority empowered to grant renewal for the period of one year. A petition under Arts. 226 and 227 of the Constitution was filed against the order of renewal after the usual appeals had been taken and proved unsuccessful and the petition was summarily dismissed. Thereafter a petition under Art. 32 of the Constitution was filed in this Court and the question for determination was whether on a proper construction of the provision of s. 58 (1) (a) and (2) of the Motor Vehicles Act the period of renewal like in the case of original

(1) [1960] 2 S. C. R. 146.

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permit had to be not less than three and not more than five years. It was held that it had to be for that period as provided in sub-s. (1) (a) of s. 58 read with sub-s. 2 of that section. This, it was submitted, was an authority for the proposition that where a provision is misconstrued by an authority having jurisdiction to construe a section a petition under Art. 32 is competents. In the first place the question as to whether Art. 32 was applicable was not raised and was therefore not decided. Secondly what was held was that if the authority renewed a permit the renewal had to be for a particular period as specified in s. 58 and could not be for a lesser period. The question was therefore of jurisdiction.

In *Universal Imports Agency* v. *The Chief Controller of Imports and Exports* (1), the petitioners, in Pondicherry, entered before its merger with India, into firm contracts with foreign sellers and the goods agreed to be imported were shipped before or after the merger. The goods were confiscated by the Controller of Customs on the ground that they were imported without a licence but as an option in lieu of confiscation the goods were released on payment of a fine. On a petition under Art. 32 it was held by a majority that under paragraph 6 of the French Establishments (Application of Laws) Order 1954, the transactions in question fell within the words "things done" in the saving clause and were not liable to tax. This saving clause was contained in the Order applying Indian laws in place of the French laws. The construction was not of the taxing statute but of certain Orders by which the taxing statute had been applied to Pondicherry. These Orders the Taxing Officer had no power to construe and there was no law to support the order of the Collector. In any case this is an instance of want of jurisdiction to tax transactions

(1) [1961] 1 S. C. R. 305.

which the law excludes from the taxing powers of the authority levying the tax. There again the question of the applicability of Art. 32 to quasi-judicial determination was not raised.

There is one other class of cases of which *K. T. Moopil Nair's* case (1) is an example. That was a case where the tax was of a confiscatory nature and the procedure was contrary to rules of natural justice. The imposition of land tax at a flat rate of Rs. 2 per acre imposed under the provisions of Travancore Cochin Land Tax Act (Act 15 of 1955) as amended by Travancore Cochin Land Tax Act (Act 10 of 1957) was held to be violative of Arts. 14 and 19 (1) (f). A taxing statute it was held by a majority of the Court, was not immune from attack on the ground that it infringes the equality clause under Art. 14, and the tax was also held to be violative of Art. 19 (1) (f), because it was silent as to the machinery and procedure to be followed in making the assessment leaving to the executive to evolve the requisite machinery and procedure thus treating the whole thing as purely administrative in character and ignoring that the assessment on a person or property is quasi-judicial in character. It was also held that a tax of Rs. 2 was unreasonable as it was confiscatory in effect. The main ground on which the law was held to be an infringement of Art. 19 (1) (f) was the procedure or the want of procedure for imposing taxes and therefore its being opposed to rules of natural justice. Here again the vice was in the Act and not in any misinterpretation of it. No doubt the amount of the tax imposed was also held to be uureasonable because it was in effect confiscatory but this is not a matter which is necessary in the present case to go into as the question whether Art. 19 (1) applies to taxing laws or not was not debated by the parties before us. On the main

(1) (1961) 3 S.C.R. 77.

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contention as to the applicability of Art. 32 these were the submissions of the learned Attorney-General.

A review of these cases shows that (1) the law which is ultra vires either because of the legislative incompetence or its contravention of some constitutional inhibition is a non-existing law and any action taken thereunder, quasi-judicial or otherwise, would be a contravention of Art. 19 (1) (f) and (g) and the result will be no different if it is a colourable piece of legislation; (2) where the proceedings are repugnant to the rules of natural justice the right guaranteed under Art. 19 (1) (f) and (g) are infringed; (3) the consequence is the same where assessment is made by an authority which has no jurisdiction to impose the tax and (4) if an administrative tribunal acting quasi-judicially misconstrues a provision which it has jurisdiction to construe and therefore imposes a tax infringement of Art. 19 (1) (g) would result according to *Kailash Nath's case* (1) but there is no such infringement according to cases which the learned Additional Solicitor General relied upon and which have been discussed above. The reason why the decision in the latter cases is correct and the decision in *Kailash Nath's case* (1) is not have already been given and it is unnecessary to repeat them.

Mr. Palkhivala who intervened in C. M. P. 1496/61 in support of the petition in the main argued the question whether a misconstruction of a taxing statute can involve the violation of a fundamental right under Art. 19 (1) (g). His contention was that an erroneous construction which result in transgression of constitutional limits would violate Art. (19) (1) (g) and that the difference between jurisdictional and non-jurisdictional error was immaterial and that a misconstruction of a statute can violate the right to trade and he relied upon

(1) A.I.R. 1957 S.C. 790.

M/s. Mohanlal Hargovind Das v. *The State of Madhya Pradesh* (1) which was a case of inter-State sale and which has already been discussed. He also relied upon the decision in *R. S. Ram Jawaya Kapur* v. *The State of Punjab* (2). In that case it was held that the acts of the Executive even if deemed to be sanctioned by the legislature can be declared void if they infringe any of the fundamental rights but no question of judicial determination by quasi-judicial tribunal arose there. Similarly in *M/s. Ram Narain Sons Ltd.* v. *Asstt. Commissioner of Sales tax* (3) the question raised was of the meaning and scope of the proviso to Art. 286 (2) and therefore the question was one of inter-State sales which no statute could authorise to turn into intra-State sale by a judicial decision.

It was argued before us that the decision of a tribunal acting quasi-judicially operates as *res judicata* and further that the judgment of the High Court of Allahabad when it was moved by the petitioner under Art. 226 of the Constitution against the order of assessment passed on the ground of misconstruction of the notification of December 14, 1957 also operates as *res judicata* as the appeal against that order has been withdrawn. The High Court rejected the petition under Art. 227 firstly on the ground that there was an alternative remedy of getting the error corrected by way of appeal and secondly the High Court said:—

> "We have, however, heard the learned counsel for the petitioner on merits also, but we are not satisfied that the interpretation put upon this notification by the Sales Tax Officer contains any obvious error in it. The circumstances make the interpretation advanced by the learned counsel for the petitioner unlikely. It is admitted that even hand-made biris have been subject to Sales tax since long

(1) [1955] 2 S.C.R. 509. (2) [1955] 2 S.C.R. 225.
(3) (1955) 2 S.C.R. 498.

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before the date of the issue of the above notification. The object of passing the Additional Duties of Excise (Goods of Special Importance) Central Act, No. 58 of 1957 was to levy an additional excise duty on certain important articles and with the concurrence of the State Legislature to abolish Sales tax on those articles. According to the argument of the learned counsel for the petitioner during the period 14th December, 1957 to June 30, 1958, the petitioner was liable neither to payment of excise duty nor to payment of sales tax. We do not know why there should have been such an exemption. The language of the notification might well be read as meaning that the notification is to apply only to those goods on which an additional Central excise duty had been levied and paid."

It is unnecessary to decide this question in this case.

It was next argued that the Sales tax Authorities are all officers of the State charged with the function of levy and collection of taxes which is essentially administrative and that when they act as quasi-judicial tribunals that function is only incidental to the discharge of their administrative function and therefore the assessment order of December 20, 1958, was an executive order and falls within Art. 19(1)(g). Reference was made to *Bidi Supply Co.*, v. *The Union of India* (1) (at pp. 271 and 277), a case under s. 5(7-A) of the Income tax Act. At page 271 the definition of the word "State" is set out and at p. 277 Das, C. J., said that the "State" includes its Income tax Department. There is no dispute that the Sales tax Department is a department of the State and is included within the word "State" but the question is what is the nature and quality of the determination made by a Sales Tax Officer

(1) (1956) S.C.R. 257, 271, 277.

when he is performing judicial or quasi-judicial functions. The argument of the learned Attorney General comes to this that even though in the performance of quasi-judicial functions the Taxing Officer may have many of the trappings of a court still he is not a court and therefore the decision of the taxing authority in the present case was not entitled to the protection which an erroneous decision of a proper court has; *Chaparala Krishna Brahman* v. *Gururu Govardhaiah* (1) where it was held that the Income tax Officer is not a court within s. 195 of the Criminal Procedure Code was cited in support of the contention that the taxing authority in the present case was not a court. So also *Sell Co. of Australia Ltd.* v. *The Federal Commissioner of Taxation* (2), where it was held that a Board of Revenue created by the Income tax Assessment Act to review the decision of Commissioner of Income tax is not a court exercising the judicial powers of the Commonwealth. At page 298 Lord Sankey. L. C., observed:

> "An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so called. Mere externals do not make a direction to an administrative officer by an ad hoc tribunal an exercise by a court of judicial power".

It was also observed in that case that there are tribunals with many of the trappings of a court, which nevertheless are not courts in the strict sense exercising judicial power. There is no gainsaying that Sales tax Officer is not a court even though he may have many of the trappings of a court including the power to summon witnesses, receive evidence on oath and making judicial determinations. In the strict sense of the term he is not a court exercising judicial power; but the

(1) A.I.R. 1954 Mad. 822. (2) (1931) A. C. 275, 298.

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question for decision in the present case is not whether he is a Court or not but whether the determination made by him in regard to the exemption available to the petitioners on the sale of biris was a decision made by a quasi-judicial authority in the exercise of its statutory powers and within its jurisdiction and therefore not an administrative act.

The characteristic of an administrative tribunal is that it has no ascertainable standards. It only follows policy and expediency which being subjective considerations are what a tribunal makes them. An administrative tribunal acting as an administrative tribunal and acting as a judicial tribunal may be distinguished thus:

> "Ordinarily 'administrative' tribunals need not act on legal evidence at all, but only on such considerations as they see fit. A statute requiring such evidence to be received prevents a tribunal's making up its mind until it has given this evidence a chance to weigh with it. But it is a fallacy to assume that the tribunal is thereby limited to acting on that evidence. If it is an 'administrative' tribunal it must still be governed by policy and expendiency until it has heard the evidence, but the evidence need not influence its policy any further than it sees fit. A contrary view would involve the decision's being dictated by the evidence, not by policy and expediency; but if certain evidence with it a right to a particular decision, that decision would be a decision on legal rights; so the tribunal would be administering 'justice' and would be exercising judicial not 'administrative". ((1933) L. Q. R. 424).

There are decisions of this court in which certain

tribunals have been held judicial bodies; *Bharat Bank Ltd., Delhi* v. *Employees of the Bharat Bank Ltd.* (1) *Province of Bombay* v. *Kusaldas S. Advani* (2) where Das, J., (as he then was) observed at p. 725:

> "that if a statutory authority has power to do any act which will prejudicially affect the subject then, although there are not two parties apart from the authority and the contest between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially".

See also *Nagendra Nath Bora* v. *The Commissioner of Hills Division & Appeals, Assam* (3).

It is unnecessary again to examine in detail the provisions of the Act to determine the character of the Sales tax Officer when he takes assessment proceedings for they have already been referred to. They are all characteristics of judicial or quasi-judicial process and would clothe the Sales tax Officer making assessment orders with judicial or quasi-judicial character. Indeed, because the order of assessment was judicial or quasi-judicial the petitioner filed in the High Court a petition for *certiorari* and against that order an appeal under Art. 136 as also a petition for *certiorari* under Art. 32. Taking the nature of the determination by the Sales tax Officer in the instant case it cannot be said that he is purely an administrative authority or the order passed by him is an executive order; on the contrary when he is determining the amount of tax payable by a dealer, he is acting in a quasi-judicial capacity.

(1) (1950) S.C.R 459, 463. (2) (1950 S.C.R. 621, 725.
(3) (1958) S.C.R. 1240, 1257, 1258.

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Mr. Chari, intervening on behalf of the State of Bihar, submitted that in Art. 12 the judicial branch of the State was not included in the definition of the word "State" and the words "other bodies" there did not comprise a tribunal having jurisdiction to decide judicially and its decisions could not be challenged by way of a petition under Art. 32 of the Constitution. In view of my decision that a quasi-judicial order of the Sales tax Officer is not challengeable by proceedings under Art. 32, I do not think it necessary to decide the wider question whether the definition of the word "State" as given in Art. 12 comprises the judicial department of the State or not.

In view of the decision as to the correctness of the decision in *Kailash Nath's case* (1). it is not necessary in this case to go into the correctness or otherwise of the order of the Sales tax Officer. The petition under Article 32 therefore fails and is dismissed. There will be no orders as to costs.

(C. M. P. No. 1349 of 1961)

KAPUR, J.—Messrs. Mohanlal Hargovind Das, the assessee firm had filed an appeal on a certificate of the Allahabad High Court against the order of the Court dismissing their petition under Art. 226 of the Constitution challenging the imposition of the sales tax, on the ground that another remedy was available. The appeal against that order was dismissed by this Court for non-prosecution on February 20, 1961. Against that order of dismissal the assessee firm has filed an application for restoration on the ground that it had been advised that in view of the rule having been issued under Art. 32 of the Constitution wherein the contentions were the same as raised in the appeal against the order under Art. 226 it was unnecessary to prosecute the appeal. It also prayed for condonation of delay in filing the application for restoration.

(1) A. I. R. (1957) S.C. 790.

No sufficient cause has been made out for allowing the application for restoration. The assessee firm deliberately allowed the appeal, which was pending in this Court, to be dismissed for non-prosecution and after deliberately taking that step it cannot be allowed to get the dismissal set aside on the ground of wrong advice. The application for restoration is therefore dismissed with costs.

Sarkar J.

SARKAR, J.—I have had the advantage of reading the judgments just delivered by my brothers Das and Kapur and I am in agreement with them.

Subba Rao J.

SUBBA RAO, J.—I have carefully gone through the judgment prepared by my learned brother Kapur, J. I am unable to agree. The facts have been fully stated in his judgment and it is therefore not necessary to cover the ground over again.

This larger Bench has been constituted to canvass the correctness of the decision in *Kailash Nath* v. *State of Uttar Pradesh* (1). After hearing the elaborate arguments of learned counsel, I am convinced that no case has been made out to take a different view.

Learned Attorney General seeks to sustain the correctness of the said decision. He broadly contends that this Court is the constitutional protector of the fundamental rights enshrined in the Constitution, that every person whose fundamental right is infringed has a guaranteed right to approach this Court for its enforcement, and that it is not permissibe to whittle down that jurisdiction with the aid of doctrines evolved by courts for other purposes. He argues that in the present case an executive authority functioning under the Uttar Pradesh Sales Tax Act, 1948 (Act XV of 1948), hereinafter called the Act, made a clearly erroneous order imposing tax on exempted goods,

(1) A.I.R. 1957 S.C. 790.

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namely, bidis, and that it is a clear infringement of the fundamental right of the petitioner to carry on business in bidis. Whenever such a right is infringed, the argument proceeds, by a State action—here we are only concerned with State action—it is the duty of this Court to give the appropriate relief and not to refuse to do so on any extraneous considerations.

The Additional Solicitor General appearing for the State does not admit this legal position. He says that the Act is a reasonable restriction on the petitioner's right to carry on business in bidis, that thereunder a Sales-Tax Officer has jurisdiction to decide, rightly or wrongly, whether bidis are exempted from sales-tax, and that, therefore, his order made with jurisdiction cannot possibly infringe the fundamental rights of the petitioner.

Mr. Chari, who appears for the intervener, while supporting the argument of learned Solicitor General emphasizes the point that the fundamental rights enshrined in Art. 19(1)(g) of the Constitution is only against State action, that the definition of "State" in Art. 12 thereof excludes all authorities exercising judicial power, that the sales-tax authority, in making the assessment in exercising judicial power, and that, therefore, no writ can be issued by this Court against the said authority.

Before attempting to answer the questions raised, it is relevant and convenient to ascertain precisely the position of the fundamental rights under the Constitution and the scope of the jurisdiction of this Court in enforcing those rights.

Fundamental rights are enshrined in Part III of the Constitution as the paramount rights of the people. Article 13(2) prohibits the State from making any law which takes away or abridges the rights conferred by the said Part and declares that

any law made in contravention of this clause shall, to the extent of the contravention, be void. These rights may be broadly stated to relate to (i) right to equality—Arts. 14 to 18, (ii) right to freedom—Arts. 19 to 22, (iii) right against exploitation—Arts. 23 and 24, (iv) right to freedom of religion—Arts. 25 to 28, (v) cultural and educational rights—Arts. 29 and 30, (vi) right to property—Arts. 31 and 31A, and (vii) right to constitutional remedies—Arts. 32 to 35. These are the inalienable rights of the people of this country—some of them of non-citizens also—believed to be necessary for the development of human personality; they are essential for working out one's way of life. In theory these rights are reserved to the people after the delegation of the other rights by them to the institutions of Government created by the Constitution, which expresses their will: see observations of Patanjali Sastri, J., as he then was, in *A.K. Gopalan* v. *State of Madras*(1). In *State of Madras* v. *Shrimati Champakam Dorairajan* (2) the same idea was more forcibly restated thus:

> "The chapter of Fundamental Rights is sacrosanct and not liable to be abridged by any legislative or Executive Act or order, except to the extent provided in the appropriate article in Part III. The directive principles of State Policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights."

In the context of fundamental rights, an important principle should be borne in mind, namely, that the English idea of legislative supremacy is foreign to our Constitution. As this Court pointed out in *A. K. Gopalan's case* (1) the Constitution has not accepted the English doctrine of absolute supremacy of Parliament in matters of legislation. Therefore, every institution, be it the

(1) (1950) S.C.R. 88. (2) (1951) S.C.R. 525, 531.

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Executive, the Legislature of the Judiciary, can only function in exercise of the powers conferred on it that is, the Constitution is the paramount law. As the Constitution declares the fundamental rights and also prescribes the restrictions that can be imposed thereon, no institution can overstep the limits, directly or indirectly, by encroaching upon the said rights.

But a mere declaration of the fundamental rights would not be enough, and it was necessary to evolve a machinery to enforce them. So our Constitution, entrusted the duty of enforcing them to the Supreme Court, the highest judicial authority in the country. This Court has no more important function than to preserve the inviolable fundamental rights of the people ; for, the fathers of the Constitution, in their fullest confidence, have entrusted them to the care of this Court and given to it all the institutional conditions necessary to exercise its jurisdiction in that regard without fear or favour. The task is delicate and sometimes difficult ; but this Court has to discharge it to the best of its ability and not to abdicate it on the fallacious ground of inability or inconvenience. It must be borne in mind that our Constitution in effect promises to usher in a welfare State for our country ; and in such a state the Legislature has necessarily to create innumerable administrative tribunals, and entrust them with multifarious functions. They will have powers to interfere with every aspect of human activity. If their existence is necessary for the progress of our country, the abuse of power by them may bring about an authoritarian or totalitarian state. The existence of the aforesaid power in this Court and the exercise of the same effectively when the occasion arises is a necessary safeguard against the abuse of the power by the administrative tribunals.

The scope of the power of this Court under Art. 32 of the Constitution has been expounded by

this Court on many occasions. The decisions not only laid down the amplitude of the power but also the mode of exercising that power to meet the different situations that might present themselves to this Court. In *Romesh Thappar* v. *State of Madras* (1) this Court declared that under the Constitution the Supreme Court constituted as the protector guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringement of such rights, although such applications are made to the Court in the first instance without resort to a High Court having concurrent jurisdiction in the matter. This Court again in *Rashid Ahmad* v. *The Municipal Board, Kairana* (2) pointed out that the powers given to this Court under Art. 32 of the Constitution are much wider and are not confined to issuing prerogative writs only. This Court further elucidated the scope of the jurisdiction in *T. C. Basappa* v. *T. Nagappa* (3), wherein Mukherjea, J., speaking for the Court defined the scope of the power thus:

> "In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges."

This Court again elaborated the scope of its power under that Article in *Kavalappara Kottarathil Kochunni Moopil Nayar* v. *The State of Madras* (4). Das, C. J., after reviewing the earlier case law on the subject observed:

> "Further, even if the existence of other adequate legal remedy may be taken into consideration by the High Court in deciding

(1) (1950) S.C.R. 594. (2) (1950) S.C.R. 566.
(3) (1955) 1 S.C.R. 250, 256. (4) (1959) Supp. 2 S C. R. 316, 325. 337,

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whether it should issue any of the prerogative writs on an application under Art. 226 of the Constitution, as to which we say nothing now—this Court cannot, on a similar ground, decline to entertain a petition under Art. 32, for the right to move this Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution is itself a guaranteed right."

