

## **Budh Prakash Jai Prakash And Anr. vs The Sales Tax Officer And Ors. on 27 February, 1952**

**Equivalent citations: AIR1952ALL764, AIR 1952 ALLAHABAD 764**

### **JUDGMENT**

Sapru, J.

1. This is an application, under Article 226(1) of the Constitution, for the issue of a writ in the nature of 'certiorari' quashing the assessment orders dated the 27-2-1950 and the 23-5-1950 relating to the assessment years 1948-49 and 1949-50 respectively and the provisional assessment order dated the 30-1-1950 relating to the assessment year 1949-50 in respect of forward contracts of peas. Included in the application is a prayer for a writ in the nature of prohibition commanding opposite party No. 1 to desist from proceeding further with assessment proceedings relating to forward contracts of guar and peas. Also included in the relief claimed is a writ in the nature of mandamus' to opposite parties calling upon them to forbear from giving effect to the provisions of the U. P. Sales Tax Act, 1948, in so far as they relate to forward contracts in respect of gold, silver and guar.

2. The case for the applicant will be found set forth in the affidavit which has been filed on behalf of the applicant by Shri. Dalip Singh Jain. No counter affidavit in this case has been filed on behalf of the State. We have, therefore, to assume that the facts stated by the deponent are correct, they not having been challenged by the State.

3. The applicant is a firm styled Budh Prakash Jai Prakash of Hapur. It carries on business, 'inter alia', of forward contracts and has been dealing in gold, silver, peas, arhar, urd and sarson. The applicant is also a shareholder member of the Mahabir Beopar Mandal Ltd., Hapur, which is a public limited company. Members of the Mandal carrying on forward contracts register them with it and it acts in respect of those transactions as a clearing house charging commission thereon.

4. On 1-4-1948, the U. P. Legislature passed an Act, called the U. P. Sales Tax Act (No. XV of 1948), hereinafter referred to as the Act. Under it forward contracts were made liable for the payment of the sales tax. Thereafter, the applicant was, assessed to the sales tax on forward contracts in the assessment years 1948-49 and 1949-50. It paid a sum of Rs. 1,082/8/- as sales tax for the year 1948-49 and Rs. 7,369/- for the assessment year, 1949-50. In addition, to these amounts, the applicant paid a sales tax on forward contracts of various commodities done from 1-4-1950 to 31-1-1951. According to the applicant, the collection of the sales tax in respect of forward contracts is made, on behalf of the State of Uttar Pradesh, by the Beopar Mandal from its share-holder members.

It may be mentioned that in respect of forward contracts relating to gold, silver and urd, the said Mandal paid on behalf of its members a sum of Rs. 1,04,246/4/- to the State of Uttar Pradesh as sales Tax for the assessment year 1948-49 and towards this sum the contribution of the applicant was Rs. 313/-. Similarly in respect of forward contracts relating to silver, gold, sarson, arhar and peas the said Mandal paid on behalf of its members a sum of Rs. 2,70,639/8/- to the State of Uttar Pradesh as sales, tax for the assessment year 1949-50 and towards this sum the contribution of the applicant was Rs. 2,719/4/-. It may be further stated that the applicant has been dealing in forward contracts in guar and in this connection on 29-6-1950 the Sales Tax Officer, Hapur Circle, Meerut, wrote a letter to the said Mandal requiring it to collect the sales tax on guar forward transactions from its members. On 5-7-1950 an intimation was sent to the Sales Tax Officer by the Mandal that inasmuch as the delivery of the commodities in the eight specified mandis of the East Punjab was outside the State of Uttar Pradesh, they were not liable to assessment to sales tax.

On 2-12-1950, the Sales Tax Officer wrote to the Mandal intimating that forward contract transactions in guar and peas, deliveries of which are stated to have been stipulated in the Mandis of the East Punjab and Delhi respectively, were according to the view of Government, taxable under the U. P. Sales Tax Act, 1948 in the same manner as any other forward transactions done in U. P. The Mandal was, therefore, required under the provisions of the U. P. Sales Tax Act to submit to Government a list of all such transactions carried on by it up to 30-11-1950 in respect of the transactions referred to above. The Mandal was also asked if it was prepared to collect the sales tax on those transactions in future in the same way as it had been doing in the past.

