

1961

October 26.

MESSRS. BURMAH CONSTRUCTION CO.

v.

THE STATE OF ORISSA AND ORS.

(B. P. SINHA, C. J., J. L. KAPUR, M. HIDAYATULLAH,
J. C. SHAH and J. R. MUDHOLKAR, JJ.)*The Sales Tax—Refund of—Limitation provided by Statute—
Validity—If applies to writ petition—Orissa Sales Tax Act, 1947,
(Orissa XIV of 1947), s. 14.*

The appellant who executed works contracts was assessed to sales tax for quarters ending June 30, 1949, to March 31, 1954, and paid the tax. On August 9, 1954, the appellant filed a writ petition before the High Court for a declaration that the provisions of the Orissa Sales Tax Act, 1947, permitting levy of sales tax on works contracts were *ultra vires*, for a declaration that the assessments were illegal and for a refund of the amount paid as tax. The High Court declared that the assessments were not in accordance with the law and directed refund of the tax paid, if recovery thereof was not barred under s. 14 of the Act on the date of the filing of the writ petition. Section 14 provided that no claim for a refund shall be allowed by the Collector unless it was made within 24 months from the date of the assessment order or within 12 months of the order passed on appeal, revision, review or reference. The appellant contended that s. 14 was *ultra vires* and that the bar of limitation in s. 14 was not applicable to the writ petition before the High Court for refund of tax illegally recovered.

Held, that provisions of s. 14 of the Orissa Sales Tax Act, 1947, were not *ultra vires* the State Legislature. The power to legislate in respect of refund of tax improperly or illegally collected, and imposition of restrictions on the exercise of the right to claim refund which was an ancillary or subsidiary matter was not beyond the competence of the legislature.

State of Orissa v. The Orient Paper Mills Ltd., A. I. R. (1961) S. C. 1438, relied on.

Held, further, that the bar of limitation in s. 14 of the Act was applicable to the case. The proceedings before the High Court were substantially to compel the Collector to carry out his statutory obligations under s. 14, and it could only be allowed subject to the restrictions imposed by the statute. It was not open to the appellant to rely upon the statutory right and to ignore the restrictions subject to which the right was made enforceable.

CIVIL APPELLATE JURISDICTION : Civil Appeal
No. 494 of 1960.

Appeal by special leave from the judgment
and order dated April 21, 1958 of the Orissa High
Court in O.J.C. No. 107 of 1954.

G. C. Mathur, for the appellants.

H. N. Sanyal, *Additional Solicitor-General of
India*, *K. N. Rajagopal Sastri*, *G. K. Mishra* and
T. M. Sen, for the respondents.

1961. October 26. The Judgment of the Court
was delivered by

SHAH, J.—Messrs. Buarmah Construction Comp-
any—a firm carrying on business as building and
works contractors—executed several contracts in
the State of Orissa for construction of buildings,
roads, bridges etc. Messrs. Burmah Construction
Company, who are hereinafter referred to as the
appellants, were registered as dealer in Orissa under
the Orissa Sales Tax Act, 1947 from the quarters
ending June 30, 1949. The Sales Tax Officers
treating the transfer of the materials used in the
construction of the buildings, roads and bridges, as
sale of goods, assessed the appellants to tax under
the Orissa Sales Tax Act. The tax so assessed
under the diverse orders of assessment was paid
from time to time. For the quarters ending June
30, 1949, to March 31, 1954, the appellant paid
Rs. 1,17,869-8-0 as tax and Rs. 2,917-11-0 as penalty.
The following table sets out the tax and penalty
paid to the Sales Tax Authorities for the twenty
quarters :—

Srl. No.	Circle Name.	Regist- ration No.	Tax paid.	Penalty paid.	Total Amount paid.
			Rs. A. P.	Rs. A. P.	Rs. A. P.
1.	PU II	1755	35336 7 0	350 0 0	35686 7 0
2.	BA	1596	53990 6 6	310 0 0	54300 5 6

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1961	3.	BA	1596A	2719	30			2719	30
Messrs. Burmah	4.	MB	808	3376	60	1352	40	4728	100
Construction Co.	5.	BP	1560	5349	10	...		5349	10
v.	6.	CU III	1375	10913	120	905	70	11819	30
The State of Orissa	7.	CU I	3940	6184	60	...		6184	60
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				117869	86	2917	110	120787	36

Relying upon the judgment of the Madras High Court in *Gannon Dunkerly & Co., Ltd. v. State of Madras*⁽¹⁾, the appellants applied on August 9, 1954, to the High Court of Judicature, Orissa for

(a) a declaration that the provisions of the Orissa Sales Tax Act, 1947 authorising imposition of the sales tax on a turnover of works contracts and repair works were *ultra vires* the State Legislature;

(b) a declaration that the assessment made by the State Sales Tax Authorities on the appellant's works contracts which had resulted in payment of Rs. 1,20,787-3-6 by way of sales tax and penalties for different quarters were without jurisdiction and illegal and liable to be quashed and that the appellant was entitled to get refund of the said amount;

(c) a direction restraining the State and its Sales Tax Officers from taking any steps in making any further assessment or complete the assessments pending before them in respect of the appellant's works contracts with the State Government and levying and collecting any sales tax from the appellant on works contracts; and

(d) issue of appropriate writ or directions directing the State of Orissa and its Sales Tax Officers to refund the amount of sales tax and penalties realised from the appellant.

(1) A. I. R. (1954) Mad. 1130.