In that case it was pressed upon this Court to hold that in exercise of its power under Art. 32 of the Constitution, this Court could not embark upon an enquiry into disputed questions of fact, and various inconveniences were pointed out if it was otherwise. After considering the cases cited in support of that contention, this Court came to the conclusion that it would fail in its duty as the custodian and protector of fundamental rights if it was to decline to entertain a petition under Art. 32 simply because it involved the determination of disputed questions of fact. When it was pointed out that if that view was adopted, it might not be possible for this Court to decide questions of fact on affidavits, the learned Chief Justice observed:

> "As we have already said, it is possible very often to decide questions of fact on affidavits. If the petitions and the affidavites in support thereof are not convincing and the court is not satisfied that the petitioner has established his fundamental right or any breach thereof, the court may dismiss the petition on the ground that the petitioner has not discharged the onus that lay on him. The court may, in some appropriate cases, be inclined to give an opportunity to the parties to establish their respective cases by filing further affidavits or by issuing a commission or even by setting the application down for trial

on evidence, as has often been done on the original sides of the High Courts of Bombay and Calcutta, or by adopting some other appropriate procedure. Such occasions will be rare indeed and such rare cases should not, in our opinion, be regarded as a cogent reason for refusing to entertain the petition under Art. 32 on the ground that it involves disputed questions of fact."

Finally, this Court also held that in appropriate cases it had the power, in its discretion, to frame writs or orders suitable to the exigencies created by enactments and that where the occasion so required to make even a declaratory order with consequential relief. In short, this decision recognized the comprehensive jurisdiction of this Court under Art. 32 of the Constitution and gave it full effect without putting any artificial limitations thereon. But in *Daryao* v. *State of U. P.* (1). this Court applied the doctrine of *res judicata* and held that the petitioners in that case had no fundamental right, as their right on merits was denied by the High Court in a petition under Art. 226 of the Constitution and that as no appeal was filed therefrom, it has become final. But the learned Judges carefully circumscribed the limits of the doctrine in its application to a petition under Art. 32. Gajendragadkar, J., speaking for the Court observed:

"If the petition filed in the High Court under Art. 226 is dismissed not on the merits but because of the laches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Art. 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 32. If a writ

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petition is dismissed *in limine* and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend upon the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which we have already indicated. If the petition is dismissed *in limine* without passing a speaking order then such dismissed cannot be treated as creating a bar of *res judicata*. It is true that, *prima facie*, dismissal *in limine* even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all; but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of *res judicata* against a similar petition filed under Art. 32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Art. 32, because in such a case there has been no decision on the merits by the Court."

Though this decision applies the doctrine of *res judicata*, the aforesaid observations indicate the anxiety of the Court to confine it within the specified limits and to prevent any attempt to overstep the said limits. Shortly stated it is settled law that Art. 32 confers a wide jurisdiction on this Court to enforce the fundamental rights, that the right to enforce a fundamental right is itself a fundamental right, and that it is the duty of this Court to entertain an application and to decide it on merits whenever a party approaches it to decide whether he has

a fundamental right or if so whether it has been infringed irrespective of the fact whether the question raised involves a question of law or depends upon questions of fact. The doctrine of *res judicata* applied by this Court does not detract from the amplitude of the jurisdiction, but only negatives the right of a petitioner on the ground that a competent court has given a final decision against him in respect of the right claimed.

In this case a further attempt is made on behalf of the State to restrict the scope of the Court's jurisdiction. Uninfluenced by judicial decisions, let us approach the question on principle. An illustration arising on the facts of the present case will highlight the point to be decided. A citizen of India is doing business in bidis. He has a fundamental right to carry on that business. The State Legislature enacts the Sales Tax Act imposing a tax on the turnover and on the sales of various goods, but gives certain exemptions. It expressly declares that no tax-shall be levied on the exempted goods. The said law is a reasonable restriction on the petitioner's fundamental right to carry on the business in bidis. Now on a true construction of the relevant provisions of the Act, no tax is leviable on bidis. But on a wrong construction of the relevant provisions of the Act, the Sales-tax Officer imposes a tax on the turnover of the petitioner relating to the said bidis. He files successive statutory appeals to the hierarchy of tribunals but without sucess. The result is that he is asked to pay tax in respect of the business of bidies exempted under the Act. The imposition of the said illegal tax on the turnover of *bidis* is certainly an infringement of his fundamental right. He comes to this Court and prays that his fundamental right may be enforced against the Sales-tax Officer. The Officer says, "It may be true that my order is wrong; it may also be that the Supreme Court may hold that my construction

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of the section as accepted by the highest tribunal is perverse; still, as under the Act I have got the power to decide rightly or wrongly, my order though illegal operates as a reasonable restriction on the petitioner's fundamental right to carry on business." This argument, in my view, if accepted, would in effect make the wrong order of the Sales-tax Officer binding on the Supreme Court, or to state it differently, a fundamental right can be defeated by a wrong order of an executive officer, and this Court would become a helpless spectator abdicating its functions in favour of the subordinate officer in the Sales-tax Department. The Constitution says in effect that neither the Parliament nor the Executive can infringe the fundamental rights of the citizens, and if they do, the person affected has a guaranteed right to approach this Court, and this Court has a duty to enforce it; but the Executive authority says, "I have a right to decide wrongly and, therefore the Supreme Court cannot enforce the fundamental right". There is nothing in the Constitution which permits such an extraordinary position. It cannot be a correct interpretation of the provisions of the Constitution if it enables any authority to subvert the paramount power conferred on the Supreme Court.

It is conceded that if the law is invalid, or if the officer acts with inherent want of jurisdiction, the petitioner's fundamental right can be enforced. It is said that if a valid law confers jurisdiction on the officer to decide rightly or wrongly, the petitioner has no fundamental right. What is the basis for this principle ? None is discernible in the provisions of the Constitution. There is no provision which enables the Legislature to make an order of an executive authority final so as to deprive the Supreme Court of its jurisdiction under Art, 32 of the Constitution.

But the finality of the order is sought to be sustained on the principle of *res judicata*. It is argued that the Sales-tax Tribunals are judicial tribunals in the sence they are courts, and, therefore their final decisions would operate as *res judicata* on the principle enunciated by this Court in *Daryao's case* (1). Can it be said that Sales-tax authorities under the Act are judicial tribunals in the sense they are courts ? In a Welfare State the Governments is called upon to discharge multifarious duties affecting every aspect of human activity. This extension of the governmental activity necessitated the entrusting of many executive authorities with power to decide rights of parties. They are really instrumentalities of the executive designed to function in the discharge of their duties adopting, as far as possible, the principles of judicial procedure. Nonetheless, they are only executive bodies. They may have the trappings of a court, but the officers manning the same have neither the training nor the institutional conditions of a judicial officer. Every Act designed to further the social and economic progress of our country or to raise taxes, constituted some tribunal for deciding disputes arising thereunder, such as income-tax authorities, Sale-tax authorities, town planning authorities, regional transport authorities, etc. A scrutiny of the provisions of the U. P. Sales-tax Act with which we are now concerned, shows that the authorities constituted thereunder are only such administrative tribunals as mentioned above. The preamble to the Act shows that it was enacted to provide for the levy of tax on the sale of goods in Uttar-Pradesh. The Act imposes a tax on the turnover of sales of certain commodities and provides a machinery for the levy, assessment and collection of the said tax. Under the Act the State Government is authorized to appoint certain assessing authorities. It provides for an appeal against the order of the assessing authority and for a revision in

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some cases and a reference to the High Courts in others. The State Government is also authorized to appoint a hierarchy of authorities or tribunals for deciding the appeals or revisions. The assessing authorities are admittedly the officers of the Sales-tax Department and there is nothing in the Act to indicate that either the assessing authority or the appellate authority need possess any legal qualification. It is true that legal qualification is prescribed for the revising authority, but that does not make him a court or make the inferior tribunals courts. The said authorities have to follow certain principles of natural justice, but that does not make them courts. The scheme of the Act clearly shows that the sale-tax authorities appointed under the Act, following the principles of natural justice, ascertain the turnover of an assessee and impose the tax. The hierarchy of tribunals are intended to safeguard the interest of the assessees as well as the State by correcting wrong orders. The fact that, following the analogy of the Income-tax Act, at the instance of the party aggrieved a reference can be made by the reviewing authority to the High Court on a question of law shows only that the help of the High Court can be requisitioned only to elucidate questions of law, but the High Court has no power to make final orders, but on receipt of the judgments of the High Court, the revising authority shall make an order in conformity with such judgment.

Now let us consider the decisions cited at the Bar which would throw some light on the nature of such tribunals. In considering whether the Board of review created by s. 41 of the Federal Income-Tax Assessment Act, 1922-25 was a judicial authority, the Judicial Committee in *Shell Company of Australia Limited* v. *Federal Commission of Taxation* (1) observed.

> "The authorities are clear to show that there are tribunals with many of the trappings

(1) (1930) A. C. 275, 296, 298.

> of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power."

The Judicial Committee further observed:

> "An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called. Mere externals do not make a direction to an administrative officer by and ad hoc tribunal an exercise by a Court of judicial power."

The Allahabad High Court in *Messrs Kamlapat Moti Lal* v. *Commissioner of Income Tax, U. P.* (1) held that the Income-tax authorities are not courts and, therefore, their decisions cannot operate as *res judicata*. Malik, C. J., observed:

> "The income-tax authorities cannot be treated as Courts deciding a disputed point, except for the purposes mentioned in s. 37, and further there is no other party before them and there are no pleadings. As has been said by Lord Herschell in *Boulter* v. *Kent Justices* (2),"
>
> "There is no truth, *no lis*, no controversy *inter partes*, and no decision in favour of one of them and against the other, unless, indeed, the entire public are regarded as the other party".
>
> The Income-tax authorities are mainly concerned with finding out the assessable income for the year and not with deciding any question of title. But to arrive at that income they have at times to decide certain general questions which might affect the determination of the assessable income not only in the year in question but also in subsequent years.....

(1) A.I.R. 1950 All. 249, 251. (2) (1897) A.C. 556.

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> An assessment is inherently of a passing nature and it cannot provide an estoppel by *res judicata* in later years by reson of a matter being taken in to account or not being taken into account by the Income-tax Officer in an earlier year of assessment."

An instructive discussion on the question whether an Income-tax Officer is a court within the meaning of s. 195 of the Code of Criminal Procedure is found in *Krishna Brahman* v. *Goverdhanaiah* (1), where Balakrishaa Ayyar, J., after considering the case law on the subject and the provisions of the Income-tax Act, held that an income-tax officer was not a "court". The learned Judge did not think that the adoptation of norms of judicial procedure or the fact that appeals were provided for, was sufficient to make them courts. The learned Judge observed:

> "When exercising his powers under Chapter IV of the Act, it seems to me, that the Income-tax Officer is acting in a purely administrative capacity. It is his duty to ascertain what the income of the particular individual is and what amount of tax he should be required to pay. There is therefore no 'lis' whatever before him."

The same reasoning would equally apply to sales-tax authorities. This Court in *Bidi Supply Co.* v. *The Union of India*(1), speaking through Das, C.J., set aside the order of an Income-tax Officer and in doing so observed :

> "Here, 'the State' which includes its Income-tax Department has by an illegal order denied to the petitioner, as compared with other Bidi merchants who are similarly situate, equality before the law or the equal protection of the laws and the petitioner can legitimately complain of an infraction of his fundamental right under article 14 of the Constitution."

(1) A.I.R. 1954 Med. 822, 826.

Though this cannot be called a direct decision on the question raised in the present case, it indicates that this Court treated the Income-tax Officer as a department of the executive branch of the Government. This Court again in *Gullapalli Nageswara Rao* v. *State of Andhra Pradesh* (1) pointed out the distinction between a quasi-judicial act of an Executive authority and the judicial act of a court thus:

> "The concept of a quasi-judicial act implies that the act is not wholly judicial; it describes only a duty cast on the executive body or authority to conform to norms of judicial procedure in performing some acts in exercise of its executive powers."

It is, therefore, clear that administrative tribunal cannot be equated with courts. They are designed to discharge functions in the exercise of the executive power of the State, and the mere fact that the relevant statutes, with a view of safeguard the interest of the people, direct them to dispose of matters comming before them following the principles of natural justice and by adopting the same well-known trappings of judicial procedure, does not make them any the less the executive orgnas of the State. It is not possible to apply the principle of *res judicata* to the orders of such tribunals, for obviously s. 11 of the Code of Civil Procedure does not apply to such orders, and the general priciple of *res judicata de'hors* that provision has never been applied to such orders. It is true that some statutes expressly or by necessary implication oust the jurisdiction of Civil Courts in respect of certain matters but such exclusion cannot affect the extraordinary powers of superior courts conferred under Arts. 226, 227 and 32 of the Constitution.

(1) [1959] Supp. 1 S.C.R. 319, 353-354.

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There is a simpler answer to the plea of *res-judicata*. In the present case the Sales-tax authorities decided the case against the petitioners. The petitioners are seeking the help of this Court under Art.32 of the Constitution to enforce their fundamental rights on the ground that he said order infringes their rights. To put it differently, the petitioners by this application question the orders of the Sales-tax authority. How is it possible to contend that the order which is now sought to be quashed can operate as *res-judicata* precluding this Court from questioning its correctness? The principle underlying the doctrine of *res judicata* is that no one shall be vexed twice on the same matter. This implies that there should be two proceedings,and that in a former proceeding in a court of competent jurisdiction, an issue has been finally decided *inter partes* and therefore the same cannot be reagitated in a subsequent proceeding. On the said principle the impugned order itself cannot obviously be relied upon to sustain the plea of *res-judicata*.

The argument *ab-inconvenienti* does not appeal to me. As it is the duty of this Court to enforce a fundamental right of a party if any authority has infringed his right, considerations based upon inconvenience are of no relevance. It is suggested that if the jurisdiction of this Court is not restricted in the manner indicated, this Court will be flooded with innumerable petitions. Apart from the fact that this is not a relevant circumstance, a liberal interpretation of Art. 32 has not had that effect during the ten years of this Court's existence, and I do not see any justification for such an apprehension in the future. It is further said that if a wider interpretation is given namely, that if this Court has to ascertain in each case whether a statutory authority has infringed a

fundamental right or not, it will have to decide complicated questions of fact involving oral and documentary evidence, and the machinery provided under Art. 32 of the Constitution is not adequate to discharge that duty satisfactory. This again is an attempt to cloud the issue. If the jurisdiction is there and there are difficulties in the way, this Court will have to evolve by convention or otherwise some procedure to avoid the difficulties. A similar argument of inconvenience was raised in *Kavalappara Kottarathil Kochuani Moopil Nayar* v. *State of Madras* (1) and was negatived by this Court. This Court evolved a procedure to meet some of the difficult situations that might arise in particular cases. That apart, this Court also may evolve or mould further rules of practice to suit different contingencies. If a party comes to this Court for enforcement of a fundamental right the existence whereof depends upon proof of facts and the said party has not enhausted the remedies available to him by going through the hierarchy of tribunal created by a particular Act, this Court, if the party agrees, may allow him to withdraw the petition with liberty to file it at a later stage, or, if the party does not agree, may adjourn it *Sine die* till after the remedies are exhausted. If, on the other hand the party comes here after exhausting his remedies and after the tribunals have given their findings of fact, this Court may ordinarily accept the findings of fact as it does in appeals under Art. 136 of the Constitution. If the party complains that the order made against him by a tribunal is based upon a wrong construction of the provisions of a statute, this Court may ascertain whether on a correct interpretation of the statute, the petitioner's fundamental right has been violated. There may be many other situations, but I have no doubt

(1) [1959] Supp. (2) S.C.R. 316, 325, 337.

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that this Court will deal with them as and when they arise. I would, therefore, unhesitatingly reject the argument based on inconvenience.

I shall now proceed to deal with the main argument advanced by learned counsel for the respondent. Briefly stated, the argument is that the Sales-tax Officer has jurisdiction to construe rightly or wrongly the provisions of the Act, which is a valid law, and that even if the said authority wrongly constructed a provision of the Act and imposed the tax, though on a right construction of the said provision it cannot be so imposed, the said order does not infringe the fundamental right of the petitioner. With respect, if I may say so, this argument equates the guaranteed right of a citizen under Art. 32 of the Constitution with that of the prerogative writs obtaining in England, such as writs of certiorari, prohibition and manadamus, issued against orders of inferior tribunals or authorities. This also confuses the fundamental right enshrined in Art. 32 of the Constitution with one or more of the procedural forms this Court may adopt to suit each occasion. The approach to the two question is different. The jurisdiction of the Supreme Court under Art. 32 is couched in comprehensive phraseology and, as pointed out earlier, is of the widest amplitude: it is not confined to the issue of prerogative writs, for the Supreme Court has power to issue directions or orders to enforce the fundamental right; even in respect of issuing the said writs, this Court is not oppressed by the procedural technicalities of the prerogative writs in England. While under Art. 32 this Court may, for the purpose of enforcing a fundamental right, issue a writ of *certiorari*, prohibition or *mandamus*, in a suitable case, it may give the relief even in a case not reached by the said writs. The limitations imposed on the prerogative writs cannot

limit the power of the Supreme Court under Art. 32 of the Constitution. In order a writ of *certiorari* may lie against a tribunal, the said tribunal must have acted without jurisdiction or in excess of jurisdiction conferred upon it by law or there must be some error of law apparent on the face of the record. There are similar limitations in the case of writs of prohibition and mandamus. In the context of the issue of the said writs, courts were called upon to define what "jurisdiction" means. Jurisdiction may be territorial, pecuniary, or personal. There may be inherent want of jurisdiction or irregular exercise of jurisdiction. A tribunal may have power to decide collateral facts for the purpose of assuming jurisdiction; or it may have exclusive jurisdiction to decide even the said facts. In Halsbury's Laws of England, 3rd edn., Vol. III, the scope of the power of *mandamus*, prohibition and *certiorari* is stated thus at p. 59 :

> "The primary function of the three orders is to prevent any excess of jurisdiction (prohibition and *certiorari*; or to ensure the exercise of jurisdiction (*mandamus*). The jurisdiction of inferior tribunals may depend upon the fulfilment of some condition precedent (such as notice) or upon the existence of some particular fact. Such a fact is collateral to the actual matter which the inferior tribunal has to try, and the determination whether it exists or not is logically and temporally prior to the determination of the actual question which the inferior tribunal has to try. The inferior tribunal must itself decide as to the collateral fact: when, at the inception of an inquiry by a tribunal of limited jurisdiction a challenge is made to its jurisdiction, the tribunal has to make up its mind whether it will act or not, and for that purpose to arrive at some decision on whether it has jurisdiction or not."

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"There may be tribunals which, by virtue of legislation constituting them, have the power to determine finally the preliminary facts on which the further exercise of their jurisdiction depends; but, subject to that, an inferior tribunal cannot, by a wrong decision with regard to a collateral fact, give itself a jurisdiction which it would not otherwise possess or deprive itself of a jurisdiction which it otherwise would possess".

It is clear from this passage that a tribunal may have to decide collateral facts to exercise its jurisdiction, but unless the relevant statute confers an exclusive jurisdiction on that tribunal, it cannot wrongly clutch at jurisdiction which it has not or refuse to exercise jurisdiction which it possesses. The doctrine of jurisdiction with its limitations may be relevant in the matter of issue of prerogative writs to quash the orders of tribunals made without or in excess of jurisdiction, but the said restrictions cannot limit the power of the Supreme Court in enforcing the fundamental rights, for under Art. 32 of the Constitution for enforcing the said rights it has power to issue directions or orders uncontrol by any such limitations. That apart, even within the narrow confines of the doctrine of jurisdiction, it is wrong to confine the jurisdiction to inherent want of jurisdiction. A person, who has within the narrow confines of the doctrine of no authority to function under an Act, if he purports to act under that Act, his order will be no doubt without jurisdiction. If an authority by a wrong construction of a section purports to exercise jurisdiction under an Act which it does not possess at all, it may again be described as inherent want of jurisdiction. But there may be many cases on the border line between inherent want of jurisdiction and exercise of undoubted jurisdiction. The authority may have jurisdiction, to decide certain disputes under an Act, but by a

wrong construction of the provisions of the Act, it may make an order affecting a particular subject-matter, which, on a correct interpretation, it cannot reach. By a slight modification of the facts arising in the present case, the point may illustrated thus: A provision of the Sales-tax Act says that the sale of *bidis* is not taxable; the statute prohibits taxation of *bidis*; but the Sales-tax Officer on a wrong construction of the provision holds that hand-made *bidis* are taxable; on a correct interpretation, the Act does not confer any power on the Sales-tax Officer to tax such *bidis*. In such a case on a wrong interpretation of the provisions of the Act, he has exercised jurisdiction in respect of a subject-matter, which, on their correct interpretation, he does not possess. In a sense he acts without jurisdiction in taxing goods which are not taxable under the Act.