On the same date notice was issued by the Sales Tax Officer to, 'inter alia', the Mahabir Beopar Mandal, Hapur, and it was also published for the information of all dealers, intimating that they should deposit all taxes in Government treasury along with returns in form IV by 31-12-1950. On the same date, i.e., 2-12-1950 the Sales Tax Officer directed the Mandal to furnish a list of all the dealers who had entered into forward transactions of guar and peas so that notice might be issued to them to deposit the sales tax. The forward contracts related to the delivery of commodities in eight districts of the East Punjab.

On 6-12-1950, the Mandal informed the Sales Tax Officer, Hapur, that, in its opinion, the decision of Government on the point of the taxability of forward transactions in guar, the delivery of which was contracted to be made in the mandis of the East Punjab, was not binding on the company as no opportunity was given to the said company to represent its case and the company proposed to challenge it in a court of law if so advised. It further desired the Sales Tax Officer to communicate with the dealers directly in respect of guar transactions. It is further alleged in the affidavit that the applicant is also a member of the Chamber of Commerce, Hapur and that the latter acts as a clearing house to its members carrying on forward contract business through it.

The applicant also made forward contracts through the Chamber of Commerce, Hapur, relating to peas, delivery of which was contracted to be made in the mandi of Delhi outside the State of Uttar Pradesh. On 30-1-1951 the Sales Tax Officer, Hapur Circle, Meerut, issued an order purporting to be under Rule 41(3) of the Act assessing the applicant to a sales tax of Rs. 138/- on the above mentioned forward contracts in peas done through the Chamber of Commerce, Hapur, and also in

those effected, in his view independently by the applicant.

The applicant was further directed to deposit the assessed amount within 16 days of the receipt of the order. The applicant wrote a letter to the Sales Tax Officer on 5-2-1951, objecting to the taxation of the above-mentioned forward contracts on the ground that their delivery was to take place outside the State of Uttar Pradesh and that those transactions could not be taxed in any shape or form by the State of U. P. On 9-2-1951 opposite party No. 1 wrote to the applicant with reference to its application dated 5-2-1951 saying that it could go in appeal if so advised. The applicant has now come up to this Court for the issue of writs of the nature I have indicated in the earlier part of this judgment.

5. Now, on these facts, the arguments that were advanced by Mr. Pathak who appears for the applicant were that (a) the reference to forward contracts in Clause (h) of Section 2 read with Explanation III of the Act was beyond the legislative competence of the U. P. legislature, (b) that the provisions relating to taxation of sales, delivery of which was made outside the U. P. were ultra vires of the U. P. Legislature and (c) that, in any case, Clause (h) read with Explanation II was invalid as it was inconsistent with Article 226 of the Constitution. It was contended on behalf of the opposite party that the application should be rejected on the ground that the applicant had another equally speedy and efficacious remedy open to it by way of appeal to the appellate authority mentioned in the Act.

6. Now, the first question which I shall consider in this case is whether forward contracts are assessable under the Act and whether the provisions in the Act relating to the taxation of those forward contracts in which delivery does not take place are constitutionally legal or not. Learned counsel for the applicant contends that it was open to the United Provinces (now Uttar Pradesh) Legislature to levy a tax under Entry 48 of List II of the Seventh Schedule of the Government of India Act, 1935. Entry 48 is in the following terms:

"Taxes on the sale of goods and on advertisements."

The powers of the Provincial Legislature to legislate are to be found in Section 100 of the old Government of India Act, 1935, by which the transactions in question are governed. Sub-section (3) of that section enacts that:

"Subject to the two preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule."

Entry No. 48 is in the Provincial legislative lists. The answer to the question whether forward contracts could or could not be legally the subject-matter of taxation by the Provincial legislature depends upon the meaning to be assigned to the words "sale of goods." The expression "sale of goods" is defined in Section 4(3) of the Indian Sale of Goods Act.

Section 4 of that Act and its various sub-sections run as follows :

"4(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

It will be seen that, according to Sub-section (3), there is a difference between a contract of "sale" in which the property in the goods is transferred from the seller to the buyer and "an agreement to sell" where the transfer of the property in the goods is to take place at a future time or subject to some condition to be fulfilled on some future date. The position is made very clear by Sub-section (4) quoted above. It will be seen that Sub-section (1) defines the term "contract of sale" as a contract whereby the seller transfers or agrees to transfer the goods for a price. An agreement to sell is what may be called a contract 'simpliciter' or an executory contract of sale and whether an agreement to sell has or has not become a sale is, as I read Sub-section (4), a matter of fact to be decided with reference to the facts of each case.