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Following the judgment of this Court in the *State of Madras v. Gannon Dunkerly & Co., Ltd.*⁽¹⁾ which confirmed the decision of the Madras High Court in 5 S.T.C. 216, the High Court declared that the assessment of sales tax was not in accordance with law and directed that no steps, either by certificate proceedings or otherwise should be taken to realise the arrears of sales tax in respect of those contracts. The High Court also directed refund of tax paid, if recovery thereof was not barred under s. 14 of the Orissa Sales Tax Act 1947 on the date of the filing of the application. The High Court also directed the Sales Tax Authorities to revise the assessments made in the light of the decision of this Court in respect of assessments made after the date of the petition. The appellants have appealed to this Court with special leave challenging the order in so far as their claim for refund is partially declared to be barred by the rule of limitation prescribed by s. 14 of the Orissa Sales Tax Act.

The appellants challenge the correctness of the order declaring that the portion of the tax paid refund whereof is beyond the period of limitation under s. 14 of the Orissa Sales Tax Act, 1947 on the date of the filing of the application under Art. 226, as not refundable on two grounds:

(1) that s. 14 of the Act is *ultra vires* the State Legislature;

(2) that an application under s. 14 which imposes a statutory obligation upon the Collector to refund the tax unlawfully recovered subject to certain conditions is not the only remedy open to the tax payer from whom tax has been unlawfully recovered and the power of the High Court to direct refund of tax illegally recovered is not restricted by s. 14 of the Act. To the enforcement of other remedies the bar prescribed by the proviso to s. 14 does not apply.

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Section 14 of the Orissa Sales Tax Act, 1947, provides:

"14. The Collector shall, in the prescribed manner, refund to a dealer applying in this behalf any amount of tax paid by such dealer in excess of the amount due from him under this Act, either by cash payment or, at the option of the dealer, by deduction of such excess from the amount of tax due in respect of any other period:

Provided that no claim to refund of any tax paid under this Act shall be allowed unless it is made within twenty-four months from the date on which the order of assessment was passed or within twelve months of the final order passed on appeal, revision, review or reference in respect of the order of assessment, whichever period is later."

By the first paragraph, s. 14 imposes an obligation upon the Collector to refund to a dealer any amount paid by such dealer in excess of the amount due from him under the Act. But the obligation is restricted; refund is not to be made unless an application is made within 24 months of the date on which the order of assessment was passed or within 12 months of the final order passed on appeal, revision, review or reference in respect of the order of assessment, whichever period is later. The Orissa Sales Tax Act was enacted by the Orissa Legislature in exercise of the Legislative authority conferred upon it by item 48 of List II of the Seventh Schedule of the Government of India Act, 1935. In dealing with the *vires* of s. 14A of the Orissa Sales Tax Act, which was incorporated in the amended Act 28 of 1958 and which sought to confer a right to claim refund by an application to the Collector upon the person from whom tax was collected by the dealer, this Court observed in *The State of Orissa v. The Orient Paper Mills Ltd.*, that "The power to legislate with respect to a tax

comprehends the power to impose the tax, to prescribe machinery for collecting the tax, to designate the officers by whom the liability may be enforced and to prescribe the authority, obligations and indemnity of those officers. The diverse heads of legislation in the Schedule to the Constitution demarcate the periphery of legislative competence and include all matters which are ancillary or subsidiary to the primary head. The Legislature of the Orissa State was therefore competent to exercise power in respect of the subsidiary or ancillary matters of granting refund of tax improperly or illegally collected". If the power to legislate in respect of tax comprehends the power to legislate in respect of refund of tax improperly or illegally collected, imposition of restrictions on the exercise of the right to claim refund will not be beyond the competence of the Legislature. Granting refund of tax improperly or illegally collected and the restriction on the exercise of that right are both ancillary or subsidiary matters relating to the primary head of tax on sale of goods. The provisions of s. 14 of the Act are therefore not *ultra vires* the State Legislature.

It is not necessary to consider in this case whether s. 14 prescribes the only remedy for refund of tax unlawfully collected by the State. The appellants have not filed any civil suit for a decree for refund of tax unlawfully collected from them. This appeal arises out of a proceeding filed in the High Court substantially to compel the Collector to carry out his statutory obligations under s. 14 of the Act. The High Court normally does not entertain a petition under Art. 226 of the constitution to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimant and leaves it to the aggrieved party to agitate the question in a civil suit filed for that purpose. But an order for payment of money may sometimes be made in a petition under Art. 226 of the Constitution against the State or against an

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officer of the State to enforce a statutory obligation. The petition in the present case is for enforcement of the liability of the Collector imposed by statute to refund a tax illegally collected and it was maintainable: but it can only be allowed subject to the restrictions which have been imposed by the Legislature. It is not open to the claimant to rely upon the statutory right and to ignore the restrictions subject to which the right is made enforceable.

We are therefore of the opinion that the High Court was right in restricting the order of refund in the petition under Art. 226 of the Constitution. The order of refund passed by the High Court, however, requires to be slightly modified and we direct that it shall run as follows:

“That part of the sales tax which has been paid by Messrs. Burmah Construction Co. shall be refunded by the State of Orissa to the Burmah Construction Company if the order of assessment pursuant to which payment was made was within 24 months of the date on which the petition was filed in the High Court, namely, 9th of August, 1954. Without deciding whether the Burmah Construction Co. has the right to recover the balance of the amount of the tax paid by other appropriate proceedings, the claim to recover the balance of the tax paid is dismissed.”

The appeal substantially fails and is dismissed with costs.

Appeal dismissed.