The criterion of jurisdiction must also fail in a case where an aggrieved party approaches this Court before the Sales-tax authority makes its order. A Sales-tax authority may issue only a notice threatening to take action under the Act: at that point of time, there is no decision by the tribunal. The person to whom notice is given approaches this Court and complains that the authority under the colour of the Act proposes to infringe his fundamental right; in that case, if this Court is satisfied that his fundamental right is infringed, it has a duty to enforce it. But it is said that when the Sales-tax Act provides a machinery for getting the validity of his claim tested by the tribunals, he must only resort to that machinery. This argument may be relevant to the question whether a civil courts jurisdiction is ousted in view of the special machinery created by a statute, but that circumstance cannot have any bearing on the question of enforcement of fundamental rights, for no law can exclude the jurisdiction of this Court under Art. 32 of the Constitution. Nor is the

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argument that if a citizen comes to this Court when the proceeding before the Sales-tax authorities is in the midstream, this Court will be permitting a citizen to short-circuit the rest of the procedure laid down by the Act, has any relevance to the question of its jurisdiction under Art. 32. This may be an argument of inconvenience and this Court, as has already been indicated, may adjourn the case till the entire proceedings come to an end before the highest Sales-tax authority. This argument of inconvenience cannot obviously arise when a party approaches this Court after availing himself of all the remedies available to him under the Act.

I would, therefore, hold that the principles evolved by the courts in England and accept by the courts in India governing the issue of prerogative writs cannot circumscribe the unlimited power of the Supreme Court to issue orders and directions for the enforcement of the fundamental rights. Even otherwise, in cases similar to those covered by the illustration Supra, a prerogative writ can be issued for quashing the order of an inferior tribunal, and *a fortiori* an order can be issued for enforcing a fundamental right under Art. 32 of the Constitution.

Even if the said legal position be wrong, the present case falls within the limited scope of the principle governing the issue of a writ of *certiorari*. In *Hari Vishnu Kamath* v. *Syed Ahmad Ishaque*(1), the scope of that power vis-a-vis an error of law has been stated thus:

> "It may therefore be taken as settled that a writ of *certiorari* could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however,

(1) [1955] 1 S.C.R. 1104, 1123.

is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error case to be mere error, and become an error apparent on the face of the record ? Learned counsel on either side were unable to suggest any clear-cut rule by which the boundary between the two classes of errors could be demarcated. Mr. Pathak for the first respondent contended on the Strength of certain observations of Chagla, C.J., in *Batuk K. Vyas* v. *Surat Municipality* (1), that no error could be said to be apparent on the face of the record if it was not self-evident, and if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self-evident might not be so considered by another. The fact is that what is an error apparent on the face of the record, cannot be defined precisely or exhaustively there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case."

Whether there is an error of law on the face of the record can be determined only on the facts of each case, and, as this Court pointed out, an error that might pe considered as self-evident by one Judge may not be so considered by another. Except perhaps in a rare case, it is always possible to argue both ways. I would not, therefore, attempt to law down a futher criterion then that which has been accepted by this Court, namely,

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that the question must be left to be determined judicially on the facts of each case. In the present case, the recitals in the notification clearly disclose that there is an error of law on the face of the order of the tribunals. If that error is corrected, as we should do, the position is that the Sales-tax tribunals imposed a tax on the sales transactions of biris which they had no power to do. In that event, there is a clear infringement of the fundamental rights of the petitioners to carry on business in biris.

Now let us look at the decisions of this Court to ascertain whether all or any of them have applied the criterion of jurisdiction in the matter of enforcement of fundamental right of a citizen.

Where under s. 11 of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947, the Controller was given jurisdiction to determine whether there was non-payment of rent or not, as well as the juridiction, on finding that there was non-payment of rent, to order eviction of a tenant, it was held by this Court in *Rai Brij Raj Krishan* v. *S. K. Shaw and Brothers* (1) that even if the Controller had wrongly decided the question whether there had been non-payment of rent, his order for eviction on the ground that there had been non-payment of rent could not be questioned in a civil court. This decision has nothing to do with the scope of this Court's power to enforce a fundamental right, but it deals only with the question of the ouster of the civil court's jurisdiction when a special tribunal is created to finally decide specific matters. In *Messrs. Mohanlal Hargovind Das Biri Merchants Jabalpur* v. *The State of Madhya Pradesh* (2) when the Sale-tax authorities of Madhya Pradesh on a wrong view of the transactions carried on by

(1) [1951] S.C.R. 145. (2) [1955] 2 S.C.R. 509.

the petitioners therein, held that the said transactions were intra-State transactions and on that basis required them to file a statement of return of total purchase of tobacco made by them, this court, on a correct view of the transactions came to the conclusion that they related to inter-State trade and, on that view, enforced the fundamental right of the petitioners. Though there was no decision of the Sales-tax authorities that the transactions were intra-State, the notice was on that basis; but yet that did not prevent this Court from coming to a different conclusion and enforcing the fundamental right of the petitioners. In *Messrs. Ram Narain Sons Ltd.* v. *Asstt. Commissioner of Sale-tax* (1) the Sales-tax authorities determined the turnover of the petitioners including therein the proceeds of sales held by them to be intra-State transactions. This Court held, considering the nature of the transactions once again, that they were not sales inside the State and were only sales in the course of inter-State trade and commerce, and, on that basis, enforced the fundamental right of the petitioners. This Court again enforced the fundamental rights of the petitioners in *J. V. Gokul & Co.* v. *Asstt. Collector of Sale-tax* (2) by reversing the finding of the Sales-tax Officer, who had held that the sales in that case were intra-State and holding that they were made in the course of import.

Ignoring the first decision wherein there was no order of the Sales-tax Officer on merits, in the other two decisions, the Sale-tax Officer in exercise of his jurisdiction decided on the facts before him that the sales were intra-State sales, whereas this Court on a reconsideration of the facts held that they were outside sales. The criterion of jurisdiction breaks in these cases, for the Sales-tax Officer

(1) (1965) 2 S C R 483. (2) (1960) 2 S.C.R. 852.

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has inherent jurisdiction to decide the question whether the sales were inside sales or outside sales. But an attempt is made to distinguish these cases on the ground that by a wrong view of the transactions, the sales-tax Officer violated the provisions of Art. 286 of the Constitution, and therefore he had no inherent jurisdiction to impose the tax. There are no merits in this distinction. The Sales-tax Officer had jurisdiction to decide under the relevant sales-tax Act whether a transaction was inside or outside sale. He had the jurisdiction to decide rightly or wrongly; on the basis of his finding, though a wrong one, the sales were not exempt from taxation. If, on the facts of the case, the Sales-tax Officer had arrived at the correct conclution, he would not have any power to impose a tax on inter-State sales under the Act; he would also have infringed Art. 286 of the Constitution, if he had imposed a tax on such a sale. The absence of jurisdiction or want of power in one case was traceable to a statutory injunction, and in the other to a constitutional prohibition; but that in itself cannot sustain the distinction in the application of the criterion of jurisdiction, for in either case the said wrong finding of fact was the root of the error.

The decision of this Court in *Kailash Nath* v. *State of U. P.* (1), which necessitated the reference to this Bench, is another instance where this Court enforced the fundamental right of the petitioner by accepting an interpretation of the provisions of the Sales-tax Act different from that put upon them by the Sales-tax authority. There, as in the present case, the question depended upon the interpretation of the terms of a notification issued under s. 3 of the Sales-tax Act exempting certain goods from taxation. It is said that the view of this Court was based upon the judgments of this Court enforcing fundamental rights on the ground that the impugned provisions whereunder tax was

(1) A.I.R. 1957 S.C. 790.

levied were *ultra vires*. But the objection taken before this Court in that case was that the imposition of an illegal tax would not entitle a citizen to invoke Art. 32 of the Constitution, but he must resort to the remedies available under the ordinary law or proceed under Art. 226 of the Constitution. But that argument was negatived on the basis of the decisions cited before them. The test of jurisdection now sought to be applied was not directly raised in that Case. It cannot therefore be said that this Court went wrong by relying upon irrelevant decisions. The discussion shows that this Court held in the manner it did as it came to the conclution that a fundamental right had been clearly infringed by a wrong interpretation of the notification.

Let me now consider the decisions of this Court which are alleged to have departed from the view expressed in that case. In *Gulabdas & Co.* v. *Asstt. Collector of Customs*(1), the petitioners were established importers holding quota rights for importing stationery articles and having their places of business in Calcutta. They had a licence for a period of 12 months to import goods known as "Artists' Materials" falling under Serial No. 168(C) of Part IV of the Policy Statement. Item No. 11 of Appendix XX annexed to the Import Trade Control Policy Book was described as "Crayons". The petitioners, on the basis of the licence, imported "Lyra" brand crayons. The Assistant Collector of Customs instead of assessing duty on them under item 45(A), assessed duty under item 45 (4) of the Indian Customs Tariff. On appeal the Central Board of Revenue confirmed it. It was argued, *inter alia*, that the Customs authorities imposed a duty heavier than the goods had to bear under the relevant provisions. This Court held that no question of fundamental right arose in that case.

(1) A.I R. [1957] S. C. 733, 736.

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In that context, the following observations were made.

> "If the provision of law under which the impugned orders have been passed are good provisions and the orders passed are with jurisdiction, whether they be right or wrong on facts, there is really no question of the infraction of a fundamental right. If a particular decision is erroneous on facts or merits, the proper remedy is by way of an appeal."
>
> "If the petitioners were aggrieved by the order of the Central Board of Revenue they had a further remedy by way of an application for revision to the Central Government .....All that is really contended is that the orders are erroneous on merits. That surely does not give rise to the violation of any fundamental right under Art. 19 of the Constitution".

In that case, on facts, the Customs authorities held that the petitioners were liable to pay a particular duty on the goods, and this Court accepted that finding and, therefore, no question of fundamental right arose. But, if on the other hand the observations meant that the order of the Customs authorities was binding on this Court, I find it difficult to accept that view. It is one thing to say that this Court ordinarily will accept the findings of administrative tribunals on questions of fact, and it is another to say that the said finding are binding on this Court. I do not think that this Court intended to lay down that the findings of administrative tribunals are binding on this Court, however, erroneous or unjust the said findings may be. This Court again in *Bhatnagars and Co. Ltd.* v. *The Union of India* (1) accepted the findings of fact recorded by the relevant Customs authorities, and observed:

(1) [1957] S.C.R. 701, 712.

"Essentially the petitioner's grievance is against the conclusions of fact reached by the relevant authorities. If the said conclusion cannot be challenged before us in the present writ petition, the petitioner would obviously not be entitled to any relief of the kind claimed by him."

The finding arrived at by the Customs authorities was that, though the licences were obtained by the petitioner in his name, he had been trafficking in those licences, that the consignments had been ordered by another individual, that the said individual held no licence for import of soda ash and as such the consignments received by the said individual were liable to be confiscated. The finding was purely one of fact, and this Court accepted: it as correct: on that basis, no question of fundamental right would arise. The decision in *The Parbhani Transport Co-operative Society Ltd.* v. *The Regional Transport Authority, Aurangabad* (1) related to the fundamental right of the petitioner therein to carry on the business of plying motor buses as stage carriages. The State applied for permits for all these routes under Ch. IV of the Motor Vehicles Act, 1939, as amended by Act 100 of 1956, and the petitioner applied for renewal of its permit. The Regional Transport Authority rejected the petitioner's right and granted the permit to the State. One of the contentions raised was that the provisions of Art. 14 of the Constitution had been infringed. This Court held that the Regional Transport Authority, on the facts, had held that there was no discrimination. Dealing with that contention, this Court observed:

"This contention is in our view clearly untenable. The decision of respondent No. 1 may have been right or wrong and as to that we say nothing, but we are unable to see that

(1) (1960) 3 S.C.R. 177, 183.

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that decision offends Art. 14 or any other fundamental right of the petitioner. The respondent No. 1 was acting as a quasi-judicial body and if it has made any mistake in its decision there are appropriate remedies available to the petitioner for obtaining relief. It cannot complain of a breach of Art. 14."

This decision in effect refused to interfere with the findings of fact arrived at by the tribunal for the reasons mentioned therein. If the findings stand no question of fundamental right would arise. The decision in *A. V. Venkateswaran, Collector of Customs Bombay* v. *Ramchand Sobhraj Wadhwani* (1) is of no assistance, as it was a decision under Art. 226 of the Constitution. In *Aniyoth Kunhamina Umma* v. *The Ministry of Rehabilitation, Government of India, New Delhi* (2), the petitioner therein filed a writ petition for enforcement of his fundamental right on the ground that the property in question was not evacuee property. The authorities under the relevant Act decided that it was an evacuee property, and the petitioner carried the matter to the appellate tribunals without success. This Court dismissing the petition on the ground that the petitioner had no fundamental right made the following observations:

> "It is, indeed, true that s. 28 of the Act cannot affect the power of the High Court under Arts. 226 and 227 of the Constitution or of this Court under Arts. 136 and 32 of the Constitution. Where, however, on account of the decision of an authority of competent jurisdiction the right alleged by the petitioner has been found not to exist, it is difficult to see how any question of infringement of that right can arise as a ground for a petition under Art. 32 of the Constitution, unless the decision of the authority of competent jurisdic-

(1) (1962) 1 S.C.R. 753. (2) (1962) 1 S.C.R. 505.

tion on the right alleged by the petitioner is held to be a nullity or can be otherwise got rid of. As long as that decision stands, the petitioner cannot complain of any infringement of a fundamental right. The alleged fundamental right of the petitioner is really dependent on whether Kunhi Moosa Haji was an evacuee and whether his property is evacuee property. If the decision of the appropriate authorities of competent jurisdiction on these questions has become final and cannot be treated as a nullity or cannot be otherwise got rid of, the petitioner cannot complain of any infringement of her fundamental right under Arts. 19(1)(f) and 31 of the Constitution."

Concluding the judgment, it was observed:

> "We are basing our decision on the ground that the competent authorities under the Act had come to a certain decision, which decision has now become final the petitioner not having moved against that decision in an appropriate court by an appropriate proceeding. As long as that decision stands, the petitioner cannot complain of the infringement of a fundamental right, for she has no such right."

It would be seen that the tribunals found, on the facts of that case, that the property was evacuee property, and if that finding was accepted, no question of fundamental right arose. It is true that this Court accepted that finding on the ground that it had become final and the petitioner had not questioned the correctness of that decision in a proper court by an appropriate proceeding. As I have said earlier, this Court may ordinarily accept the findings of fact arrived at by tribunals; but, on the other hand, if the judgment meant that under no conceivable circumstances this Court could

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interfere with the findings of an administrative tribunal even if there was a clear infringement of fundamental right, in my view, it would amount to an abdication of its jurisdiction in favour of administrative tribunals. Nor does the decision of this Court in *Madan Lal Arora* v. *The Excise & Taxation Officer, Amritsar* (1) carry the matter further. There, the petitioner was a dealer registered under the Punjab General Sales Tax Act. Notices were served on him by the Sales tax authority, the last of them being that if the relevant documents were not produced within a particular date the case would be decided on the "best judgment assessment basis". It was contended on the basis of s. 11 of the Punjab General Sales Tax Act that at the date of the notice last mentioned the Sales Tax authorities had no right to proceed to make any "best judgment" assessment as the three years within which only such assessment could be made had expired before then. This Court accepted the construction put forward by the petitioner and held that no assessment could be made on the petitioner; and, in that view, it enforced his fundamental right. There was no inherent want of jurisdiction in the Sales Tax authorities, for they had jurisdiction to construe the relevant provisions of s. 11 and hold whether the assessment could be made within a particular time or not. Notwithstanding that circumstance, this Court enforced the petitioner's fundamental right. It is not necessary to multiply decisions. On a superficial reading of the aforesaid decisions, though they may appear to be conflicting, there is one golden thread which runs through all of them and, that is, a citizen has a guaranteed procedural right under Art. 32 of the Constitution, and that a duty is cast upon this Court to enforce a fundamental right if it is satisfied that the petitioner has a fundamental right and that it has been

(1) (1962) 1 S.C.R. 823.

infringed by the State. That question was approached by this Court from different perspectives, having regard to the facts of each case. When a fundamental right of a petitioner was infringed by an action of an officer purporting to exercise a power under an Act which is *ultra vires* or unconstitutional, or without jurisdiction, this Court invariably enforced the fundamental right. So too, this Court give relief under Art. 32 of the Constitution whenever a statutory authority infringed a fundamental right of petitioner on a wrong construction of the provisions of a statute whereunder he purported to act. This Court, as a rule of practice, accepted the findings of fact arrived at by tribunals and on that basis held that no fundamental right was infringed. But I do not understand any of these decisions as laying down that the amplitude of the jurisdiction conferred on this Court under Art. 32 of the Constitution and the guaranteed right given to a citizen under the said article should be restricted or limited by some principle or doctrine not contemplated by the Constitution.

Mr. Chari, appearing for one of the interveners, raised a wider question. His argument is that a relief under Act. 32 cannot be given against an authority exercising judicial power and that the Sales-tax authorities are authorities exercising judicial power of the State. This argument is elaborated thus: Under the Constitution, the institutions created thereunder can exercise either legislative, executive or judicial functions and sometimes the same institution may have to exercise one or more of the said powers; institutions exercising legislative powers make laws, those exercising powers, administer the laws, and those exercising judicial powers decide the disputes between citizens and citizens, between citizens and State and State, the said judicial powers can be conferred in the

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manner prescribed by the Constitution on any institution of individual officer, whether it is a court or not; with that background if Art. 12 of the Constitution is looked at, the argument proceeds, the institutions exercising judicial power are excluded therefrom. Article 32 enables the Supreme Court to enforce a fundamental right only against the State action; no fundamental right can he enforced against an officer exercising judicial power as he does not come under the definition of State in Art. 12 of the Constitution.

It is not necessary in this case to decide the two questions, namely, (1) whether a person can approach this Court to enforce his fundamental right on the ground that it was infringed by a decision of a court of law, and (2) whether the right guaranteed by Art. 19 of the Constitution can be enforced under Art. 32 against the action of a private individual. We are concerned only with the narrow question whether such a right can be enforced against the action of an administrative tribunal. It can certainly be enforced against it, if it comes under the definition of a State under Art. 12 of the Constitution. We have already held that an administrative tribunal is not a court but is only an executive authority functioning under a statute adopting the norms of judicial procedure. It is a department of the executive Government exercising statutory functions affecting the rights of parties. Under Art. 12, "the State" has been defined to include the Government and the Parliament of India and the Government and the Legislature of each of the States and all local and other authorities within the territory of India or under the control of the Government of India. A Division Bench of the Madras High Court in *University of Madras* v. *Shanta Bai* (1) construed the words "local or other authorities" under Art. 12 of the Constitution thus:

"These words must be construed as

(1) A.I.R. 1954 Mad. 67,68.

ejusdem generis with Government or Legislature and so construed can only mean authorities exercising governmental functions. They would not include persons natural or juristic who cannot be regarded as instrumentalities of the Government."

Applying this definition to Art. 12, it is manifest that authorities constituted under the Sales-tax Act for assessing the tax would be "other authorities" within the meaning of Art. 12; for the said authorities exercise governmental functions and are the instrumentalities of the Government. But it is contended that if the fathers of our Constitution intended to include in the definition authorities exercising judicial functions, having included the Government and the Parliament, they would not have omitted to mention specifically the judicial institutions therein. This argument may have some relevance if the question is whether a court of law is included within the definition of "State", but none when the question is whether an administrative tribunal is included in the said definition. An administrative tribunal is an executive authority and it is clearly comprehended by the words "other authorities". If the argument of learned counsel be accepted, Government also shall be excluded from the definition where it exercises quasi-judicial functions. So too, Parliament will have to be excluded when it exercises a quasi-judicial function. That would be to introduce words which are not in the Article. It is, therefore, clear to my mind that the definition of the word, whether it takes in a court or not, certainly takes in administrative tribunals. If an administrative tribunal is a "State" and if any order made or action taken by it infringes a fundamental right of a citizen under Art. 19 of the Constitution, it can be enforced under Art. 32 thereof.