I may quote here, for purposes of easy reference, Section 2(h) of the Act together with the two explanations which are important for our purposes in this case:

"2. In this Act, unless there is anything repugnant in the subject or context;

(h) 'sale' means, within its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration and includes forward contracts but does not include a mortgage, hypothecation, charge or pledge:

.....

Explanation II--Notwithstanding anything in the Indian Sale of Goods Act, 1930, or any other law for the time being in force, the sale of any goods-

(1) which are actually in the United Provinces at the time when in respect thereof, the contract of sale as defined in Section 4 of that Act is made,

(ii) or which are produced or manufactured in the United Provinces by the Producer or manufacturer thereof, shall wherever the delivery or contract of sale is made, be

deemed for the purposes of this Act to have taken place in the United Provinces.

Explanation III--Where goods under a forward contract are not actually delivered, the sale in respect of such contract shall be deemed to have been completed on the date originally agreed upon for delivery. ...."

The point which I am stressing is that there is, as is evident from Sub-sections, (3) and (4) of Section 4 of the Sale of Goods Act, a distinction between an agreement to sell and a sale and what is authorised by the Government of India Act is taxation of a sale of goods and not an agreement to sell which has not materialised into a sale. An agreement to sell is, as I have said before, an executory contract pure and simple. No property under it passes. A sale, on the other hand, is an executed contract, i.e., it is a contract plus a conveyance. The distinction between an agreement to sell and a sale has been brought out by Mr. Benjamin in his well-known book on Sale (Eighth Edn. p. 1). In Mr. Benjamin's view-

"In order to constitute a sale there must be : (1) An agreement to sell, by which alone the property does not pass; and (2) an actual sale, by which the property passes."

I would also quote in this connection the observations of Parke J. in 'DIXON v. YATES', (1833) 5 B. & Ad. 313 at p. 340:

"Where there is a sale of goods generally no property in them passes till delivery because until then the very goods sold are 'not ascertained.' But where by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very "appropriation" of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee."

7. Whether in this particular case the forward contract into which the parties had entered materialised into a sale or not was a question of fact on which the only evidence that we have is an affidavit of the applicant. This affidavit has not been controverted by the State. It is however, contended that all forward contracts, irrespective of the fact whether delivery of goods under them takes place or not, would become sales on the date originally agreed upon by virtue of Explanation III of Clause (h) of Section 2 of the Act.

Now it strikes me that in so far as Explanation III of Section 2(h) of the Act seeks to lay down that forward contracts in which no actual delivery or appropriation has taken place will nevertheless be deemed to be complete on the date originally agreed upon for delivery, it changes the meaning of the word "sale" as used in the Sale of Goods Act both English and Indian. I do not think that the meaning of the word "sale", contemplated by the British Parliament in enacting Entry 48, List II of the Seventh Schedule was the one given to it by Explanation III with reference to forward contracts.

It must be assumed that the British Parliament was conversant with the meaning of the word "sale" both in British and Indian law and that it was that meaning which it intended to assign to that word in Entry 48.

I am satisfied that Explanation III of Sub-section (h) of Section 2 of the Act which seeks to put a meaning not contemplated by the British Parliament on the word "sale" with reference to forward contracts is invalid. I would say that in this particular case, as there is no evidence of delivery, I would not be justified in holding that the forward contract was a sale within the meaning of entry 48 of the State Legislative List. For this reason, the assessments for the years in question as also the settled assessment for the year in which the application was filed were not proper.

8. It may in passing be mentioned that under our new Republican Constitution, Entry No. 90 of List I of the Seventh Schedule deals with-

"Taxes other than stamp duties on transactions in stock exchanges and futures markets."

So far as Entry No. 48 of List II of the Seventh Schedule of the Government of India Act, 1935, is concerned, it has a counter-part in Entry 54 of List II of the Seventh Schedule of our Republican Constitution. I greatly regret that I have been driven "to the conclusion that forward contracts in which no delivery actually takes place are exempt from the sales tax. I say 'regret' because they are more or less speculative transactions, the morality of which is, in my humble judgment, open to question. In view of the fact that, in my opinion, there was no "sale" and that, therefore, there could be no assessment of a tax on sale, it is unnecessary to consider the other two questions which were argued before us.

9. I come now to the question which has given me a considerable amount of difficulty. The Act provides the machinery by which a tax is to be assessed. The sections which deal with the machinery or the assessment of a tax on the sale of goods are 8, 9, 10 and 11 of the Act. Reading them together, I find that assessments are made in the initial instance by the Sales Tax Officer. From assessments made by him an appeal is provided in the sense that an assessee, objecting to an assessment, can go in appeal within a prescribed time to an appellate authority. The appellate authority can, after giving the appellant a reasonable opportunity of being heard--(a) confirm, reduce, enhance or annul the assessment, or (b) set aside the assessment and direct the assessing authority to pass a fresh order after such further inquiry as may be directed.

Orders passed in appeal under this Sub-section are subject to the powers of revision Conferred by Section 10 of the Act. Under Section 10, to which I have just referred, the Provincial (or state) Government is under an obligation to appoint a revising authority and the appellate authority is subject to its superintendence and control, it being open to the revising authority, either in its discretion or on being so moved by the Commissioner of Sales Tax or on the application of any person aggrieved by the order of assessment, to call for and examine the record of any order or proceedings recorded by any appellate or assessing authority under the Act for the purpose of satisfying itself as to the legality or propriety of such order or as to the regularity of such proceedings

and to pass such order as it thinks fit.

After the appellate authority has made an order under Sub-section (3) of Section 9 or a revising authority has made an order under Sub-section (3) of Section 10 affecting the liability of any dealer to pay the tax under the Act, it is open to a dealer by an application in writing accompanied by a prescribed fee to approach the revising authority with the prayer that it may be pleased to refer to the High Court any question of law arising out of its order. Now, if the revising authority refuses to make any such reference, the applicant has been given a right to apply to the High Court direct against such refusal. This Court has been further empowered by Sub-section (3) of Section 11 to require the revising authority to state a case and refer it to it, & on receipt of such requisition the revising authority is bound to state and refer the case. Under Sub-section (5) of Section 11 this Court has been further empowered, upon the hearing of such a case, to decide the question of law raised thereunder.

The judgment of this Court is to be sent thereafter to the revising authority and it has been made a statutory obligation on the revising authority to dispose of the case according to the judgment of this Court. Thus it will be seen that the Act provides a complete machinery, provided a question of law arises in a case, to ascertain a binding opinion of this Court. Undoubtedly in this case a question of some difficulty regarding the interpretation of the Constitution was raised by the applicant. But even so after pursuing its ordinary remedies before the authorities set up for assessment--appeal and revision--the applicant could come up by way of reference to this Court. It cannot, therefore, be said that there is in this case no alternative remedy available to the applicant. Whether it is a suitable and efficacious one is, however, a different question. I may quite frankly say that it is, in my opinion, undesirable from many points of view to encourage litigants to approach this Court directly in cases where a proper machinery has been provided by statute for ultimate reference to and decision by this Court.

10. In a case under the Act there are various items which become the subject-matter of assessment. To some the applicant may have no real objections. To others, however, the applicant may have an objection of a legal or constitutional nature. It would not be right for this Court to encourage litigants to rush to it with applications for a writ in every case where they can discover a point of law involving what is called an interpretation of the Constitution. It has been contended that the function of the revising authority is merely to assess the tax on principles laid down in the Act and not to deal with constitutional questions. Personally, I am not prepared to go so far as to say that the argument is sound and must be accepted as valid without reservations and qualifications. No doubt, on the facts, as found by us in this case, questions relating to the constitutionality of a part of the Act arise.

It is urged that constitutional questions should be decided by this Court at the earliest possible stage and that this consideration would justify this Court in issuing the writs of 'certiorari' and 'prohibition' prayed for in this case. I am not prepared to agree with the above contentions without important qualifications. I would like to quote in this connection the summary of the law on this as given by Mr. Ferris in his book "The Law of Extraordinary Legal Remedies", 1926 Edn. pp. 439 and 440. He writes:

"It is well settled that a writ of prohibition may not be used to usurp or perform the functions of an appeal, writ of error or certiorari, or to correct any mistakes, errors or irregularities in deciding any question of law or fact within its jurisdiction. The office of the writ, as at common law, is to prevent an unlawful assumption of jurisdiction, not to correct mere errors and irregularities in matters over which the court has cognizance. Where the general scope and purpose of the action is within the jurisdiction of the court, any error or overstepping of its authority in a portion of its judgment, or any other error in its proceedings, is only ground for a review or appeal, and not prohibition.

"That is to say, where there is authority to do the act, but the manner of doing it is improper, the writ will not lie. In other words whatever power is conferred may be exercised, and, if it be exercised injudiciously, erroneously or irregularly, it amounts to error merely and not to a usurpation or excess of jurisdiction. In such a case, however gross the error, irregularity or mistake, the writ does not lie, not because, as is sometimes erroneously stated, there exist other adequate remedies."