Let me now restate the legal position as I

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conceive it: (1) A citizen has a fundamental right to carry on business in *bidis* under Art. 19 (1) of the Constitution. (2) The State may make a law imposing reasonable restrictions on that right: it is conceded that the Uttar Pradesh Sales Tax Act is such a law. (3) The Sales-tax authorities constituted under the Act, purporting to exercise their powers thereunder, may make an illegal order infringing that right. (4) The order may be illegal because the authority concerned has acted without jurisdiction in the sense that the authority is not duly constituted under the Act or that it has inherent want of jurisdiction; the order may be illegal also because the said authority has construed the relevant provisions of the Act wrongly and has decided the facts wrongly or drawn the inferences from the facts wrongly. (5) The Act expressly or by necessary implication cannot give finality to the order of the authority or authorities so as to prevent the Supreme Court from questioning its correctness when the said order in fact affects the fundamental right of a citizen. (6) The aggrieved party may approach this Court before a decision is given by the Sales-tax authority or after the decision is given by the original authority or when an appeal is pending before the appellate tribunal or after all the remedies under the Act are exhausted. (7) Whatever may be the stage at which this Court is approached this Court may in its discretion, if the question involved is one of jurisdiction or a construction of a provision, decide the question and enforce the right without waiting till the procedure prescribed by a law is exhausted; but if it finds that questions of fact or mixed questions of fact and law are involved, it may give an opportunity to the party, if he agrees, to renew the application after he has exhausted his remedies under the Act, or, if he does not agree, to adjourn the petition till after the remedies are exhausted. (8) If the fundamental right of the petitioner depends upon the findings of fact arrived at by the administrative tribunals in

exercise of the powers conferred on them under the Act, this Court may in its discretion ordinarily accept the findings and dispose of the application on the basis of those findings.

The following of this procedure preserves the jurisdiction of this Court as envisaged by the Constitution and safeguards the guaranteed rights of the citizens of this country without at the same time affecting the smooth working of the administrative tribunals created under the Act. If the other view is accepted, this Court will be abdicating its jurisdiction and entrusting it to administrative tribunals, who in a welfare State control every conceivable aspect of human activity and are in a dominant position to infringe the fundamental rights guaranteed to the citizens of this country. I would prefer this pragmatic approach to one based on concepts extraneous to the doctrine of fundamental rights.

I would, therefore, hold that in the present case if the Sales-tax officer; by a wrong construction of the provisions of the Act, made an illegal order imposing a tax on the petitioner's] fundamental right, it is liable to be quashed.

The next question is whether the Sales-tax officer has wrongly construed the notification issued by the Government under s. 4(1)(a) of the Act. Section 4(1) of the Act reads as follows:

> "No tax shall be payable on—
>
> (a) The sale of water, milk, salt, newspapers and motor spirit as defined in the U. P. State Motor Spirit (Taxation) Act, 1939, and of any other goods which the State Government may by notification in the official Gazette, exempt.
>
> (b) the sale of any goods by the All-India Spinners' Association or Gandhi Ashram,

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Meerut, and their branches or such other persons or class of persons as the State Government may from time to time exempt on such conditions and on payment of such fees, if any, not exceeding eight thousand rupees annually as may be specified by notification in the Official Gazette."

The following notification dated December 14, 1957 was issued under the said section:

"In partial modification of notifications No. ST-905/X, dated March 31, 1956 and ST-418/X 902 (9)-52, dated January 31, 1957, and in exercise of the powers conferred by clause (b) of sub-section (1) of section 4 of the U. P. Sales Tax Act, 1948 (U. P. Act No. XV of 1948) as amended up to date, the Governor of Uttar Pradesh is pleased to order that no tax shall be payable under the aforesaid Act with effect from December 14, 1957 by the dealers in respect of the following classes of goods provided that the Additional Central Excise Duties leviable thereon from the closing of business on December 13, 1957 have been paid on such goods and that the dealers thereof furnish proof of the satisfaction of the assessing authority that such duties have been paid.

(1) .....

(2) .....

(3) Cigars, cigarettes, biris and tobacco, that is to say any form of tobacco, whether cured or uncured and whether manufactured or not includes the leaf, stalks and stems of the tobacco plant but does not include any part of a tobacco plant while still attached to the earth."

The following facts are not disputed: In regard to the sales of certain commodities with an inter-State market certain difficulties cropped up in the matter of imposition of sales-tax by different States. In order to avoid those difficulties, the Central Government and the States concerned came to an arrangement whereunder the States agreed for the enhancement of the excise duties under the Central Act in respect of certain commodities in substitution for the sales-tax levied upon them, and that the Central Government agreed to collect the enhanced excise duty on the said commodities and distribute the additional income derived amongst the State Governments. To implement that arrangement, Parliament passed Act No. 58 of 1957 called the Additional Duties of Excise (Goods of Special Importance) Act, 1957, on December 24, 1957. The long title of that Act shows that it was enacted to provide for the levy and collection of additional duties of excise on certain goods and for the distribution of a part of the net proceeds thereof among the States in pursuance of the principles of distribution formulated and the recommendation made by the Finance Commission. Under the Central Act, before the amendment, there was excise duty on tobacco used for various purposes, including machine-made bidis, but there was no excise duty on hand-made bidis. Therefore, under the amended Act, additional duty was payable only on tobacco products already taxable under original Act; with the result, enhanced tax was imposed on tobacco which went in to make hand-made bidis, but no additional tax was imposed on hand-made bidis.

With this background let us look at the notification issued under s. 4(1) of the Act. There is some controversy whether that notification was issued under s. 4(1)(a) or 4(1)(b) of the Act; but that need not detain us, for I shall assume that the notification was issued under s. 4(1)(b). The

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goods specified therein were exempted conditionally. The goods exempted under the notification were bidis and tobacco. Bidis might be hand-made or machine-made, and the tobacco included tobacco out of which bidis were made. Under the first part of the notification the said bidis and tobacco were exempted from the sales-tax from December 14, 1957. The condition imposed for the operation of that exemption was that additional central excise duties leviable thereon from the closing of business on December 13, 1957, should have been paid on such bidis and tobacco. Briefly stated, the *bidis* and tobacco, among others, were exempted from payment of sales-tax, if excise duties leviable thereon were paid during the relevant period. So far as the hand-made *bidis* were concerened under the amending Act no tax was leviable thereon. The condition was applicable to *bidis* as a unit. Out of *bidis*, no excise duty was leviable on hand-made *bidis*, while excise duty was leviable in respect of machine-made *bidis*. Therefore, the condition imposed has no application to hand-made *bidis*, for under the said condition only tax leviable on the said *bidis* had to be paid, and, as no excise duty was leviable in respect of hand-made *bidis*, they were clearly exempted under the said notification. Assuming that the said notification applied only to goods in respect whereof additional excise duty was leviable, the payment of additional duty in respect of tobacco which went in making hand-made *bidis* was also a condition attached to the exemption of such *bidis* from taxation. It is not disputed that additional excise duty on the said tobacco was paid by the appellant. I, therefore, hold, on a plain reading of the expressed terms of the notification, that hand-made *bidis* were exempted from taxation under the Act.

There was also every justification for such exemption. It appears from the record that the merchants doing business in hand-made *bidis* were not able to compete with businessmen manufacturing machine-made *bidis*. Indeed, before the amending Act, excise duty was imposed on machine-made *bidis* mainly, though not solely, for protecting the business in the former in competition with the latter. In the circumstances, it was but reasonable to assume that the State Government by the amending Act did not intend to impose sales-tax on hand-made *bidis*, though additional excise duty was imposed on tobacco out of which the said *bidis* were manufactured. The entire scheme of protection of one against unfair competition from the other would break if the Central Government could impose additional excise duty on tobacco and the State could impose sales-tax on *bidis* made out of the said tobacco. That this was the intention of the State Government was made clear by the subsequent notification dated December 14, 1957, exempting hand-made *bidis* from taxation without any condition. I am, therefore, clearly of the opinion that, on a fair reading of the said notification, sales of hand-made *bidis* were exempted from taxation under the Act.

In the result, there will be an order directing the respondents not to proceed to realize any sales-tax from the petitioner on the basis of the order dated December 20, 1958. The petitioner will have her costs.

Now coming to Civil Appeal No. 572 of 1960, the said appeal was dismissed for non-prosecution by order of this Court dated February 20, 1961. The assessee-firm has filed an application for restoration of the said appeal on the ground that it did not press the appeal in view of the decision of this Court

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in *Kailash Nath* v. *State of Uttar Pradesh* (1); but, as I have said that the said decision is still good law, this ground is not open to the said firm. In the result the application for restoration of Civil Appeal No. 572 of 1960 is dismissed with costs.

HIDAYATULLAH, J.—The facts have been set out fully in the order of Venkatarama Aiyar, J., and need not be stated at length. The petitioner is a partner in a firm of *bidi* manufacturers registered under the Uttar Pradesh Sales Tax Act. Under a scheme by which certain additional Central Excise duties are being levied under special Acts for the purpose and are being distributed among the States in respect of certain classes of goods, on which the States have foregone collection of sales tax locally, the Government of Uttar Pradesh issued notification on December 14, 1957, exempting *bidis* from sales tax under the U. P. Sales Tax Act, provided the additional duties of excise were paid. This was followed by another notification on November 25, 1958, by which *bidis*, whether machine-made or hand-made, where exempted without any condition from sales tax from July 1, 1958. The dispute in this petition is about the quarter ending June 30, 1958, in which the firm claimed the exemption. This claim was rejected on the ground that the firm had not paid any additional excise duty on *bidis*. An appeal followed, but was unsuccessful, and though a revision lay under the Sales Tax Act, none was filed. The firm filed instead a petition under Art. 226 of the Constitution in the High Court of Allahabad, but was again unsuccessful, mainly because the firm had other remedies under the Sales Tax Act which it had not available of. The firm, however, obtained a certificate from the High Court, and filed an appeal in this Court. Ujjambai filed this petition under Art. 32 of the Constitution for the same reliefs.

(1) A. I. R. 1957 S.C. 790.

When she obtained a rule in the petition, the firm did not prosecute the appeal and it was dismissed. In this petition, she claims a writ of *certiorari* against the order of the Sales Tax Officer as also a *mandamus* to the Department not to levy the tax. As a further precautionary measure, lest it be held that the remedy under Art. 32 is misconceived, the firm has also applied for the revival of the appeal. I shall deal with the application later.

The question is whether the exemption granted by the notification of December 14, 1957, exempting *bidis* conditionally upon payment of additional duty of excise applied to the petitioner during the quarter ending June 30, 1958. This question depends upon the words of the notification and the schedule of articles on which additional duty of excise was payable and the fact whether such excise duty was, in fact, paid or not. But the question which has been debated in this case is one which arises at the very threshold, and it is this: whether a petition under Art. 32 can lie if the petitioner alleges a breach of fundamental rights, not because the tax is demanded under an invalid or unconstitutional law but because the authority is said to have misconstrued certain provisions of that law. The petitioner contends that she has paid additional excise duty on tobacco used in the manufacture of *bidis* and the word "tobacco" is used comprehensively in the Central Excise Salt Act, 1944, and in Act No. 58 of 1957 and would include *bidis* in the exemption. The Sales Tax Officer rejected this claim, observing:

> "The exemption envisaged in this notification applies to dealers in respect of sales of Biris, provided that the additional Central Excise duties leviable thereon from the closing of business on December 13, 1957, have been paid on such goods. The assessee paid no such

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Excise duties. Sales of Biris by the assessee are, therefore, liable to Sales Tax."

Whether there has been a misconstruction of any of the provisions is a matter which, of course, could be considered on revision, or in a reference to the High Court on point of law arising out of the order finally passed or even ultimately by appeal to this Court with its special leave under Art. 136. The petitioner, however, contends that she is entitled to file a petition under Art. 32 of the Constitution, if by a wrong construction of a provision of law, a tax is demanded which is not due because it amounts to a deprivation of property without authority of law and also a restriction upon her right to carry on trade or business. The breach of fundamental rights is thus stated to arise under Arts. 31(1) and 19(1)(g) primarily by the wrong interpretation and secondarily by the result thereof, namely, the demand of a tax which is not due. The other side contends that no fundamental rights can be said to be breached when the authorities act under a valid law even though by placing their interpretation on some provision of law they may err, provided they have the jurisdiction to deal with the matter and follow the principles of natural justice. Any such error, according to the respondents, must be corrected by the ordinary process of appeals or revisions etc. and not by a direct approach to the Supreme Court under Art. 32 of the Constitution. Both sides cite cases in which petitions under Art. 32 were previously filed and disposed of by this Court, either by granting writs or by dismissing the petitions. In some of them, the question was considered, but in some it was not, because no objection was raised.

There, however, appears to be some conflict on this point. In *Kailash Nath* v. *State of U.P.*(1), where the allegation was that an exemption was

(1) A.I.R. 1957 S.C. 790.

wrongly refused on a misconstruction of a notification under s. 4 of the U.P. Sales Tax Act, it was held that the fundamental rights of the taxpayer were in jeopardy, and the remedy under Art. 32 was open. Govinda Menon, J., then observed:

> "If tax is levied without due legal authority on any trade or business, then it is open to the citizen aggrieved to approach this Court for a writ under Article 32 since his right to carry on a trade is violated, or infringed by the imposition and such being the case Article 19(1)(g) comes into play."

This proposition was rested upon the case of this Court in the *Bengal Immunity Company* (1); but a close examination of the latter case shows that no such proposition was stated there. In the latter case, exemption was claimed on the ground that the sales sought to be taxed were made in the course of inter-State trade and the Bihar Sales Tax Act, which purported to authorise such levy, offended Art. 286(2) of the Constitution and thus was invalid. On the other hand, doubts were cast on the decision in *Kailash Nath's* case (2) on this point, in *Tata Iron & Steel Co. Ltd.* v. *S. R. Sarkar* (3); but the question was left open. The question has now been raised and argued before this special Bench. In this judgment, I am only concerned with the question of constitutional law raised, since I agree with the interpretation placed on the notification by my brother, Kapur, J.

The general principles underlying Part III of the Constitution have been stated so often by this Court that it is hardly necessary to refer to them, except briefly, before considering to what extent and in what circumstances actions or orders of judicial, quasi-judicial and administrative authorities

(1) (1955) 2 S.C.R. 603. (2) A.I.R. 1957 S.C. 790.
(3) (1961) 1 S.C.R. 379.

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are open to question under Art. 32. The Constitution has accepted a democratic form of Government with the characteristic division of authority of the State between he Legislature, the Judiciary and the Executive. The Constitution being federal in form, there is a further division of powers between the Centre and the States. This division is also made in the jurisdictions of the three Departments of the State. To achieve these purposes, the distribution of legislative powers is indicated in Part XI and of taxes in Part XII, and certain special provisions regarding trade, commerce and intercourse within the territory of India are placed in Part XIII. In addition to these Parts of the Constitution, to which some reference may be necessary hereafter, the Constitution has also in other Parts indicated what things can only be done by law to be made by Parliament or the State Legislatures. These Articles are too numerous to specify here. But this much, however, is clear that where the Constitution says that a certain thing can be done under authority of law, it intends to convey that no action is justified unless the legality of that action can be supported by a law validly made. The above is, in outline, the general pattern of conferral of power upon the Legislature and the Executive by the people.

The people, however, regard certain rights as paramount, because they embrace liberty of action to the individual in matters of private life, social intercourse and share in the government of the country and other spheres. The people who vested the three limps of Government with their power and authority, at the same time kept back these rights of citizens and also sometimes of non-citizens, and made them inviolable except under certain conditions. The rights thus kept back are placed in Part III of the Constitution, which is headed "Fundamental Rights", and the conditions under

which these rights can be abridged are also indicated in that Part. Briefly stated, the conditions are that they can be abridged only by a law in the public interest or to achieve a public purpose. These rights are not like the Directive Principles, which indicate the policy and general pattern for State action to enable India to emerge, after its struggle with poverty, disease, inequalities and prejudices, as a welfare State. These Directive Principles are not justiciable, but any breach of fundamental rights gives a cause of action to the aggrieved person.

The sum total of this is that the Constitution insists upon the making of constitutional and otherwise valid laws as the first step towards State action. No arbitrary or capricious action affecting the rights of citizens and others is to be tolerated, if it is unsupported by such law. But even the Legislature cannot go beyond the limits set by the Chapter on Fundamental Rights, because ingress upon those rights is either forbidden absolutely or on condition that the action is either in an emergency or dictated by the overriding public interest. The executive can never affect the fundamental rights unless a valid law enables that to be done. To secure these fundamental rights, the High Courts by Art. 226 as part of their general jurisdiction and the Supreme Court by Art. 32 have been given the power to deal with any breach complained of and to rectify matters by the issue of directions, orders or writs including certain high prerogative writs. Article 32 is included in the Chapter on Fundamental Rights, and provides an expressly guaranteed remedy of approach to the Supreme Court in all cases where fundamental rights are invaded. This right is the most valuable right of the citizen against the State. The Article provides further that the right of moving the Supreme Court is also a fundamental right. Thus, it was that this Court said in *Romesh Thappar's case* (1) that this

(1) [1950] S.C.R. 594, 596, 597.

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Court is the protector and guarantor of fundamental rights, in *Rashid Ahmed* v. *Municipal Board, Kairana* (1) that the Supreme Court's powers under Art. 32 are wider than the mere right to issue prerogative writs, in *A. K. Gopalan's case* (2) that the fundamental rights are the residue from the power surrendered by the people and kept back by them to themselves, and in *Champakam Doraijan's case* (3) that the fundamental rights are sacrosanct and incapable of being abridged by any legislative or executive action except to the extent provided in the appropriate Articles in Part III. It may, however, be stated that under certain Articles of the Constitution, laws can be made without a challenge in Courts, notwithstanding the Constitution (see, for example Art. 329), and other considerations may arise in respect of those laws. In this judgment, therefore, I shall deal with those laws and situations only, which admittedly are affected by the Chapter on Fundamental Rights.

The invasion of fundamental rights may assume many forms. It may proceed directly from laws which conflict with the guaranteed rights. It may proceed from executive action unsupported by any valid law or laws or in spite of them. Examples of both kinds are to be found in the Reports. In *K. T. Moopil Nair's case* (4), a taxing statute was held to be discriminatory and also unreasonable because of the restrictions it created and was struck down under Arts. 14 and 19 (1) (f) of the constitution. In *Tata Iran & Steel Co., Ltd. case*(5), a threat to recover a tax twice over was said to offend fundamental rights. In both these cases, Art. 32 was invoked successfully. In the first kind of cases the law itself fails, and if the law fails, so does any action under it. In the second kind of cases, the laws are valid but in their application,

(1) [1950] S.C.R. 566. (2) [1950] S.C.R. 88.
(3) [1961] 3 S.C.R. 525, 531. (4) [1961] 3 S.C.R. 77.
(5) [1961] 1 S.C.R. 379.

the executive departments make their own actions vulnerable. A law can give protection to an action only which is within itself, but it cannot avail, if the action it outside. Thus, in *Chintaman Rao's case* (1), a law was struck down because it arbitrarily and excessively invaded a fundamental right and in *Lachmandas Kewalram Ahuja* v. *The State of Bombay* (2), s. 12 of the Bombay Public Safety Measures Act, 1947 was declared void (after January 26, 1950) as it did not proceed upon any purported classification. Of these two cases, the first was a petition under Art. 32 of the Constitution and the latter, an appeal on a certificate of the High Court under Art. 132 of the Constitution. The method of approach to this court was different, but it made no difference to the application of the provisions of Part III. There are other such decisions, but these two will suffice.

The inference is, therefore, quite clear that this Court will interfere under Art. 32 if a breach of fundamental rights comes before it. and indeed, it was so stated in *Romesh Thappar's* case (3) that this Court—

> "cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights,"

although such applications are made to the Court in the first instance without resort to a High Court, and the American cases about exhausting of other remedies were not followed. In *Himmatlal's case* (4) this Court issued a writ prohibiting assessment of a tax under an invalid law, even though there was no assessment begun or even a threat of one. In *K. K. Kochunni Moopil Nayar* v. *State of Madras* (5)

(1) (1950) S.C.R. 759. (2) (1952) S.C.R. 710.
(3) (1950) S.C.R. 594, 596, 597. (4) (1954) S.C.R. 1122.
(5) 1959) Supp. 2 S.C. R. 316, 325.

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Das, C. J. after considering all previous cases of this Court laid down.

> "Further, even if the existence of other adequate legal remedy may be taken into consideration by the High Court in deciding whether it should issue any of the prerogative writs on an application under Art. 226 of the Constitution, as to which we say nothing now —this Court cannot, on a similar ground decline to entertain a petition under Art. 32, for the right to move this Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution is itself a guaranteed right."

In that case, the learned Chief Justice said that, if necessary, this Court may even get a fact or facts proved by evidence.