I must not be understood to agree completely with the propositions relating to the issue of writs of prohibition and certiorari in cases in which, 'inter alia', a constitutional question is involved (as) laid down by my brother, Agarwala, J. I am confining myself only to the facts of this particular case.

11. The position, that faces me is that the arguments in this case have covered a wide ground and all the material facts and law on which this Court could or would ultimately have come to a conclusion on a reference being made to it have been placed before us. In order to avoid a multiplicity of proceedings and inconvenience to all the parties in this case, including the State, I think it desirable, particularly as proceedings relating to forward contracts are pending before the Sales Tax Officer, that we should make the position in regard to the assessment of forward contracts in this particular case clear.

12. The principles on which Courts issue writs of certiorari and prohibition are well-known. They have been the subject-matter of consideration by this Court in a number of cases. The principles on which they should be issued were laid down by this Court in the Full Bench cases of 'MOTI LAL v. GOVT. OF THE STATE OF UTTAR PRADESH', AIR 1951 All 257 (FB), & 'THE ASIATIC ENGINEERING CO v ACHHRU RAM', 1951 All LJ 576 (FB). The view which has been taken in the latter of these two cases by this Court is that Article 226 of the Constitution has made the issue of writs, directions or orders in the nature of certiorari, prohibition and mandamus discretionary. In doing so, however, the Court has to keep in mind their historic background. The discretion which is vested in the Court is of a judicial nature and has to be exercised in accordance with certain settled principles. I do not think it necessary to discuss at any length the case law bearing on the principles on which writs of certiorari or prohibition should be issued by this Court.

Suffice it to say that the following circumstances, justify intervention by this Court in this case:



(1) In the first place, I feel that there is force in the contention of learned counsel for the applicant that the question of constitutionality which has been raised by him is of such a nature that the appellate authority and the revising authority may feel embarrassed in dealing with it.

(2) In the second place, as I have said before, arguments have covered a wide ground in this Court in this case and it would be a sheer waste of time and effort if questions canvassed before us were to be sent back for re-agitation in the various courts referred to by me as authorities which can dispose of the matter. The proper function of those courts is the assessment of a tax on principles laid down in the Act itself. Here the constitutionality of some of the provisions of the Act has been called in question. This question of the validity of those provisions will have to be decided by the Court at one stage or the other. It is desirable, in view of the fact that we have all the materials before us, and, have heard full arguments, that it should be decided now and here.

(3) A third reason why I think we should interfere in this case is that the Sales Tax Officer is going ahead with proceedings relating to the year in which the writ application was filed. These proceedings can be stopped only by a writ of prohibition. I do not wish to lay down any general or broad principle on which writs of prohibition which have been held to be discretionary should be issued by this Court. Suffice it to say that it is desirable, in order to expedite matters, that the Sales Tax Officer should have the guidance of this Court in this case in regard to the manner in which he should proceed. The question on which he should have concentrated himself on is whether these forward contracts constituted a sale within the meaning of the word "sale" in the Act.

As I have said, the question whether a forward contract does or does not constitute a sale is a question of evidence dependent on the actual delivery to be decided on the facts of each case. There is no evidence of delivery in this case at all. It is from this angle unnecessary to declare any part of the Act, except Explanation III of Sub-section (h) of Section 2 of the Act as invalid.

13. For the reasons given above, I would issue an order in the nature of certiorari to the Sales Tax Officer quashing the assessment orders dated 27-2-1950 and 23-5-1950 relating to the assessment years 1948-49 and 1949-50 respectively and the provisional assessment order dated 30-1-1950 relating to the assessment year 1949-50. I also direct a writ in the nature of 'prohibition' to issue to the opposite parties to refrain from proceeding further with the assessment proceedings relating to forward contracts of guar and peas. As the defence which has succeeded in this case is largely of a technical nature, I propose to make no order as to costs.

Agarwala, J.

14. I concur in the order proposed by my brother but, in view of the importance of the questions involved in the case I wish to add a few remarks of my own. The facts have all been narrated in the

judgment of my brother and it is not necessary to repeat them.

15. Three questions were canvassed before us by Mr. Pathak (1) that Clause (h) of Section 2 read with Explanation III, of the U. P. Sales Tax Act No. XV of 1948, in so far as it refers to "forward contracts" was 'ultra vires' the U. P. legislature as it contravened the provisions of the Government of India Act, 1935, Item 48, List II of the 7th Schedule; (2) that the said clause read with Explanation II was 'ultra vires' the U. P. legislature because it purported to legislate for sales taking place beyond the limits of the U. P. and (3) that the said clause read with Explanations II and III had become void because it was in contravention of Article 226 of the Constitution.

16. A preliminary objection to the hearing of this application was raised by the learned counsel for the State on the ground that this Court may not be pleased to exercise its jurisdiction under Article 226 in view of the fact that the applicants have another equally adequate, efficacious and speedy remedy at their disposal--the remedy by way of appeal from the order of the Sales Tax Officer to the Appellate authority under Section 9 of the Sales Tax Act.

17. The preliminary objection raised on behalf of the State must be dealt with first. In the present case, writs of certiorari, prohibition and mandamus are sought. In what circumstances these writs should be issued or refused is well known. It has been held in this Court that these writs should be issued only when there is no other adequate, equally convenient, beneficial and effectual remedy available to the applicant, vide 'MOTI LAL v. GOVT. OF THE STATE OF UTTAR PRADESH', AIR 1951 All 257 (FB). It is clear that the mere fact that there is another remedy available is not sufficient. In order to debar an applicant from seeking his remedy in this Court, the alternative remedy must be 'equally convenient, beneficial and effective'.

18. In the case of a writ of prohibition the High Court directs a subordinate court or tribunal or other authority having judicial or quasi-judicial functions not to proceed with a pending case before it as in doing so it has either exceeded its jurisdiction or it had no jurisdiction at all. It is obvious that such proceedings should be prevented as soon as possible and further expense of the parties and waste of time of the Court or public officers be avoided. It is suggested that the applicant could get the relief sought for by him by an appeal under Section 9 of the Sales Tax Act." It is true that after the Sales Tax Officer had made the assessment, his order could be the subject of an appeal under Section 9. But that would not be an adequate alternative remedy. The very object of the writ of prohibition is to stay the illegal exercise of a jurisdiction by an inferior court, where none exists.

This object is frustrated if the applicant is denied relief at the earliest opportunity and the proceedings are allowed to be continued and time and energy and money of all concerned is wasted. Further, if the order of assessment is passed, the applicant will have to deposit the tax assessed on him. True, under Section 9 of the Sales Tax Act an appeal may be preferred to the appellate authority upon depositing the tax which the assessee admits to be due from him or upon depositing the instalment of tax that he has been called upon to deposit. This provision, however, is a condition of filing an appeal but does not prevent the Sales Tax Officer from demanding payment of the whole amount assessed by him.

The appellate authority has not been given any power to stay the realisation of the amount assessed which can be recovered from an assessee under Section 8. The tax may run to lacs of rupees and even if ultimately returned the applicant's would have suffered great loss of interest on the amount deposited by them. In this connection, it may be pointed out that the Courts in England have held that an appeal against the final order passed in the proceedings is not an adequate remedy so far as the writ of prohibition is concerned.

19. In 'THE KING v. NORTH', (1927) 1 K B 491, at p. 500 Bankes L. J. stated:

"It was said that the vicar had a right of appeal, and that under those circumstances appeal was his only remedy, and that he could not ask for a prohibition. I am not going to decide here whether he had a right of appeal or not, though there is strong reason for saying that, as he was not a party to a suit, he had not. But even if he had a right of appeal, in the case to which Atkin L. J. has referred me, 'WHITE v. STEELE', (1862) 12 C B (N. S.) 383, where the case was very similar to the present, the Court definitely stated that in their opinion the fact that there was an appeal to the Court of Arches was no ground for refusing a writ of prohibition."

To the same effect was the observation of Scrutton L. J. in that case. At page 506 Atkin L. J. stated, ".....I think it is quite plain that the fact of there being a remedy by way of appeal is no answer to a writ of prohibition, where the want of jurisdiction complained of is based upon the breach of a fundamental principle of justice, such as I conceive to have been the case here. There is plenty of authority for the proposition that in such cases prohibition will lie notwithstanding that there is a right of appeal."

20. In 'RASHID AHMED v. THE MUNICIPAL BOARD, KAIRANA', 1950 S C R 5136, the Municipal Board of Kairana had prevented a trader from doing the wholesale business of purchase and sale of vegetables on the ground that the monopoly right to do wholesale business in vegetables had been granted to some one else. The Supreme Court observed as follows:

"There can be no question that the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs, but the powers given to this Court under Article 32 are much wider and are not confined to issuing prerogative writs only. The respondent Board having admittedly put it out of its power to grant a licence and having regard to the fact that there is no specific bye-law authorising the issue of a licence, we do not consider that the appeal under Section 318 to the local Government which sanctioned the bye-laws is, in the circumstances of this case, an adequate legal remedy."