The view expressed in the last case finds further support from what Gajendragadkar, J., said very recently in *Daryao* v. *The State of U. P.* (1):

> "If the petition field in the High Court under Art. 226 is dismissed not on the merits but because of the laches of the party applying for the writ of because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Art. 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 32."

Gajendragadkar, J. then went on to consider the matter from the point of view of *res judicata*, and held that in some cases, that principle would apply if no appeal against the order of the High Court was field, but not in others. This must be so.

(1) [1962] 1 S.C.R. 574.

because if there is a decision of the High Court negating fundamental rights or their breach, then the decision of the competent Court must be removed by appeal to establish the rights or their breach.

From these cases, it follows that what may be said about a direct appeal to this Court without following the intermediate steps may not be said about Art. 32, because resort to other forums for parallel reliefs is strictly not necessary where a party complains of breach of fundamental rights. Of course, when he makes an application under Art. 32, he take the risk of either succeeding or failing on that narrow issue, and a finding of the High Court or some tribunal below on some point, if not set aside in appropriate proceedings, may stand in his way. The right under Art. 32 is not a right of appeal, and cannot be used as such, and this Court may not be in a position to examine the case with the same amplitude as in an appeal. But, if a party takes the risk of coming to this court direct on the narrow issue, he cannot be told that he has other remedies. To take this restricted view of Art. 32 may, in some cases, by delay or expense involved in the other remedies, defeat the fundamental rights before even they can be claimed. But this is not to say that the other remedies are otiose. The issue to be tried under Art. 32 is a narrow one, and once that issue fails, everything else must fail. In jurisdictions like that under Art. 226 and/or in appeals under Art. 132 or Art. 136, not only can the breach of fundamental rights be considered but all other matters which the Court may permit to be raised. It, therefore, follows that if a person chooses to invoke Art. 32, he cannot be told that he must go elsewhere first. The right to move this Court is guaranteed. But this Court in dealing with the petition will deal with it from the narrow standpoint of fundamental rights and not as an appeal.

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Though the area of action may be thus limited, the power exercisable therein are vast. The power to issue writs in the nature of the five high prerogative writs of *hebeas corpus, mandamus, prohibition, quo warranto* and *certiorari* is, in itself, sufficient to compel obedience by the State (as defined in Art. 12) and observance by it of the Constitution and the laws in all cases where a breach of fundamental right or rights is established. The writ of *mandamus* is a very flexible writ and has always been called in aid to ampliate justice and proves sufficient in most cases of administrative lapses or excesses. Then, there is the writ of *certiorari* to get rid of orders which affect fundamental rights, the writ of prohibition to stop action before it can be completed, the writ of *quo warrnto* to question a wrongful assumption of office, and lastly, the writ of *habeas corpus* to secure liberty. Indeed, an observed by Lord Atkin (then, Atkin, L. J.) in *Rex* v. *Electricity Commissioners* (1):

> "Whenever any body or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the Kings Bench Division exercised in these writs."

What was said of judicial action and of the writ of *certiorari* applies equally to other writs and actions of administrative agencies, which are executive or ministerial. The powers of the Supreme Court and the High Courts in our country are no whit less than those of the Kings Bench Division. Indeed, the power conferred on him is made even more ample by enabling these superior Courts to issue in addition to the Prerogative Writs, directions, orders and writs other than the named writs, and the concluding words of Art. 32 (2) "whichever

(1) (1924) 1 K. B. 171, 205.

may be appropriate, for the enforcement of any of the rights conferred by this Part (Part III)" show the wide ambit of the power. As far back as *Basappa* v. *Nagappa* (1), Mukherjea, J. (as he then was) observed:

> "In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any differences or change of opinion expressed in particular cases by English Judges."

Speaking then of the writ of *certiorari* the learned Judge added:

> "We can make an order or issue a writ in the nature of *certiorari* in all appropriate cases and in appropriate manner, so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law."

What has been said here has my respectful concurrence, and is applicable to the other writs also. These principles have now become firmly established in the interpretation of Arts. 32 and 226 of the Constitution. The difference in the two Articles is in two respects: firstly, Art, 32 is available only for the enforcement of fundamental rights, but the High Courts can use the powers for other purposes (a power which Parliament can also confer on the Supreme Court by law, vide Art. 139), and secondly, that the right of moving the Supreme Court is itself a guaranteed right (Art. 32 (1) and is unaffected by the powers of the High Court (Art. 226 (2)).

The foregoing is a resume of the interpretations placed upon Art. 32, but there are other provisions of the Constitution relating to the Supreme

(1) (1955) 1. S. C. R. 250, 256.

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Court which must be viewed alongside, because the Supreme Court has other roles to perform under the Constitution. Those provisions give an indication of how the Supreme Court is intended to use its powers.

The Supreme Court is made, by Arts. 133 and 134, the final Court of appeal over the High Court in all civil and criminal matters, though the right of appeal arises only in certain classes of cases and subject to certain conditions. Under Arts. 132 and 133 (2), the Supreme Court is also the final Court of appeal over the High Court in all matters involving an interpretation of the Constitution. By Art. 136, the Supreme Court has been given the power to grant, in its discretion, special leave to appeal to itself from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any Court or tribunal in the territory of India. The last power is overriding, because Art. 136 commences with the words "notwithstanding any thing in this Chapter". Only one exemption has been made in favour of a Court or tribunal constituted by or ordered under any law relating to the Armed Forces.

There are other jurisdictions of the Supreme Court also, which may be described as advisory and original, arising in special circumstances with which we are not concerned. The appellate jurisdiction of the Supreme Court sets it at the top of the hierarchy of civil and criminal Courts of civil judicature. Articles 132, 133, 134 and 135 make the Supreme Court the final Court of appeal but only in cases which are first carried before the High Court in accordance with the law relating to those cases. Access to the Supreme Court under Arts. 132-135 is not direct but through the High Court. There can be no abridging of that process. But, under Art. 136, the Supreme Court has the jurisdiction to

grant special leave, though it has declared in several cases that it would exercise its discretion under Art. 136 only against a final order. *See Chandi Prasad Chokhani* v. *State of Bihar* (1), *Indian Aluminium Co.* v. *Commissioner of Income tax* (2), *and Kanhaiyalal Lohia* v. *Commissioner of Income-tax* (3). In exercising the discretionary powers to grant special leave, the Supreme Court now insists on the aggrieved party exhausting all its remedies under the law before approaching it.

From what has been said above, it is clear that there are three approaches to this Court, and they are: (a) by appeal against the decision of the High Court, (b) by special leave granted by this Court against the decision of any Court or tribunal in India and (c) by a petition under Art. 32. No Court or tribunal in India other than the Supreme Court and the High Courts has been invested with the jurisdiction to deal with breaches of fundamental rights, though the Constitution has reserved the power to Parliament to invest by law this jurisdiction in any other Court [Art 32 (3)]. As a result, the enforcement of fundamental rights can only be had in the High Court or the Supreme Court. In most taxation laws, there is a jurisdiction and a right to invoke the advisory jurisdiction of the High Court and in some there is a right of appeal or revision to the High Court, but the question of a breach of fundamental rights cannot be raised in the proceedings before the tribunals. In its advisory jurisdiction, the High Court can only answer the question referred to it or raise one which arises out of the order passed and in its appellate and revisional jurisdiction, the High Court can deal with the matter on law or fact or both (as the case may be) but only in so far as the tribunal has the jurisdiction. In these jurisdictions, the plain question of the enforcement of fundamental rights may

(1) (1962) 2 S. C. R. 276.
(2) Civil Appeal No. 176 of 1959 decided on April 24, 1961.
(3) (1962) 2 S.C.R. 339.

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not arise. There is, however, nothing to prevent a party moving a separate petition under Art. 32 of the Constitution and raising the issue, as was actually done in this case. The result thus is that no question of a breach of fundamental rights can arise except under Arts. 226 and 32 of the Constitution, and it must be raised before the High Court and the Supreme Court respectively, by a proper petition. But, where the High Court decides such an issue on a petition under Art. 226, the question can be brought before this Court under Arts. 132 and 136.

If this be the true position, and if this Court can only deal with question of breach of fundamental rights in petitions under Art. 32 and in appeals against the orders of the High Court under Art. 226, I am of opinion that a petition under Art. 32 must always lie where a breach is complained of, though, I must say again, if the matter is brought before this Court under Art. 32, the only question that can be considered is the breach of fundamental rights and none other.

The right to move this Court being guaranteed, the petition may lie, but there are other thing to consider before it can be said in what cases this Court will interfere. I shall now consider in what kind of cases the powers under Art. 32 will be used by this Court. Since this case arises under a taxing statute, I shall confine myself to taxing laws, because other considerations may arise in other circumstances and the differing facts are sometimes so subtle as to elude one, unless they are before him. The challenge on the ground of a breach of fundamental rights may be against a law or against executive action. I am leaving out of account action by the Courts of civil judicature, and am not pausing to consider whether the word "State" as defined in Art. 12 includes the ordinary Courts of civil judicature. That question does not

arise here and must be left for decision in a case in which it properly does. Whether or not be word "State" covers the ordinary Courts, there is authority to show that tribunals which play the dual role as deciding issues in a quasi-judicial way and acting as the instrumentalities of Governments are within the word "State" as used in Part III of the Constitution. In the *Bidi Supply Co.*, v. *Union of India*(1), Das, C. J., observed:

> "Here 'the State' which includes its Income-tax department has by an illegal order denied to the petitioner, as compared with other Bidi merchants who are similarly situate, equality before the law or the equal protection of laws and the petitioner can legitimately complain of an infraction of his fundamental rights under article 14 of the Constitution."

Again, in *Gullapalli Nageswara Rao* v. *State of Andhra Pradesh* (2) it was observed:

> "The concept of a quasi-judicial act implies that the act is not wholly judicial; it describes only a duty cast on the executive body or authority to conform to norms of judicial procedure in performing some acts in exercise of its executive power."

The taxing departments are instrumentalities of the State. They are not a part of the legislature; nor are they a part of the judiciary. Their functions are the assessment and collection of taxes, and in the process of assessing taxes, they have to follow a pattern of action, which is considered judicial. They are not thereby coverted into Courts of civil judicature. They still remain the instrumentalities of the State and are within the definition of 'State' in Art. 12. In this view of the matter, their actions

(1) (1956) S.C.R. 267, 277.
(2) (1959) Supp. 1 S.C.R. 319, 353, 354.

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must be regarded, in the ultimate analysis, as executive in nature, since their determinations result in the demand of tax which neither the legislature nor the judiciary can collect. Thus, the actions of these quasi-judicial bodies may be open to challenge on the ground of breach of fundamental rights.

I have already said that the attack on fundamental rights may proceed from laws or from executive action. Confining myself to taxation laws and executive action in furtherance of taxation laws, I shall now indicate how the breaches of fundamental rights can arise and the extent of interference by this Court under Art. 32. Taxing laws have to conform to provisions in Part XII of the Constitution: they are circumscribed further by Part XIII, and they can only be made by an appropriate legislature as indicated in Part XI. These are the provisions dealing with the making of taxing laws. The total effect of these provisions is summed up in Art. 165, which says:

"No tax shall be levied or collected except by authority of law."

Law is thus a condition precedent to the demand of a tax. A tax cannot be levied by the State, unless a law to that effect exists, and that law must follow and obey all the directions in the Constitution about the making of laws. In other words, the law must be one validly made.

Taxation laws may suffer from two defects, and they are: (a) if they are not made within the four corners of the powers conferred by the Constitution on the particular legislature, or (b) if they are opposed to fundamental rights. A law may fail as *ultra vires*, though it is not opposed to fundamental rights, because it is outside the powers of the legislature that enacted it, or because it is a colourable exercise of power, or if the law was not made in accordance with the special procedure for making

it. A simple example is imposition of Profession Tax by Parliament, which it has no power to impose, or the imposition of a tax above Rs. 250 per year on a single person by the State Legislature, which is beyond the powers of the State Legislature. In these cases, the laws fail, because in the first case, Parliament lacks the power completely, and in the second, because the State Legislature transgresses a limit set for it. Such a law is no law at all, and will be struck down under Art. 265 read with the appropriate provisions of the Constitution. A question arising under Art. 265 cannot be brought before the Supreme Court under Art.32, because that Article is not in the Chapter on Fundamental Rights. But an executive action to enforce the law would expose the executive action to the processes of Arts. 226 and 32, if a fundamental right to carry on a profession or an occupation, trade or business is put in jeopardy. In the order of reference in this case, this position is summed up in the following observation:

> "Where the provision is void, the protection under Art. 265 fails, and what remains is only unauthorised interference with property or trade by a State Officer, and articles 19(1)(f) and (g) are attracted."

Where the law fails being opposed to fundamental rights as, for example, when it is void because it involves discrimination or otherwise invades rights protected by Part III, the protection of Art. 265 is again lost. Indeed, the law fails not because of Art. 265 but because of Art. 13, and a cause of action under Art. 35 may arise. This was recognised in *K. T. Moopil Nair* v. *State of Kerala*(1) where it was observed:

> "Article 265 imposes a limitation on the taxing power of the State in so far as it provides that the State shall not levy or

(1) (1961) 3 S.C.R. 77.

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collect a tax, except by authority of law, that is to say, a tax cannot be levied or collected by a mere executive fiat. It has to be done by authority of law, which must mean valid law. In order that the law may be valid, the tax proposed to be levied must be within the legislative competence of the Legislature imposing a tax and authorising the collection thereof and, secondly, the tax must be subject to the conditions laid down in Art. 13 of the Constitution. One of such conditions envisaged by Art. 13(2) is that the Legislature shall not make any law which takes away or abridges the equality clause in Art. 14, which enjoins the State not to deny to any person equality before the law or the equal protection of the laws of the country. It cannot be disputed that if the Act infringes the provisions of Art. 14 of the Constitution, it must be struck down as unconstitutional".

This arose in a petition under Art. 32 of the Constitution.

It appears that taxation laws were unsuccessfully challenged under Art. 32 of the Constitution as a breach of Art. 31(1) in *Ramjilal's case* (1) and *Laxmanappa Hanumantappa* v. *Union of India* (2). In the former, the reason given was:

> "Reference has next to be made to article 265 which is in Part XII, Chapter I, dealing with 'Finance'. That article provides that no tax shall be levied or collected except by authority of law. There was no similar provision in the corresponding chapter of the Government of India Act, 1935. If collection of taxes amounts to deprivation of property within the meaning of Art. 31(1), then there was no point in making a separate provision

(1) (1951) S.C.R. 127. (2) (195) 1 S C.R. 769.

> again as has been made in article 265. It, therefore, follows that clause (1) of article 31 must be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, for otherwise article 265 becomes wholly redundant..... In our opinion, the protection against imposition and collection of taxes save by authority of the law directly comes from article 265, and is not secured by clause (1) of article 31. Article 265 not being in Chapter III of the Constitution, its protection is not a fundamental right which can be enforced by an application to this Court under article 32. It is not our purpose to say that the right secured by article 265 may not be enforced. It may certainly be enforced by adopting proper proceedings. All that we wish to state is that this application in so far as it purports to be founded on article 32 read with article 31(1) to this Court is misconceived and must fail."

Similar observations were made in the other case.

If by these observations it is meant to convey that the protection under Art. 265 cannot be sought by a petition under Art. 32, I entirely agree. But if it is meant to convey that a taxing law which is opposed to fundamental rights must be tested only under Art. 265, I find it difficult to agree. Articles 31 (1) and 265 speak of the same condition. A comparison of these two Articles shows this :

> Art. 31 (1)—"No person shall be deprived of his property save by authority of law."
>
> Art. 265—"No tax shall be levied or collected except by authority of law."

The Chapter on Fundamental Rights hardly stands in need of support from Art. 265. If the

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law is void under that Chapter, and property is seized to recover a tax which is void, I do not see why Art. 32 cannot be invoked. Where the authority of the law fails a tax, Art. 265 is offended, and the tax cannot be collected. A collection of such a tax will also offend Art. 32. Where the law is opposed to fundamental rights, and in the collection of such a void tax, a person is deprived of his property, Art. 31(1) is offended. It is not possible to circumscribe Art. 32 by making the remedy only upon Art. 265.

From this, it is clear that laws which do not offend Part III and are not otherwise *ultra vires* are protected from any challenge whether under Art. 265 or under the Chapter on Fundamental Rights. Where the laws are *ultra vires* but do not *per se* offend fundamental rights (to distinguish the two kinds of defects), they are capable of a challenge under Art. 265, and the executive action, under Art. 32. Where they are *intra vires* otherwise but void being opposed to fundamental rights, they can be challenged under Art. 265 and also Art. 32.

This position, however, changes radically when the law is valid but the action under it is challenged. The real difference in such cases arises, because the law is not challenged at all. What is challenged is the interpretation of the law by the taxing authorities, and a breach of fundamental rights is said to arise from the wrong interpretation. In considering this matter, several kinds of cases must be noticed. Where the action of an officer of the State is wholly without jurisdiction (as, for example, when a sales tax officer imposes income-tax or *vice versa*, though such things are hardly likely to happen), it can have no support from the law he purports to apply. Cases of jurisdiction thus come within Art. 32. Other examples are an attempt to recover a tax twice over,

where the first collection is legal (*Tata Iron and Steel Company's case* (1); or acting beyond the period of limitation (*Madanlal Arora* v. *The Excise and Taxation Officer, Amritsar*) (2). In such cases, even if the taxing authority thought on its own understanding of the law that it was acting within its jurisdiction, it would not avail, and the want of jurisdiction, if proved, would attract Art. 32. Speaking of such a situation, the order of reference in this case has said:

> "This again is a case in which the authority had no jurisdiction under the Act to take proceedings for assessment of tax, and it makes no difference that such assumption of jurisdiction was based on a misconstruction of statutory provisions."

The above was said of *Madanlal Arora's* case (2).

But where the law in made validly and in conformity with the fundamental rights and the officer enforcing it acts with jurisdiction, other considera tions arise. If, in the course of his duties, he ha to construe provisions of law and miscarries, it gives a right of appeal and revision, where such lie, and in other appropriate cases, resort can be had to the provisions of Arts. 226 and 227 of the Constitution, and the matter brought before this Court by further appeals. This is because every erroneous decision does not give rise to a breach of fundamental rights. Every right of appeal or revision cannot be said to merge in the enforcement of fundamental rights. Such errors can only be corrected by the processes of appeals and revisions. Article 32 does not, as already stated, confer an appellate or revisional jurisdiction on this Court, and if the law is valid and the decision with jurisdiction, the protection of Art. 265 in not destroyed. There is only one exception to this, and it lies within extremely narrow

(1) (1961) 1 S.C R. 379. (2) (1962) 1 S.C.R. 823.

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limits. That exception also bears upon jurisdiction, where by a misconstruction the State Officer or a quasi-judicial tribunal embarks upon an action wholly outside the pale of the law he is enforcing. If, in those circumstances, his action constitutes a breach of fundamental rights, than a petition under Art. 32 may lie. The cases of this Court in which interference can be sustained on this ground are many; but as examples may be seen the following: *Amar Singh*, case (1) and *Mohanlal Hargovind's* case (2). The first is not a case of a taxing statute, but the second is.

The decision in *Kailas Nath's* case (3), with respect, appears to have unduly widened the last narrow approach by including cases of interpretation of provisions of law where the error is not apparently one of jurisdiction as within Art. 32. It cited as authority the case of *Bengal Immunity Company* (4), which does not bear out the wide proposition. The case involved an interpretation of notification to find out whether an exemption applied to a particular case or not, and no question of want of jurisdiction, as explained by me, arose there. *Kailas Nath's* case (3) does not appear to confine the exercise of powers under Art. 32 to cases of errors of jurisdiction. In my opinion—and I say it respectfully—it must be regarded as having stated the proposition a little too widely.

Whether taxing statutes which have the protection of Art. 265 can be questioned under Arts. 19(1)(f) and (g) is a subject, which need not be gone into in this case. I do not, therefore, express any opinion upon it. Here, the several statutes and the notification are not challenged as *ultra vires*. What is claimed is that by a wrong interpretation of the word '*bidis*' and 'tobacco' as used in the notification of December 14, 1957, an exemption is

(1) (1955) 2 S.C.R. 303.
(2) (1955) 2 S.C. R. 509.
(3) A.I.R. 1957 S.C. 79.
(4) (1955) 2 S.C.R. 603.

denied to the petitioner, to which she was entitled, and this affects her fundamental rights under Arts. 31(1) and 19(1)(g). This is not an error of jurisdiction. Whether the Sales Tax Officer's interpretation is right or the contrary interpretation suggested on behalf of the petitioner is right, is a matter for decision on the merits of the case. If there is an error, it can be corrected by resorting to appeals, revisions, references to the High Court and ultimately by appeal to this Court. This Court cans not ignore these remedies and embark upon an examination of the law and the interpretation placed by the authorities, when no question of jurisdiction is involved. To do so would be to convert the powers under Art. 32 into those of an appeal. In my opinion, the petition under Art. 32 is misconceived in the circumstances of this case. I would, therefore, dismiss it with costs.

As regards the application of the appeal, I am of opinion that the party was negligent in not prosecuting it. I would therefore, dismiss the application for restoration but without any order about costs.

Ayyangar J.

AYYANGAR, J.—This bench has been constituted for deciding the following two questions set out at the conclusion of what might be termed the order of reference (1) : Is an order of assessment made by an authority under a taxing statute which is *intra vires*, open to challenge as repugnant to Art. 19(1)(g) on the sole ground that it is based on a mis-construction of a provision of the Act or of a notification issued thereunder? (2) Can the validity of such an order be questioned in a petition under Art. 32 of the Constitution? Though the matter was not discussed with any elaborateness, both these questions were answered in the affirmative by this Court in *Kailashnath* v. *The State of U.P.* (1). In effect therefore the bench has been constituted for

(1) A.I.R. [1957] S.C. 79.

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considering the correctness of the decision on these points in Kailashnath's case.

Before proceeding to consider the submissions of learned Counsel on either side it is necessary to point out two matters;

(1) It was agreed before us that in deciding the first question set out above we need not consider the special features applicable to taxing legislation and in particular the point as to whether the constitutional validity of such legislation could be tested with reference to the criteria laid down by Art. 19(1)(f); in other words, the limits to which Art. 19 would be attracted to a law imposing a tax. The discussion in this judgment therefore proceeds on the basis of there being no distinction between a law imposing a tax and other laws.

(2) The second matter which I consider it necessary to state at the outset is that notwithstanding the industry of Counsel which has enabled them top lace before us quite a large number of decisions of this Court which have been referred to in the judgments of Kapur and Subba Rao, JJ., in none of them was the point approached with reference to the matters argued before us. Some of these decisions proceed on the basis that in the circumstances stated in question No. 1 a fundamental right had been invaded and on that basis afforded to the petitioner before them the relief sought. Other decisions state that no fundamental right was involved in the grievance put forward by the petitioners before them and relief has been refused on that basis. In none of them was the question discussed on principle as to when alone a fundamental right would be invaded and in particular as to whether a breach by a quasi-judicial authority of the provisions of a law which is otherwise valid, could involve an invasion of a fundamental right. For this reason I propose to discuss

the question on principle and without reference to the decisions which were placed before us at the hearing. I feel further justified in doing so because they have all been referred to in the judgment of Kapur, J., and discussed in detail by Subba Rao, J.

I shall now proceed to consider what in my view should be the answer to the first of the questions propounded for our decision and am ignoring the reference therein to a taxing enactment. Pausing here it might be useful to recall briefly the function of Part III in the Constitution. The rule of British Constitutional Law and in general of the Dominion Constitutions framed by the British Parliament might broadly be stated to be that it asserts the sovereignty of the Legislature in the sense that within the sphere of its activity in the case of a Federal Constitution and in every sphere in the case of a unitary one its will was supreme and was the law of the land which the Courts were bound to administer. As Dicey has pointed out, there are no legal limits to the sovereignty of Parliament. Public opinion, as well as the fear engendered by the possibility of a popular revolt, might impose practical restraints upon the exercise of sovereignty but so would be the limitations or restraints dictated by good sense, justice or a sense of fairplay. But so far as the legal position was concerned, any law made by Parliament was legal and could be enforced. Our Constitution makers did not consider that to the conditions of this country such a vesting of power in the legislatures or in the State would be proper or just or calculated to further the liberty of the individual which they considered was essential for democratic progress. It was in these circumstances and with these ideas that they imposed fetters on State action in Part III entitled "Fundamental Rights". Article 13 laid down that "every law whether made before or after the Constitution which was inconsistent with

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the rights guaranteed by the succeeding Articles should, save as otherwise expressly provided, be invalid to the extent of the repugnancy". And "law" was defined in a comprehensive manner so as to include not merely laws made by Parliament or the legislatures but every piece of subsidiary legislation including even notifications. The scheme therefore of the Constitution makers was to prescribe a code of conduct to which State action ought to conform if it should pass the test of constitutionality. The rights included in the eighteen Articles, starting from 14 up to 31, comprehend provisions for ensuring guarantees against any State action for protecting the right to life, liberty, and property, to trade and occupation, besides including the right to freedom of thought, belief and worship. The general scheme of Part III may be stated thus: Certain of the freedoms are absolute, i.e., subject to on limitations, e.g., Art. 17, Art. 20(1). In respect of certain others the Articles (vide Art. 19) set out the precise freedom guaranteed as well as its content and the qualifications to which the exercise of that freedom might be subjected by enacted law or action taken under such law. Having thus enumerated these freedoms and laid down the limitations, if any to which they could be subjected Art. 32 vests in the Supreme Court the authority and jurisdiction to ensure that the fundamental rights granted by Part III are not violated, and even the right to move this Court for appropriate relief for infraction of a fundamental right is itself made a fundamental right which ordinary legislation may not affect. The purpose of my drawing attention to these features is two fold: (1) to emphasize the great value which the Constitution-makers attached to the freedoms guaranteed as the *sine qua non* of progress and the need which they considered for marking out a field which was immune from State action, and (2) the function of this

Court as a guardian of those rights for the maintenance of individual liberty enshrined in the Constitution. It was with advertance to this aspect of the matter that this Court observed in *Daryao* v. *The State of U. P.* (1):

> "There can be no doubt that the fundamental right guaranteed by Art. 32(1) is a very important safeguard for the protection of the fundamental rights of the citizens, and as a result of the said guarantee this Court has been entrusted with the solemn task of upholding the fundamental rights of the citizens of this country. The fundamental rights are intended not only to protect individual's rights but they are based on high public policy. Liberty of the individual and the protection of his fundamental rights are the very essence of the democratic way of life adopted by the Constitution, and it is the privilege and the duty of this court to uphold those rights. This Court would naturally refuse to circumscribe them or to curtail them except as provided by the Constitution itself. It is because of this aspect of the matter that in *Romesh Thappar* v. *The State of Madras*, (1950 S. C. R. 594) in the very first year after the Constitution came into force, this Court rejected a preliminary objection raised against the competence of a petition filed under Art. 32 on the ground that as matter of orderly procedure the petitioner should first have resorted to the High Court under Art. 226, and observed that 'this Court is thus constituted the protector and guarantor of the fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights'. Thus the right given to the citizen to move

(1) (1962) I S.C R. 574.

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this Court by a petition under Art. 32 and claim an appropriate writ against the unconstitutional infringement of his fundamental rights itself is a matter of fundamental right, and in dealing with the objection based on the applications of the rule of *res judicata* this aspect of the matter has no doubt to be borne in mind."

Before dealing with the merits of the case it is necessary to mention that the following positions were conceded on the side of the respondent and, in my opinion, properly: (1) If the levy was imposed or the burden laid on a citizen (as the petition before us is concerned with a legislation imposing a tax I am using phraseology appropriate to such an enactment, but as would be seen, the principle is of wider application and would cover infringement of liberties other than in relation to property and by laws other than in relation to taxation) by a statute beyond the competence of a legislature to enact as not falling within the relevant entry in the legislative list the action by government or governmental officers would involve the violation of the freedom guaranteed by Art. 19 (1)(f)—to acquire, hold and dispose of property or by clause (g) to carry on any trade or business, either the one or the other and in some cases both and could therefore furnish a right to invoke the jurisdiction of this Court Art. 32 notwithstanding that the particular action impugned was by a quasi-judicial authority created under such an enactment. The reason for this concession must obviously be that the authority functioning under such a law could have no legal basis for its existence and therefore his or its action would be without authority of law. (2) The legislature may profess to legislate under a specified head of legislative power which it has, but might in reality be seeking to achieve indirectly what it could not do

directly. In such a case also it was conceded that the tax imposed would infringe the guarantee embodied in Art.19(1)(f) and (g). It would, however, be seen that this is in reality merely one manner in which there might be lack of legislative power already dealt with under head (1), (3) The same result would follow and there would be a breach of a fundamental right if though there was legislative competence to enact the legislation in the sense that the subject-matter of the law fell within one of the entries of the Legislative List, appropriate to that legislature, but the legislation was invalid as violating other fundamental rights of a general nature applicable to all legislation, such as the violation of Art. 14, etc. (4) Even in cases where the enactment is valid judged by the tests in 1 to 3 above, if on a proper construction of the enactment, the quasi-judicial authority created to function under the Act and to administer its provisions, acted entirely outside the jurisdiction conferred on him or it by the enactment, such action, if violative of the fundamental rights, could be complained of by a petition under Art. 32 and this Court would be both competent and under a duty to afford relief under that Article. Here again, the ratio on which the concession is based is similar to, though not identical with the basis upon which the concession as regards action under invalid legislation was made. (5) Where even if the officer or authority had jurisdiction, still if he had adopted a procedure contrary to either the mandatory provisions of the statute or to the principles of natural justice, the resulting order and the imposition of liability effected thereby were conceded to involve a breach of the fundamental right.

These exceptions having been conceded by learned Counsel for the respondent, it is sufficient if attention is confined to the question, whether a patently incorrect order passed on a misconstruction

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of a charging enactment would or would not result in the violation of a fundamental right and is that the very narrow question which this bench is called upon to answer.

The argument of the learned Attorney-General who appeared for the petitioner, was short and simple. His submission rested on the correctness of the following steps:

(1) The Constitution has vested in this Court the power to ensure, when approached by a petition under Art. 32, that fundamental rights were not violated and accordingly there is a constitutional duty cast upon the Court to afford relief when so approached in every case where fundamental rights were violated.

(2) The two matters which a petitioner seeking relief under Art. 32 of the Constitution would have to establish would therefore be: (a) the existence in him of the fundamental right which he complains has been infringed, and (b) its violation by State action. If these two conditions are satisfied the petitioner is entitled as of right to the grant of relief and the Court would be under a duty to afford him that relief by passing appropriate orders or directions which would be necessary to ensure the maintenance of his fundamental right.

(3) There was no dispute that a fundamental right could be invaded by State action which was legislative in character, or where the complaint was as regards the action of executive and administrative authorities created even under valid statutes.

(4) If the above premises which were not in dispute were granted, the next step was whether the decision of a quasi-judicial authority constituted under a valid law could violate a guaranteed freedom. A quasi-judicial authority he urged is as much

part of the machinery of the State as executive and administrative authorities, and its decisions and orders are as much State action and if the function of Part III of the Constitution is to protect the citizen against improper State action, the protection should logically extend to the infraction of rights effected by such orders of quasi-judicial authorities.

The short question for decision may in the circumstances be formulated thus: Can an action of a quasi-judicial authority functioning under a valid enactment and not overstepping the limits of its jurisdiction imposed by the Act and not violating the procedure required by the principles of natural justice but whose decision is patently erroneous and wholly unjustified on any proper interpretation of the relevant provision, be complained of as violative of the fundamental rights of a party prejudicially affected by such mis-interpretation. Taking the handy illustration of a taxing statute, if by a plain misinterpretation of the charging-provision, an assessing authority levies a tax on transaction A while the statute on its only possible construction imposes no tax on such a transaction, is any fundamental right of the party who is subjected to such an improper levy prejudicially affected by such an imposition ?

In considering the proper answer to this question it is necessary to exclude one matter which is apt to cloud the issue and it is this. The statute under which the quasi-judicial authority functions or makes the decision or order may contain provisions for enabling the correctness of the decision reached or the order passed being challenged by an appeal or may provide for a gradation of appeals and further revisions. The existence of procedures for redressing grievances or correcting errors of primary or appellate authorities is obviously wholly irrelevant for a consideration of the question as to whether the order of the authority involves an

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infringement of fundamental rights or not. This Court has laid down in a large number of cases of which it is sufficient to refer to: *Union of India* v. *T. R. Varma* (1), *The State of Uttar Pradesh* v. *Mohammad Nooh* (2), and *A. V. Venkateswaran, Collector of Customs, Bombay* v. *Ramchand Sobharj Wadhwani* (3) that the existence of an alternative remedy is no legal bar to the exercise of the jurisdiction of the High Court under Art. 226 of the Constitution. If that is so in the case of the jurisdiction under Art. 226 it must *a fortiori* be so in the case of a guaranteed remedy such as is vested in this Court under Art. 32 of the Constitution. Besides it cannot be predicated that there is a violation of a fundamental right if the party aggrieved has no appeal provided by the statute under which the authority acts, but that if other statutory remedies are provided there would be no violation of a fundamental right, for the question whether a fundamental right is violated or not is dependent on the action complained of having an impact on a guaranteed right, and its existence or non-existence or the action constituting a breach of a fundamental right cannot be determined by the absence or presence of procedures prescribed by the statute for correcting erroneous orders. The absence of any provision for redress by way of appeal may have a bearing on the reasonableness of the law, but it has none on the point now under discussion. Besides, it cannot be that if the remedies open under the statute are exhausted and the authority vested with the ultimate authority under the statute has made its decision and there is no longer any possibility of an objection on the score of an alternative remedy being available, there would be a violation of a fundamental right with the consequence that this Court would have jurisdiction, but that if it was

(1) [1958] S.C.R. 499. (2) [1958] S.C.R. 595.
(3) [1962] 1 S.C.R. 753.

approached at an earlier stage there was no violation of a fundamental right and that it lacks jurisdiction to afford relief under Art. 32, for it must be admitted that in ultimate analysis there is no distinction between the nature and quality of an order passed by an original as distinct from one by an appellate or revisional authority—in its consequences vis-a-vis the fundamental right of the individual affected. It is common ground and that is a matter which has already been emphasized that if a petitioner made out to the satisfaction of the Court that he has a fundamental right in respect of the subject-matter and that the same has been violated by State action, it is imperative on the Court to afford relief to the petitioner the Court not having any discretion in the matter in those circumstances. On this basis the only ground upon which the jurisdiction could be denied would be that the order or decision of the authority which is impugned does not prejudicially affect the fundamental right of the petitioner, for it cannot be that the order of the ultimate authority under the statute could involve the violation of a fundamental right but that the same orders passed by authorities lower down in the rung under the statute would not involve such a violation.

Pausing here, one further matter might also be mentioned for being put aside. This Court has laid down that the principal underlying the rule of *res judicata* is based on principles of law of general application and as such would govern also the right to relief under Art. 32. That principle is not involved in the consideration of the point under discussion, because what is sought to be challenged as violating a fundamental right is the very order of the authority and we are not concerned with a collateral attack on an order that had become final as between the parties thereto.

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Coming back to the point under consideration it was conceded by the learned Additional Solicitor-General who appeared for the respondent that legislative action might involve an infraction of fundamental rights and that similarly the action of the executive-authorities might involve such an infraction even when the legislation under which they acted or purported to act was within legislative competence and within the constitutional limitations imposed by Part III. His contention, however, was that a very different state of circumstances arose when the action complained of was by a quasi-judicial authority. His submission may be summarised in the following terms:—Where a stat ute was within legislative competence and does not by its provisions violate any of the constitutional guarantees in Part III, it follows as a matter of law that every order of a quasi-judicial authority vested with power under the Act is also valid and constitutional and that the legality and constitutionality of the statute would cover every act or order of such an authority if the same was within his or its jurisdiction and prevent them from the challenge of unconstitutionality. The same argument was presented in a slightly different form by saying that such a quasi-judicial authority has as much jurisdiction to decide rightly as to decide wrongly and that if there was error in such a decision the only remedy of the citizen affected was by resort to the tribunals set up by the Act for rectifying such errors and that in the last resort, that is after the entire machinery under the Act was exhausted, the affected party had a right to approach the High Courts under Art. 226 in cases where the error was of a type which could be brought within the scope of the remedial-writs provided by that Article.

Before examining the correctness of this submission it is necessary to mention that Mr. Chari

who appeared for some interveners supporting the Respondent, made a submission which if accepted would have far-reaching consequences. His contention was that the State in Part III against whose action the fundamental rights were guaranteed was confined to the legislative and the executive branches of State activity and that the exercise of the judicial power of the State would never contravene the fundamental rights guaranteed by Part III. It would be seen that this is wholly different from the submission made on behalf of Government by the learned Additional Solicitor-General and it would be convenient to deal with this larger question after disposing of the arguments of Mr. Sanyal.

The question for consideration is what exactly is meant when it is said that a statute is valid in the sense of: (a) being legally competent to the legislature to enact, and (b) being constitutional as not violative of the freedoms guaranteed by Part III. It is obvious that it can only mean that the statute properly construed is not legally incompetent or constitutionally invalid. In this connection it is of advantage to refer to a point made by Mr. Palkhivala who appeared for some of the interveners in support of the petition. One of his submissions was this: Suppose there is an Act for the levy of sales-tax which is constitutionally valid. On its proper construction it does not purport to or authorise the imposition of a tax on a sale "in the course of export or import." If it did so expressly authorise, it is obvious that such a provision in the enactment would be *ultra vires* and unconstitutional as violative of the prohibition contained in Art. 286 (1) (a). Suppose further that an authority functioning under such an enactment vested with jurisdiction to assess dealers to sales tax proceeds to levy a tax and includes in the computation of the assessable turnover not merely those items which are properly within the legislative competence of the

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State Legislature to tax under the head 'Taxes on the sale of goods' but also the turnover in respect of transactions which are plainly "sales in the course of export or import" and this it does on a patent misconstruction of the statute, could it be said that the fundamental right of the dealer guaranteed by Art. 19 (1) (f) and (g) was not violated by the imposition of the sales tax in such circumstances? The logic behind this argument might be stated thus: If the legislature had in terms authorised the imposition of sales tax on such a transaction it would have been plainly void and illegal and hence *ex-concessis* the fundamental right in respect of property as well as of business under Art. 19 (1) (f) and (g) would be violated by the levy of the tax and its collection. How is the position improved if without even the legislature saving so in express terms an officer who purports to act under the statute himself interprets the charging provision so as to bring to tax a transaction which it was constitutionally incompetent for the legislature itself to tax. I find the logic in this reasoning impossible to controvert, nor did the learned Additional Solicitor-General attempt any answer to this argument.

It appears to be manifest that the fact that an enactment is legislatively competent and on its proper construction constitutionally valid, i. e., it does not contain provisions obnoxious to Part III of the Constitution, does not *ipso jure* immunise the actions of quasi-judicial authorities set up under the statute from constituting an invasion of a fundamental right. What the legislature could not in express terms enact, could not obviously be achieved by the State vesting power in an authority created by it to so interpret the enactment as to contravene the Constitution. It might be suggested that such a case would fall within the exception which it is conceded

exists that an act of a quasi-judicial authority which is plainly beyond its jurisdiction could give rise to the violation of a fundamental right in regard to which this Court might afford relief if moved under Art. 32. In my opinion, this is not quite a satisfying answer because the suggestion is coupled with the assertion of the well-worn dictum as regards the jurisdiction of the tribunal to decide wrongly as much as rightly. The illustration I have given of unconsitutional action by authorities acting under valid and constitutional enactments cannot be properly answered unless it be held that a plain and patent mis-interpretation of the provisions of the enactment could it self give rise to a plea that it was beyond the jurisdiction of the authority but that would be stretching the concept of jurisdictional errors beyond what is commonly understood by that term.

Let me next take a case where the mis-interpretation by the quasi-judicial authority does not involve the levy of a duty beyond the competence of the legislature enacting the statute. In the type of case now under consideration the quasi-judicial authority by a plain misinterpretation of, let us say, the charging provision of a taxing enactment (as that furnishes a handy illustration of the point now under discussion) levies a tax on a transaction which, under the Constitution, it was competent for the legislature to levy if it had been so minded. In other words, there are two related transaction or taxable events—A & B. The taxing-statute has selected the transaction or taxable event A and has imposed a tax upon it, and it alone. The authority vested with jurisdiction under the Act, however, by a patent misconstruction of the enactment considers that not merely the transaction or taxable event A but also the related transaction or taxable event B is within the charging provision and levies a tax thereon and proceeds to realise it. The problem

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now under consideration is, could or could it not be said that in such a case the fundamental right of a citizen who has been wrongly assessed to tax in respect of the transaction or taxable event B which *ex-concessis* was not intended to be taxed under the enactment has been violated. With the greatest respect to those who entertain a contrary view I consider that the question can be answered only in one way and that in favour of holding that the fundamental right of the citizen is prejudicially affected. When once it is conceded that a citizen cannot be deprived of his property or be restricted in respect of the enjoyment of his property save by authority of law, it appears to me to be plain that in the illustration above there is no statutory authority behind the tax liability imposed upon him by the assessing authority. The Act which imposed the tax and created the machinery for its assessment, levy and collection is, no doubt, perfectly valid but by reason of this circumstance it does not follow that the deprivation of property occasioned by the collection of a tax which is not imposed by the charging section does not involve the violation of a fundamental right merely because the imposition was by reason of an order of an authority created by the statute, though by a patent mis-interpretation of the terms of the Act and by wrongly reaching the conclusion that such a transaction was taxable.