21. There is nothing in the case of 'ASIATIC ENGINEERING CO. v. ACHHRU RAM', 1951 All L J 576 (FB), which is contrary to what has been stated above. In that case, after considering the nature of the various writs an observation was made to the effect that where a revision lies to this Court, a writ of prohibition or certiorari should not be issued. The Full Bench was considering the remedy available in this very Court, though in another form. It was not considering an alternative remedy

available in the lower courts either by way of an appeal or otherwise.

22. In the Present case the matter could be agitated in this Court in a reference made by the Revising Authority under the Sales Tax Act. But that would have entailed several proceedings to have been gone into, namely, first, the conclusion of the proceedings for assessment of the tax, then an appeal, then a revision to the Revising Authority; if the Revising Authority did not agree with the applicant, an application by him to refer the matter to the High Court; if the Revising Authority still rejected the application, an application by the applicant to the High Court for directing the Revising Authority to refer the case to the High Court, and lastly, the reference by the Revising Authority to the High Court. In these circumstances, it could not be said that the reference to the High Court would be an adequate, convenient, beneficial or effectual remedy.

23. The observation of the Full Bench in 'ASIATIC ENGINEERING CO's CASE', (1951 All L J 576), was the subject-matter of interpretation by another Bench of this Court, in 'RAVI PRATAB NARAIN SINGH v. THE STATE OF UTTAR PRADESH', AIR 1952 All 99, in which one of the members (V. Bhargava, J.) was also a member of the Full Bench in the 'ASIATIC ENGINEERING CO's CASE'. It was observed:

"The question of existence of a specific and adequate alternative remedy is material only when the question of issue of a writ of mandamus is under consideration and not in the case of a writ in the nature of certiorari or a prohibition."

24. If it were urged that there is an alternative remedy by means of a suit in which an injunction could have been issued to the Sales Tax Officer prohibiting him from proceeding with the case before him, still that case would have to be filed in a court subordinate to this Court and would have to be transferred to this Court under Article 226 of the Constitution. Having regard to all these matters it cannot be said that in the present case there is another adequate, convenient, beneficial or effectual remedy so far as the writ of prohibition asked for is concerned.

25. The writ of certiorari which is prayed for in the present case consists of an order of assessment which has already been made. A right of appeal against this order is provided for under Section 9 of the Sales Tax Act. This is an alternative remedy which, in my opinion, is adequate for the purpose of obtaining the relief by way of the issue of a writ of certiorari which is also sought for in the present application. Ordinarily, I would have refused to interfere with the order of the Sales Tax Officer.

It was urged by Mr. Pathak, learned counsel for the applicant, that since the power of appeal given in Section 9 of the Act and the further power of revision mentioned in Section 11 of the Act are confined to questions which arise under the Act, the Sales Tax Officer or the Appellate or the Revisional Authority had no jurisdiction to decide whether a certain provision of the Sales Tax Act itself was ultra vires or not and that they would be unable to decide upon the questions raised in the present case. I do not agree with this contention.

26. It is a fundamental principle of the administration of justice in all Courts and for all officers upon whom is cast the duty of deciding a case judicially that they will entertain objections to the

jurisdiction of their own authority. If a provision of the Sales Tax Act is 'ultra vires' the legislature which enacted it, it is the duty of the Sales Tax Officer or the Appellate or Revisional Authority, though appointed under the Sales Tax Act itself, to decide whether the Act or any portion thereof is 'ultra vires' or not. These Authorities may have to decide that their own constitution is invalid, but that is what they must decide when a question is raised before them.

I am, however, in agreement with my brother in issuing a writ of certiorari in the present case for two reasons. In the first place, the writ of prohibition also is sought and, as already stated there is no equally adequate, convenient, beneficial and effectual remedy so far as the prayer for that writ is concerned and since questions involved in the two writs are exactly the same, it is better to issue the writ of certiorari when the writ of prohibition has got to be issued. In the second place, the question raised is a question of constitutional importance whether a certain provision of the Sales Tax Act is ultra vires or not. It concerns a large number of litigants and it is in the fitness of things that a constitutional question of such importance should be decided by this Court at the earliest opportunity so that there may be no multiplicity of proceedings and unnecessary litigation in subordinate courts and offices may be avoided.

The spirit of the Constitution also shows that it was intended that questions of constitutional importance should be decided as early as possible by the High Court itself, as a reading of Article 228 to which reference has already been made would show. The preliminary objection, therefore, fails.

27. Section 2 (h) of the U. P. Sales Tax Act runs as follows:

"sale' means, within its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration and Includes forward contracts but does not include a mortgage, hypothecation, charge or pledge.

.....

'Explanation II'--Notwithstanding anything in the Indian Sale of Goods Act, 1930, or any other law for the time being in force, the sale of any goods,

(i) which are actually in the United Provinces at the time when in respect thereof, the contract of sale as defined in Section 4 of that Act is made,

(ii) or which are produced or manufactured in the United Provinces by the producer or manufacturer thereof, shall wherever the delivery or contract of sale is made, be deemed for the purposes of this Act to have taken place in the United Provinces.

'Explanation III'--Where goods under a forward contract are not actually delivered, the sale in respect of such contract shall be deemed to have been completed on the date originally agreed upon for delivery."

28. It is obvious upon a reading of Clause (h) of Section 2 that the definition of 'sale' not only includes 'transfer' of property in goods but includes 'forward contracts' in which delivery of goods or transfer of property in goods may not take place. The question is whether the U. P. Legislature had power to enact this clause and empower the Government to assess forward contracts in which transfer of property in goods may not take place. The power of the provincial Government to make a law with regard to the taxation on sales of goods is covered by Item 48 of List II of 7th Schedule of the Government of India Act. 'Sales of goods' is an expression which has not been used in the Government of India Act for the first time. It is a well-recognised expression used both in the Indian Sale of Goods Act as also in the English Sale of Goods Act.

29. Section 4 of the Indian Sale of Goods Act runs as follows:

"(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred."

The section distinguishes between a 'sale' and 'an agreement to sell'. Both are denominated as 'contracts of sale'. The difference between a 'sale' and 'an agreement to sell' lies in the time at which the transfer of the property in the goods which are the subject-matter of a sale or an agreement to sell takes place. If the transfer of the property in the goods takes place immediately, it is a sale. If it takes place at a future time or subject to some conditions to be fulfilled in future, it is an agreement to sell. An agreement to sell becomes a sale when the future time arrives and the transfer of property takes place.

Benjamin on Sale has brought out the distinction very clearly. Says he, "...the distinction consists in this, that in a sale, the thing which is the subject of the contract becomes the property of the buyer (under the contract, that is to say), the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the seller, whereas in the agreement to sell, the property is to pass at a future time or subject to the fulfilment of some condition and the goods remain the property of the seller till the contract is executed."

30. A 'forward contract' is a contract under which parties agree that property in certain goods, whether in existence or not, shall be transferred from the buyer to the seller on a future date. Such contracts usually are speculative contracts in which parties intend that they will pay and receive

differences according to the market rate prevailing on the date fixed for delivery of goods. Sometimes delivery of goods is actually made but mostly it is not made. When it is not made there is always a question whether contracts were waging or not. We are, however, not concerned in this case with that matter. The fact remains that forward contracts when made are not sales. They are merely contracts or rather agreement to sell. In the present case, as pointed out by my brother in his judgment, it is in evidence that in none of the contracts, which were the subject matter of the assessment before the Sales Tax Officer, was any delivery made. Therefore, even if the taxation was made after the expiry of the date of delivery, it could not be said that in the present case any transfer of property had taken place. If there was no transfer of property, there was no sale.

31. The expression 'sale of goods' as used in Item 48 List II, 7th Schedule, Government of India Act, could not be enlarged by an Act of the U. P. legislature to include forward contracts or agreement to sell by means of a definition of its own regardless of the fact whether transfer of property takes place or not. If the legislature attempts to do this, it clearly acts beyond its powers. In this connection the entries in the present Constitution may be compared with Entry 48, List II, 7th Schedule, Government of India Act. The said Entry 48 is identical with Entry 54, List II, of the present Constitution.

In the Central List I, Item 90 authorises the centre to tax "futures markets". This would also indicate that the expression "sale of goods" in Entry 54 does not include forward contracts. Explanation III to Section 2(h) therefore, under which 'forward contracts' are to be assessed, even though actual delivery has not taken place, cannot be held to be within the power of the U. P. legislature. As in the present case no delivery has taken place, it is not necessary for me to express an opinion as to whether the entire provision relating to forward contracts, even including forward contracts in which delivery of goods does take place, is ultra vires or not. Explanation III to my mind is certainly ultra vires.

32. In this view of the matter, it is not necessary to determine the other two points raised by the applicant.