I consider that the four concessions made by the respondent which I have set out earlier, all proceed on the basis that in these cases there is no valid legislative backing for the action of the authority—executive, administrative or quasi-judicial. I consider that the reason of that rule would equally apply to cases where the quasi-judicial authority commits a patent error in construing the enactment—for in such a case also there would obviously be no legislative backing for the action resulting from his erroneous decision.

There is however one matter to which it is necessary to advert to avoid misconception, and that concerns the effect of findings reached on questions of fact by quasi-judicial authorities. Provided there is relevant evidence on which the finding could rest, the finding would preclude any violation of a fundamental right because this Court, though in the absence of a finding of a duly constituted authority would have the power and jurisdiction to investigate even disputed facts in an appropriate case, would however accept findings of fact by duly constituted authorities and proceed to find out whether on that basis a fundamental right exists and is prejudicially affected by the action impugned. The distinction which I would, in this context, draw and emphasise is between a mis-interpretation of a statute by which an authority brings within the scope of an enactment transactions or activities not within it on any possible construction of its terms, and erroneous findings on facts by reason of which the authority considers a transaction as being within the Act even if properly construed.

To sum up the position: (1) If a statute is legally enacted in the sense of being within legislative competence of the relevant legislature and is constitutional as not violating any fundamental rights, it does not automatically follow that any action taken by quasi-judicial authorities created under it cannot violate fundamental rights guaranteed by Part III of the Constitution. The legislative competence, the existence of which renders the enactment valid, is confined to action by the authorities created under it, which on its proper construction could be taken. In an authority constituted under such a legal and valid enactment oversteps the constitutional limitations on the legislative power of the State Legislature, the acts of such an authority would be plainly unconstitutional and the consequences arising out of unconstitutional

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State action would necessarily attach to such action. If an "unconstitutional Act" of the State Legislature would invade fundamental rights the same character and the same consequence must *a fortiori* follow when that act is not even by the State Legislature but by an authority constituted under an enactment passed by it. (2) Where State action without legislative sanction behind it would violate the rights guaranteed under Part III, the result cannot be different because the State acts through the mechanism of a quasi-judicial authority which is vested with jurisdiction to interpret the enactment. The absence of legislative sanction for the imposition of an obligation or the creation of a liability cannot be filled in by the misinterpretation by an authority created under the Act.

To hold that a patently increased interpretation of a statute by a quasi-judicial authority by which a liability is imposed on a citizen does not violate his fundamental rights under Arts. 19(1)(f) and (g) might not have done consequences but for two circumstances. The first is as regards the difficulty of designating with certainty an authority as quasi-judicial. The fact is that there is no hard and fast formula for determining when an authority which is vested with power to act on behalf of the State falls within category which is termed 'quasi-judicial'. As Prof. Robson stated; "Lawyers, of course, have often had to decide, in practical cases arising in the courts, whether a particular activity was of a judicial or an administrative (or 'ministerial') character; and important consequences have flowed from their decisions. But those decisions disclose no coherent principle, and the reported cases throw no light on the question from the wider point of view..... save to demonstrate, by the very confusion of thought which they present, the difficulty of arriving at a clear basis of distinction". The significance of this point stems from the fact that it is a matter of

concession that where the power of the State is vested in an executive or administrative authority under an enactment which is valid and constitutional and such an authority does an act which on the proper construction of the relevant statute is not justified by it, the act may be of such a character as to violate a fundamental right guaranteed by Part III, i.e., if the impact is in a field which is protected from State interference, and such a violation could be complained of by a petition to this Court under Art. 32. At the same time it is the contention of the respondent that a similar act, order or decision by a quasi-judicial functionary which is not warranted by the terms of the statute, does not give rise to the violation of fundamental rights.

It is therefore necessary to examine somewhat closely the dividing line between an executive authority whose actions may give rise to the violation of a fundamental right and what is termed a "quasi-judicial" authority whose actions do not have that effect. To start with, it is obvious that the nature of the act or of the order might be the same, so that if the same act proceeded from one authority it would have a particular effect but would have quite a different effect or would not have that effect if the same act proceeded from a slightly different type of authority also exercising the power of the State. This Court in *Express Newspapers (Private) Ltd.* v. *The Union of India* (1) quoted with approval the following statement of the law as summarised in Halsbury's Law of England (3rd Ed., Vol. 2 at pp. 53-56):

> ".....An administrative body in ascertaining facts or law may be under a duty to act judicially notwithstanding that its proceedings have none of the formalities of, and are not in accordance with the practice of a

(1) (1959) S.C.R. 12, 113, 114.

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> court of law.....A body may be under a duty, however, to act judicially although there is no form of lis inter partes before it....."

and in a further passage from the decision in *R.* v. *Manchester Legal Aid Committee* (1) which this Court extracted it was observed:

> "The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to attempt to define exhaustively."

The question therefore whether an authoritiy created under a statute is a quasi-judicial authority or, in other words, an authority which is bound to act judicially cannot be laid down by any hard and fast rule but must be gathered from the entire provisions of the Act read with the purpose for which the power is vested in the authority as well as the grounds for the creation of such authority. I must however confess that this is a branch of law in which authorities far from shedding light are in reality unhelpful—for one gets nowhere if these lay down as they do, that an authority would be quasi-judicial, if (not being a court) it is bound to act judicially and that to find out when, apart from clear provisions in the statute, it is bound to act judicially—you are told that it is when it is a quasi-judicial authority. Bearing in mind these circumstances I find it not possible to accept the contention that if the power of the State be exercised by an authority which on a conspectus of the statute is deemed to be quasi-judicial and the exercise of such power prejudicially affects rights of life, liberty or property which are guaranteed by Part III the same cannot amount to a violation of a fundamental right, whereas if on a proper construction of the

(1) [1952] 2 Q.B. 413.

statute that authority were a mere administrative body but the act remains the same, it would so involve.

Let me next see whether there could be any rational or reasonable basis on which such a contention could rest. I take it that the reason why quasi-judicial authorities are suggested as being exceptions to the general rule that State action which involves a prejudicial result on a person's right to property etc. involves a violation of fundamental rights is that a quasi-judicial authority is vested with the jurisdiction to *decide* and that the conferment of such a jurisdiction carries with it by necessary implication a right to decide rightly as well as wrongly; in other words, that it does not outstep the limits of the jurisdiction by a decision which is erroneous. I consider that it is the case of the transference of a principal to a branch of law or a situation in which it has no place or relevance. The question for consideration in the context of a petition under Art. 32 is whether there is valid legal sanction behind the action of the authority, for apart from such a sanction it must be and it is conceded that there would be a violation of a fundamental right. Besides, if this proposition is right, then it must rest on the principal that the quasi-judicial authority is vested with the right to decide. Does it, however, follow that executive action does not invole a decision or posit a right to decide? If it is clear law, as must be conceded, that there is no necessity to have a *lis* in order to render the body or authority deciding a matter to be treated as a quasi-judicial authority, then it is very difficult to conceive of few actions by the executive which do not involve an element of discretion. No doubt in the case of an administrative or executive body the decision is not preceded by a hearing involved in the maxim *Audi Alteram Partem* but this, in my opinion of the

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merely the procedure before the decision is reached and is not the essence of the distinction. Besides, as pointed out by Prof. Robson in 'Justice and Administrative Law' (a),

> "Sometimes the administrative and judicial functions of an office have been so inextricably blended that it is well-night impossible to say which capacity is the dominant one."

In this state of affairs to determine the maintainability of a petition under Art. 32 by proceeding on an investigation as to the nature of the authority which passed that order when, as I have pointed out earlier, there is no essential difference in either the nature or the quantum of the injury suffered by the citizen, cannot be sustained on any proper interpretation either of the Constitution or the principles of law governing the interpetation of statutes. I would, therefore, hold that the freedoms guaranteed by Part III may be violated by the action of a quasi-judicial authority acting within the limits of its jurisdiction under a valid and constitutional statute where it plainly misinterprets the provisions of the statute under which it functions or which it is created to administer.

As regards the practical effect of accepting the contention of the learned Additional Solicitor General there is a second matter to which I consider it essential to draw attention. With a very great increase in governmental activity and the diverse fields in which it operates owing to the State being a welfare State as contrasted with a Police-State concerned mainly with the maintenance of law and order, there has necessarily been a great proliferation of governmental departments with the attendant creation of several authorities which have to pass decisions in spheres affecting the citizen at manifold points. It is therefore true to say that in a modern welfare State administrative agencies

exercising quasi-judicial authority are vastly more numerous and if I may add, more important and more vital than even the normally constituted Courts. In such a situation to hold that fundamental rights would not be involved by the activities of these various authorities which are increasing in number day by day would, be, in my opinion, to deny to the citizen the guarantee of effective relief which Art. 32 was designed to ensure in the great majority of cases. In such a situation to assert at one breath the prime importance and significance of the function of this Court as a protector and guarantor of fundamental rights, and at the same time to hold that these numerous statutory authorities which are created to administer the law cannot invade those rights would be to render this assertion and this guarantee of relief mostly empty of meaning. Though if the words of the Constitution were explicit, considerations such as there would be of no avail, yet even if the matter were ambiguous I am clearly of the opinion that the rejection of the broad contention raised on behalf of the respondent is justified as needed to give effect to the intentions of the framers of the Constitution. But as I have pointed out already, on no logical basis could it be held that where an act or order of a quasi-judicial authority lacks legislative backing, it cannot still impinge on a person's fundamental right and where an order suffers from patent error, it is no legislative sanction behind it.

It now remains to consider the point urged by Mr. Chari that 'State" action which involves the violation of a fundamental right does not include that resulting from what be termed "the judicial authority of the State". The argument put forward in support of this proposition was rested in most part, if not wholly, on the terms of Art. 12 of the Constitution and the definition of the expression "State" contained in it. Article 12 enacts:

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"In this part, unless the context otherwise requires, 'the State' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

It was pointed out that the "State" whose action might involve the violation of fundamental rights or rather as against whom the citizen had been granted a guarantee of certain rights under this Part was defined to include the "Government" and "Parliament" of the Union and of the States, and the local authorities, did not name the "Judicial power of the State" as within it. If learned Counsel is right in this submission that the State in Part III impliedly excludes judicial and quasi-judicial authorities by reason of the absence of specific mention the further submission that by any of the actions of such anthorities fundamental rights could not be violated would appear to be made out and it has to be added that if this contention is right some of the concessions made by Mr. Sanyal would be unjustified.

There are several considerations to which I shall immediately advert which conclusively negative the correctness of the inference to be drawn from judicial and quasi-judicial authorities not being specifically named in Art. 12. (1) In the first place, it has to be pointed out that the definition is only inclusive, which itself is apt to indicate that besides the Government and the Legislature there might be other instrumentalities of State action which might be comprehended within the expression "State". That this expression "includes" is used in this sense and not in that in which it is very occasionally used as meaning "means and includes" could be gathered not merely from other provisions

of Part III but also from Art. 12 itself. Article 20(1) would admittedly refer to a limitation imposed upon the judicial power of the State and is obviously addresssed also, if not wholly, to judicial authorities. Mr. Chari however sought to get over the implication arising from Art. 20(1) by suggesting that the definition in Art. 12 which excluded judicial and quasi-judicial authorities from within the purview of the expression "State" should be understood as applying only subject to express provision to the contrary. I feel wholly unable to accept the method suggested of reconciling the presence of Art. 20(1) with the interpretation of Art. 12 as excluding judicial and quasi-judicial authorities. No doubt, the definition in Art. 12 starts with the words "unless the context otherwise requires", that expression however could serve to cut down even further the reach of the definition and cannot serve to expand it beyond the executive and legislative fields of State action if the word "includes" were understood as "means and includes" which is the contention urged by learned Counsel. Again, Art. 12 winds up the list of authorities falling within the definition by referring to "other authorities" within the territory of India which cannot, obviously be read as *ejusdem generis* with either the Government and the Legislatures or local authorities. The words are of wide amplitude and capable of comprehending every authority created under a statute and functioning within the territory of India. There is no characterisation of the nature of the "authority" in this residuary clause and consequently it must include every type of authority set up under a statute for the purpose of administering laws enacted by the Parliament or by the State including those vested with the duty to make decisions in order to implement those laws (2). Among the reliefs which on the terms of Art. 32 this Court might afford to persons approaching it complaining of the violation of the

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fundamental right is the issue of a writ of *certiorari* specifically enumerated in that Article. It is common ground that that writ is available for issue only against judicial or quasi-judicial authorities and it would normally follow that quasi-judicial authorities could equally with other instruments of State action violate fundamental rights which could be redressed by the issue of this type of writ. (3) The theory propounded by learned Counsel is based on what might be termed the rigid doctrine of the separation of powers which is not any feature of our Constitution as has bean repeatedly laid down by this Court. (4) Even on the words of Art. 12 as they stand the construction suggested by learned Counsel has to be rejected. The article refers to the government (of Union and of the States) as within the definition of a "State". It is however admitted that both the Government of the Union as well as of the State, function as quasi-judicial authorities under various statutory enactments. The question would at once arise whether when the "government" exercise such powers it is deemed to be a "government" falling within the definition of "State" or should be classified as a judicial authority wielding 'the judicial power of the State" so as to be outside the definition, so that its decisions and orders do not give rise to a violation of a fundamental right. Article 12 on any reasonable construction cannot permit the dissection of "government" for the purpose of discovering the nature or the quality of the powers exercised by it, into the three fields of executive pure and simple, judicial and legislative for the purpose of a fresh reclassification into certain categories. When government exercises any power, be it executive pure and simple, or quasi-judicial under a statute or quasi-legislative in say framing subordinate legislation, it does so as "government" and no further sub-division of it

is possible except for the purposes merely of academic study or for determining the nature of the relief which might be had by persons affected by its activities in any particular field. Similarly, Parliament is vested with a quasi-judicial power to punish for contempt which itself is by reason of such power belonging to the Parliament of the United Kingdom and this if anything is an indication that the constitution does not recognise any doctrine of the separation of powers. In other words, the reference to the Government and the Legislature in the definition is a reference to them as institutions known by that name and is not with a view to describe their particular functions in the body politic.

(5) That the reference to the Government and the Legislatures is to them as institutions and is not to be understood as a reference to their functions, viz., to bodies performing executive and legislative functions is perhaps forcefully brought out by the inclusion of "Local authorities" in the definition of "State". It is obvious that municipal and local Board authorities going under various descriptions in the several State would be comprehended within that term. Now municipal councils exercise, as is well known, legislative, executive as well as quasi-judicial functions. They frame Rules and bye-laws which are subordinate legislation and would fall within the description of "laws" as defined by Art.13. Municipal Councils are vested with administrative functions and they also exercise quasi-judicial functions when assessing taxes, hearing taxation appeals, to mention only a small fraction of the quasi-judicial power which they possess and exercise in the discharge of their functions as the local administration. If the "local authority" as a whole is a "State" within the definition there is no canon of construction by which any part of the action of that authority could be designated as not

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falling within State action for the purpose of giving rise to violation of a fundamental right. (6) There is only one other matter which need be referred to in this connection. Both this Court, as well as the High Court have vested in them the power to make rules, and it cannot be disputed that such rules would be "laws" within the definition of the expression in Art. 13. If so, it is manifest that such rules might violate the fundamental rights, i.e., their validity would depend *inter alia* on their passing the test of permissible legislation under Part III. This would directly contradict any argument that Courts and quasi-judicial authorities are outside the definition of State in Art. 12.

In the face of these deductions following from the Constitution itself, I find it wholly impossible to accede to the submission that what is termed as judicial power of the State which, it is submitted, would include quasi-judicial authorities created under statutes do not fall within the definition of the "State" and that their actions therefore are not to be deemed "State" action against which the Constitution has provided the rights guaranteed under Part III.

I would therefore answer the question referred to the Bench by saying that the action of quasi-judicial authority could violate a fundamental right if on a plain mis-construction of the statute or a patent misinterpretation of its provisions such an authority affects any rights guaranteed under Part III. This would be in addition to the three broad categories of cases in regard to which it was conceded that there could be a violation of fundamental rights: (1) where the statute under which it functions was itself invalid or unconstittional, (2) where the authority exceeds the jurisdiction conferred on it by the Act, and (3) where the authority though functioning under statute, contravenes mandatory procedure prescribed in the statute or

violates the principles of natural justice and passes an order or makes a direction affecting a person's rights of property etc.

Before concluding it is necessary to advert to one matter which was just touched on in the course of the agruments as one which might be reserved for consideration when it actually arose, and this related to the question whether the decision or order of a regular ordinary Court of law as distinguished from a tribunal or quasi-judicial authority constituted or created under particular statutes could be complained of as violating a fundamental right. It is a salutary principle that this Court should not pronounce on points which are not involved in the questions raised before it and that is the reason why I am not dealing with it in any fulness and am certainly not expressing any decided opinion on it. Without doing either however, I consider it proper to make these observations. There is not any substantial identity between a Court of law adjudicating on the rights of parties in the *lis* before it and designed as the High Courts and this Court are to investigate *inter alia* whether any fundamental rights are infringed and vested with power to protect them, and quasi-judicial authorities which are created under particular statutes and with a view to implement and administer their provisions. I shall be content to leave the topic at this.

This brings me to the question as to whether there has been a patent misinterpretation of the statute, as I have described earlier, and whether as a result the petitioner has established a violation of a fundamental right. Section 4(1) of the U. P. Sales Tax Act enacted:

> "No tax shall be payable on:
>
> (a) the sale of water, milk.....
> .....and on any other goods which the

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State Government may, by notification in the official gazette, exempt.

(b) the sale of any goods by the All India Spinner- Association.....or such other person or class of persons as the State Government may, from time to time, exempt on such conditions.....as may be specified by notification in the official gazette."

Pursuant of the powers conferred by a s. 4 (1) (b) the Government of Uttar Pradesh published a notification dated December 14, 1957 and it is the proper interpretation of this notification that forms the central point of the merits of this petition. The notification read:

".....In exercise of the powers conferred by cl. (b) of sub-s. (1) of s. 4 of the U. P. Sales Tax Act 1948 as amended up to date, the Governor of Uttar Pradesh is pleased to order that no tax shall be payable under the aforesaid Act with effect from the 14th of December 1957 by the dealers in respect of the following classes of goods:

Provided that the Additional Central Excise Duties leviable thereon from the closing of business on December 13, 1957 have paid on such goods and that the dealers there of furnish proof to the satisfaction of the assessing authority that such duties have been paid:

(1).....

(2).....

(3) Cigars, cigarettes, biris and tobacco, that is to say any form of tobacco, whether cured or uncured and whether manufactured or not and includes the leaf, stalks and

stems of the tobacco plant but does not include any part of a tobacco plant while still attached to the earth."

The petitioners are manufacturers of hand-made *biris* and there was no duty of excise payable on them under the relevant entry in the Central Excise Act, nor was there any imposition of any fresh duty on biris so manufactured under Central Act 58 of 1957 whose object was to provide for the levy and collection of "additional duties *inter-alia* on tobacco and tobacco products and for the distribution of a part of the net proceeds thereof among the States in place of the sales tax which was to be forborne by the States on those goods. Briefly stated, the contention urged on behalf of the petitioner was that in the proviso to the notification dated December 14, 1957, the expression have been paid on such goods" applied only to those cases where an additional duty was payable and was framed to deny the benefit of the exemption to parties who being liable to pay such duty failed to pay the same. Where, however, no duty, was payable at all, no question of the levy of duty arose and the proviso was inapplicable. On the other hand, the Sales Tax Officer construed the notification with the aid of the proviso as meaning that the exemption from payment of sales tax was granted only in those cases where an additional duty having become payable the same had been paid i. e. the State was intended to be deprived of the right to levy Sales tax only when it obtained some benefit from the additional excise duty which was distributed to it. The question that arises is not whether the construction contended for by the petitioner is the correct or the preferable one, but whether that adopted by the Sales Tax Officer was not one which it was possible for one reasonably to take of the provision. If not withstanding that the one is preferable to the other or that a Court of construction would more

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readily accede to the one rather than to the other, the officer had adopted a construction which it was possible to take, could it be said that there was an error apparent on the face of the record justifying the issue of a writ of certiorari. Judged from the point of view I am inclined to hold that where it is possible reasonably to uphold the construction adopted by an inferior tribunal it would be a case of mere error of law and not a patent error, or an error apparent on the face of the record which should justify the issue of a writ of *certiorari*. In this view I would dismiss the writ petition.

As regards the application to restore the appeal to the file, I do not consider that the request ought to be allowed and for two reasons: Firstly, the applicant having voluntarily withdrawn the appeal I do not see any justification for acceding to his present request. Secondly, if as I have held, the error in the order of the officer was not such as to justify the issue of a writ of certiorari to quash the same the judgment of the High Court under Art. 226 was correct and the petitioner would not gain any advantage by the revival of the appeal. In the circumstances I would dismiss the petition for restoration of the appeal.

Mudholkar J.

MUDHOLKAR, J.—The question which arises for consideration in this petition under Art. 32(1) of the Constitution is whether a right guaranteed by Part III such as a right to carry on trade or business is breached because a taxing authority, though acting under a law which is *inter vires* and following a procedure which is constitutionally as well as legally permissible has erroneously assessed and levied a tax on a trade or business. Unless we hold that an erroneous assessment, be it due to misconstruction of law or misappreciation of facts, constitutes an invasion of a right guaranteed by Part III, the remedy provided by Art. 32(1) will not be available. The

substance of the petitioner's contention is that when the construction placed by a taxing authority upon a provision of law is wrong the levy of tax is one which is not authorised by law and thus the assessee's right under Art. 19(1)(g) of the Constitution is infringed.

What had to be construed by the Sales Tax Officer in the case before us was not a statutory provision but a notification issued by the Government of Uttar Pradesh on December 14, 1957 under s. 4(1) of the Uttar Pradesh Sales Tax Act, 1948 (U.P. Act XV of 1948). The aforesaid provision of the Sales Tax Act and the notification have been set out in the judgments of some of my learned brethren and need not be set out over again in this judgment. Upon the construction placed by him on this notification the Sales Tax Officer held the petitioner liable to pay sales tax on the turnover of sales of *bidis* for the period between April 1, 1958 and June 20, 1958. The petitioner's contention before the Sales Tax Officer was that *bidis* were exempted from sales tax by the notification in question. The plea was negatived by the Sales Tax Officer. The petitioner having unsuccessfully challenged the assessment before the sales tax authorities moved the High Court of Allahabad under Art. 226 of the Constitution. The petition was dismissed. Having failed them the petitioner sought and obtained a certificate from the High Court to the effect that the case is fit for appeal before this Court. Thereafter the petitioner moved the present petition before this Court but took no steps to bring the appeal before this Court. That appeal was thereupon dismissed for non-prosecution on February 20, 1961. I may incidentally mention here that the petitioner has now applied for restoration of the appeal. But that has nothing to do with the point which I have referred to earlier.

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This petition went up before a constitution bench of this Court. At the hearing reliance was placed on behalf of the petitioner on the decision of this Court in *Kailash Nath* v. *State of U.P.*(1) in which by accepting an interpretation on a provision of the Sales Tax Act different from that put upon it by the sales tax authorities this Court held that the petitioner before it was being deprived of his property without the authority of law. The correctness of the decision was challenged on behalf of the respondent State on the basis of various decisions, including some of this Court, and in view of the importance of the question involved the case was directed to be placed before the Chief Justice for constituting a large Bench. In the referring Order the following two questions were formulated by the learned Judges who made the reference :

> (1) Is an order of assessment made by an authority under a taxing statute which is *intra vires*, open to challenge as repugnant to Art. 19(1)(g) on the sole ground that it is based on a misconstruction of a provision of the Act or of a notification issued thereunder ?
>
> (2) Can the validity of such an order be questioned in petition under Art. 32 of the Constitution ?

I have not discussed the decisions of this Court as they have been considered fully in the judgments of my brethren but have approached the questions with reference to the principles of law applicable to the questions placed before us.

The two questions are really one : 'Can an erroneous order of assessment by a taxing authority result in a breach of a right to carry on trade or business so as to entitle the person complaining of the breach to approach this Court under Art. 32 ? The remedy provided by this Article—which is

(1) A.I.R. 957 S.C. 790.

itself a fundamental right—is restricted to the enforcement of fundamental rights and does not extend to other rights such as a right to have a wrong order quashed. On the one hand it was contended at one stage, on the authority of the decisions in *Ramjilal* v. *Income-Tax Officer, Mohindargarh* (1) and *Laxmanappa Hanumantappa Jamkhandi* v. *The Union of India* (2) that a fundamental right will not be breached if the requirements of Art. 265 are satisfied, that is to say, the tax is assessed under authority of law. On the other hand it is said, in substance, that an erroneous order of a taxing authority is an unreasonable restreiction on a person's right to carry on trade or business and Art. 32 entitles that person to redress from this Court. It has, however, been made clear in sereval decisions of this Court that a law under Art. 265 must not violate a right guaranteed in Part III of the Constitution. [*See Mohommad Yasin* v. *The Town Area Committee, Jalalabad* (3) ; *State of Bombay* v. *United Motors (India) Ltd.*, (4) ; *Shree Meenakshi Mills Ltd., Madurai* v. *A. V. Viswanatha Sastri* (5); *Ch. Tika Ramji* v. *The State of Uttar Pradesh* (6) ; *Balaji* v. *Income Tax Officer, Special Investigation Circle*, (7)]. If it violates any of the guaranteed rights, recourse to the provisions of Art. 32 is available to the aggrieved person.

Fundamental rights enumerated in Art. 19(1) are, however, liable to be restricted by laws permissible under cls. 2 to 6 and, therefore, we must first consider the limits within which a person can claim to assert and exercise his fundamental right. We must also bear in mind the nature of a quasi-judicial tribunal and the legal efficacy of its decisions.

The right to carry on trade, business etc., with which we are concerned here falls under

(1) [1951] S.C.R. 127. (2) [1955] 1 S.C.R. 769.
(3) [1952] S.C.R. 572, 578. (4) [1953] S.C.R. 1069.
(5) [1955] 1 S.C.R. 787. (6) [1956] S.C.R. 393.
(7) [1962] 2 S.C.R. 983.

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cl. (1)(g) and can be restricted by a law permissible by cl. 6. This right is further subject to the sovereign power of the State to levy a tax. For, the right to levy a tax is essential for the support of the State and in exercise thereof the State can impose a tax on a trade or business. Article 265 of the Constitution provides that the imposition must be under the authority of a law. Further our Constitution being, broadly speaking, federal, the right to levy taxes has been divided between the Union and the States and the fields in which the Union and the States can respectively levy taxes have been demarcated in the lists contained in the Seventh Schedule to the Constitution. Despite the demarcation, each is supreme in its own field in the matter of levying taxes. There is yet another limitation on the power of the State to make laws including a law levying a tax and that is placed by cl. (2) of Art. 13 of the Constitution which runs thus :

> "The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void."

A pre-constitution law like the U. P. Sales Tax Act with which we are concerned here must also be consistent with Art. 13(1) which runs thus :

> "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such in consistency, be void."

Such a law or any provision thereof to the extent of its inconsistency with the provisions of Part III of the Constitution will be void. The law must further not be violative of any other constitutional

provision as for example Art. 276(2), Art. 286, Art. 301 etc. The law must also have been enacted after complying with all the requirements of the Constitution and where it is subordinate legislation, those of other relevent laws.

If a law imposing a tax is in contravention of any of the rights conferred by Part III of the Constitution the law would be void and a person aggrieved would be entitled to move this Court under Art. 32 on the ground that one of his fundamental rights has been infringed. Similarly, if a law is beyond the competence of the legislature which enacted it or if it contravenes any provision of the Constitution such as Art. 276 or Art. 286 it would be an invalid law as being *ultra vires* the Constitution and the tax levied thereunder would also be one which is not authorised by law and the assessee can move this Court under Art. 32 on the ground that his right under Art. 19(1)(g) is breached. Similarly, if a tax is levied by an authority not empowered by law to do so, or by a competent authority in violation of the procedure permitted by law or in violation of the principles of natural justice, the levy would be unauthorised and the decision under which it was made would be a nullity. In such a case also the assessee can move this Court under Art. 32. All this is accepted before us on behalf of the State.

But where a tax is levied by a competent legislature, after due compliance with all the requirements relating to the making of laws and when it is subordinate legislation, the requirements of other relevant laws, and is also not in violation of any provision of the Constitution it will operate as a reasonable restriction upon the right of a person to carry on his trade, business etc. Though a person's right to carry on a trade or business is a fundamental right it is thus subject to the aforesaid limitations. The quantum of the right left to an individual to

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carry on his trade or business will be that which is left after a valid restriction is placed upon it by the State under cl. (6) of Art. 19. His actual right would be to carry on business burdened with the aforesaid restriction. Where, as here, the restriction is placed on a dealer and takes the form of a liability to pay a tax on the turnover of sales on certain commodities by him then he can carry on his trade subject to his liability to pay the tax as assessed from time to time. It is this which is the nett content of his right to carry on trade, ignoring for the moment restrictions laid upon it by other competent laws made by the State. After a valid restriction is placed upon a fundamental right what will be enforceable under Art. 32 would be not the unrestricted right but the restricted right.

It was not disputed before us that where a quasi-judicial tribunal constituted under the Act whereunder a tax is levied, by an erroneous construction of the Constitution or of that Act holds the tax to be within the competence of the State legislature or as not contravening a provision of the Constitution, its decision will still be deemed to affect a fundamental right of the person upon whom a tax is levied in pursuance of that decision. This position was rightly not disputed before us because, in the premises, the Act would itself be void and consequently no legal liability can arise by virtue of the quasi-judicial tribunal constituted under it. A restriction imposed by a void law being illegal falls outside cl. (6) of Art. 19.

Now when a State wants to impose a tax on a trade or business it must necessarily provide for the machinery for assessing and collecting it The assessment and collection of a tax cannot be arbitrary and, therefore, the State must confer upon the taxing authority the power and impose upon it the duty to act judicially. Absence of such a provision will make the law bad as being violative

of Art. 19 (1) (g): *K. T. Moopil Nair* v. *State of Kerala* (1).

The Sales Tax Act in force in Uttar Pradesh is a law of this kind. It not only imposes a tax on the sale of certain commodities but also provides for the assessment of the tax as well as for appeals, revisions etc., from the orders of assessment. It is a law as contemplated by Art. 265 and it is not contended that any of its provisions infringe the petitioner under Art. 19(1)(g).

Being an instrumentality of the State, like others charged with administrative duties, a taxing authority is not a court of law, as that expression is understood. All the same it has, in the discharge of its functions, to act judicially. Since, however, it is a tribunal of limited jurisdiction and since also it performs other functions which are administrative in character it is not a purely judicial but only a quasi-judicial tribunal.

The qualification 'quasi', however, would not make its duty to act judicially less imperative. In its role as an assessing authority is if incumbent upon it to ascertain facts and apply the taxing law to those facts. It must apply its mind to the relevant provisions of the law and to the facts of each case and arrive at its findings. It is, therefore, inevitable that the authority should have the power to construe the facts as well as the laws. In other words, it must have jurisdiction to do those things or else its decisions can never have any value or binding force.

A taxing authority which has the power to make a decision on matters falling within the purview of the law under which it is functioning is undoubtedly under an obligation to arrive at a right decision. But the liability of a tribunal to err is an accepted phenomenon. The binding force

(1) (1961) 3 S.C.R. 77.

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of a decision which is arrived at by a taxing authority acting within the limits of the jurisdiction conferred upon it by law cannot be made dependent upon the question whether its decision is correct or erroneous. For, that would create an impossible situation. Therefore, though erroneous, its decision must bind the assessee. Further, if the taxing law is a valid restriction the liability to be bound by the decision of the taxing authority is a burden imposed upon a person's right to carry on trade or business. This burden is not lessened or lifted merely because the decision proceeds upon a misconstruction of a provision of the law which the taxing authority has to construe. Therefore, it makes no difference whether the decision is right or wrong so long as the error does not pertain to jurisdiction.

The U. P. Act empowers the sales tax officer to make the assessment, to ascertain the necessary facts for holding whether or not a person is liable to pay tax and if he is liable, to determine the turnover of his sales. Since sales tax is imposed only on certain commodities and tax at different rates is since sales chargeable an different commodities the power of the Sales Tax Officer to makes an assessment carries with it the power to determine whether the sales of particular commodities effected by the assessee fall within the ambit of the Act or not and if they do, to determine the rate or rates of tax chargeable in respect of sales of different commodities. In regard to all these matters he has to follow the procedure prescribed by the Act. If he finds upon a construction of the Act and of the rules and notifications issued thereunder that a certain commodity is liable to pay a tax then so long as the transaction is one upon which the State legislature could impose a tax and the commodity is one on which the State legislature could impose a tax it is

difficult to see how the decision arrived at by the Sales Tax Officer can be said to be otherwise than within his jurisdiction even though he may have made an error in coming to a particular conclusion. If he comes to a wrong conclusion would he, in demanding the tax on the basis of such conclusion, be making an unlawful demand? The conclusion may be obviously or palpably wrong but so long as it is not shown to be dishonest would his decision be void? Of course, if by placing an erroneous construction on the law he holds, say, that a transaction which is hit by Art. 286 of the Constitution is one which can be taken into consideration for the purposes of assessing the tax or if he holds that a commodity upon which the State legislature could not impose a tax is taxable under the Act he would clearly have acted beyond his jurisdiction and his assessment with respect to such a transaction or a commodity would be void. With respect to such assessment the assessee will of course have the right to move this Court under Art. 32. But where such is not the case and the error of the Sales Tax Officer lay only in holding that a tax is payable on a certain commodity, as in this case bidis, even though *bidis* may have been exempted from such tax by a notification made by the Government, how could he be said to have acted without jurisdiction?

It was, however, contended that where the erroneous construction by the Sales Tax Officer results in the levy of a tax for which there is no authority in law the fundamental right to carry on trade or business will necessarily be breached. The answer to this contention is that since he has the power to construe the law and decide whether a particular transaction or commodity is taxable his decision though erroneous must be regarded as one authorised by law and consequently the tax

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levied thereunder held to be one authorised by law. For, what is authorised by law is that which the appropriate authority upon consideration and construction of the law holds to be within the law.

It was said that the answer would take in even erroneous decisions as to commodities and transactions with respect to which the State legislature is incompetent to make laws. I have no doubt that it would not, because the power of the Sales Tax Officer to levy a tax cannot extend beyond that of the State legislature.

The Sales Tax Officer functioning under the Act in question has, clearly, the power to summon witnesses, call documents, record evidence and so on. The Act imposes a duty on him to give an opportunity to the person sought to be assessed to be heard. His decision upon matters falling within the scope of the laws governing the proceedings before him, unless revised or modified by a tribunal or authority or a court to which he is subordinate must, therefore, be regarded as having as much validity as that of a court of law in the exercise of its judicial power subject, of course, to the limitations stated earlier. The decision may be erroneous. It may proceed upon a blatant or obvious error on the face of the record. Even so, it cannot be regarded as *'non est'* or void or a mere nullity. If that is the correct legal position, what difference would it make if as a result of an erroneous decision arrived at by a Sales Tax Officer resulting from a misconstruction of a notification under the Sales Tax Act, a person is held liable to pay tax upon sales of a commodity which, upon a proper construction, would appear to be exempted from tax by the law like the notification in question? Just as a person cannot complain of a breach of his fundamental right to carry on trade or business because an erroneous decision of a court of law renders him liable to pay a sum of money, so too

he cannot complain against an equally erroneous decision of a Sales Tax Officer. But that does not mean that an erroneous decision can never be challenged before this Court. After exhausting the remedies provided by the taxing statute the aggrieved party can challenge it directly under Art. 136 or indirectly by first moving the High Court under Art. 226 or 227 and then coming up in appeal against the decision of the High Court.

Though this Court is the guardian of all fundamental rights the Constitution has not taken away the right of the ordinary courts or of quasi-judicial tribunals administering a variety of laws to exercise their existing jurisdiction and to determine matters falling within their purview. If by reason of the decision of a tribunal a person, for instance, loses his right to occupy a house, or has to pay a tax, that decision cannot be thrown to the winds and a complaint made to this Court that a fundamental right has been violated. The decision being one made in exercise of a judicial power and in performance of a duty to make it is a valid adjudication though as a result of it a person may not be able to occupy his house or may have to pay a tax. The decision may be a right one or a wrong one. If it is not a nullity when it is right I fail to see how it can be said to be a nullity because it is erroneous, so long of course, as the law is a good law, the decision is of an authority competent to act under the law, the procedure followed by it is as prescribed by the law and the error does not pertain to jurisdiction. The error may lie in the construction placed upon a statue by the tribunal. If it is that and no more, such erroneous construction cannot render the action taken thereunder arbitrary or unauthorised. The error has to be corrected in the manner permitted by law or the Constitution and until it is so

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corrected it would not be open to the party to say that its fundamental right is violated.

Looking at the matter from the aspect of the nature of the right which is capable of being enforced under Art. 32 the same conclusion is reached. Thus when the provisions of a taxing law entitle a taxing authority to assess and levy a tax and for these purposes to decide certain matters judicially and give binding effect to its decision and none of the provisions of that law are void under Art. 13 or otherwise invalid the right enforceable under Art.32 would be the right to carry on business subject to the payment of the tax as assessed by the taxing authority and not a right to carry on trade or business free from that liability. It makes no difference even if the assessment of the tax is based upon an erroneous construction of the taxing law inasmuch as the right to have a correct determination of the tax is not part of the fundamental right to carry on business but flows only from the taxing law. It would follow therefore that in such a case nothing is left for being enforced under Art. 32 when the taxing authority does no more than assess and levy a tax after determining it.

One more point needs to be dealt with. It was said that a quasi-judicial tribunal being an instrumentality of the State its action is State action and so it will be under the same disabilities as the State to do a thing which it is incompetent or impermissible for the State to do. It is also said that what a State cannot do directly it cannot do indirectly. In so far as the incompetency of the State arises out of a constitutional prohibition or lack of legal authority due to any reason whatsoever, it will attach itself to the action of the quasi-judicial tribunal purporting to act as the instrumentality of the State. Where, in such a case, any fundamental right of a person is violated by the action of the quasi-judicial tribunal that person is

entitled to treat the action as arbitrary or a nullity and come up to this court under Art. 32 because the action would be one which is not authorised by law. But while an erroneous action of the State in exercise of its administrative functions can be challenged directly under Art. 32 if it affects a person's fundamental right on the ground that it is not authorised by law the action of the tribunal pursuant to an erroneous order will not be open to challenge for the reason that its action arises out of the exercise of a judicial power and is thus authorised by law, State action though it be. When, under the provisions of a law, the State exercises judicial power, as for instance, by entertaining an appeal or revision or assessing or levying a tax it acts as a quasi-judicial tribunal and its decision even though erroneous will not be a nullity and cannot be ignored. It can be corrected only under Art. 226 or Art. 227 by the High Court or under Art. 136 by this Court inasmuch as the State would then be acting as a quasi-judicial tribunal.

To summarise, my conclusions are these :

1. The question of enforcement of a fundamental right will arise if a tax is assessed under a law which is (a) void under Art. 13 or (b) is *ultra vires* the Constitution or (c) where it is subordinate legislation, it is *ultra vires* the law under which it is made or inconsistent with any other law in force.

2. A similar question will also arise if the tax is assessed and/or levied by an authority (a) other than the one empowered to do so under the taxing law or (b) in violation of the procedure prescribed by the law or (c) in colourable exercise of the powers conferred by the law.

3. No fundamental right is breached and

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consequently no question of enforcing a fundamental right arises where a tax is assessed and levied *bona fide* by a competent authority under a valid law by following the procedure laid down by that law, even though it be based upon an erroneous construction of the law except when by reason of the construction placed upon the law a tax is assessed and levied which is beyond the competence of the legislature or is violative of the provisions of Part III or of any other provisions of the Constitution.

4. A mere misconstruction of a provision of law does not render the decision of a quasi-judicial tribunal void (as being beyond its jurisdiction). It is a good and valid decision in law until and unless it is corrected in the appropriate manner. So long as that decision stands, despite its being erroneous, it must be regarded as one authorised by law and where, under such a decision a person is held liable to pay a tax that person cannot treat the decision as a nullity and contend that what is demanded of him is something which is not authorised by law. The position would be the same even though upon a proper construction, the law under which the decision was given did not authorise such a levy.

My answer to each of the two questions is in the negative.

BY COURT: In accordance with the judgments of the majority, Writ Petition No. 79 of 1959 is dismissed, but the parties will bear their own costs. C. M. P. No. 1349 of 1961 for restoration of Civil Appeal No. 572 of 1960 is also dismissed, but the parties will bear their own costs.