A

ASHOKA MARKETING LTD.

v.

STATE OF BIHAR AND ANR.

January 30, 1970

B [M. HIDAYATULLAH, C.J., J. C. SHAH, K. S. HEGDE, A. N. GROVER, A. N. RAY AND I. D. DUA, JJ.]

Constitution of India Schedule VII, Entry 54, *List II, Entries* 6, 7 *and* 13, *List III—Scope of. Bihar Sales Tax Act* 1959, *section* 20-*A* (3), (4) *and* (5)—*Validity of.*

C In determining the Appellant's turnover for assessment to sales tax for the year 1956-57, the Superintendent of Sales Tax included an amount representing Railway freight in the Appellant's sales of Cement. The Appellate authority set aside the orders directing the inclusion of the Railway freight in the turnover. After the introduction of section 20-A in the Bihar Sales Tax Act 19 of 1959 by Act 20 of 1962, the Assistant Commissioner issued a notice to the Appellant under section 20-A (3) of the Act requiring the Appellant to show cause why an amount repre-
D senting Sales tax on the Railway freight which became refundable under the orders of assessment, be not forfeited. The Appellant's contention that section 20-A was *ultra vires* the State Legislature was rejected by the Assistant Commissioner, and by the High Court in a writ petition under Article 226 of the Constitution.

On appeal to this Court,

E HELD : The appeal must be allowed and the petition of the assessee must be granted. Sub sections (3), (4) and (5) of section 20A are *ultra vires* the State Legislature. As a corollary thereto, sub sections 6 and 7 must also be deemed invalid.

Sub-section (8) of s. 20A does not alter the true nature of the demand or appropriation which can be made under sub-ss. (3), (4) and (5) of s. 20-A. The intention underlying sub-ss. (3), (4) and (5) is to enable
F the State to collect from the dealer tax which the State is not entitled to levy and to appropriate it to itself except in the very rare cases in which the purchaser may approach the State and be able to satisfy it that he has a claim, that the claim is in order, and that it is within limitation. Notwithstanding the addition of sub-s. (8), the amount received by the State or appropriated by the State continues to have the character of a tax collected which the State is not entitled to collect. A provision which
G enables the dealer to pass on the liability for payment of tax is incidental to legislation for sales-tax. But it cannot be held that a provision under which a dealer is called upon to pay to the State an amount which has been collected by him on a representation—express or implied—that an equal amount is payable by him under the Bihar Sales Tax Act is a provision incidental to the power to levy "tax on sale or purchase of goods" within the meaning of Entry 64, List II, of the Seventh Schedule. In effect the provision is one for levying an amount as tax which the State
H is incompetent to levy. A mere device cannot be permitted to defeat the provisions of the Constitution by clothing the claim in the form of a demand for depositing the money with the State which the dealer has collected, but which he was not entitled to collect. [464 F, 463 E, H]

The power to legislate in respect of sub-ss. (3), (4) and (5) of s. 20A does not fall under Entries 6, 7 and 13 of List III expressly, nor is it necessarily incidental to the power contained in Entries 6, 7 and 13 of List III. [465 E-F] A

The Orient Paper Mills Ltd. v. *The State of Orissa and Ors.* [1962] 1 S.C.R. 549 distinguished.

R. Abdul Qader & Co. v. *Sales Tax Officer, Hyderabad* [1964] 6 S.C.R. 867 followed. B

State of Bombay v. *United Motors (India) Ltd.* [1953] S.C.R. 1069 referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2004 of 1966.

Appeal by special leave from the order dated March 14, 1966 of the Patna High Court in C.W.J.C. No. 143 of 1966. C

S. V. Gupte, H. K. Puri for *K. K. Jain,* for the appellant.

Lal Narain Sinha, Advocate-General for the State of Bihar and *U. P. Singh,* for the respondents. D

The Judgment of the Court was delivered by

Shah, J. Ashoka Marketing Ltd.—hereinafter called 'the assessee'—returned for the year 1956-57 under the Bihar Sales Tax Act, 1947, an amount of Rs. 2,46,67,517-1-6 as its turnover from sale of cement and other commodities. The Superintendent of Sales Tax brought to tax an additional amount of Rs. 7,67,702-13-0 being the railway freight paid in respect of the goods supplied by the assessee. By order dated April 2, 1961 the Appellate Authority set aside the order directing inclusion of the railway freight in the turnover, and ordered that the assessment be revised. E

In the meantime the Bihar Sales Tax Act, 1947, was repealed and was replaced by the Bihar Sales Tax Act, 19 of 1959. By Act 20 of 1962 s. 20A was introduced in the Bihar Sales Tax Act 19 of 1959. The relevant provisions of s. 20A were : F

> "(1) No person who is not a registered dealer shall collect from any person any amount, by whatever name or description it may be called, towards or purporting to be tax on sale of goods. G
>
> (2) No registered dealer shall collect from any person any such amount, except in a case in which and to the extent to which such dealer is liable to pay tax under this Act. H
>
> (3) (a) Notwithstanding anything to the contrary contained in any law or contract or any judgment,

A decree or order of any Tribunal, Court or authority, if the prescribed authority has reason to believe that any dealer has or had, at any time, whether before or after the commencement of this Act, collected any such amount, in a case in which or to an extent to which the said dealer was or is not liable to pay such amount, it B shall serve on such dealer a notice in the prescribed manner requiring him on a date and at a time and place to be specified therein either to attend in person or through authorised representative to show cause why he should not deposit into the Government treasury the amount so collected by him.

C (b) On the day specified in the notice under clause (a) or as soon thereafter as may be, the prescribed authority may, after giving the dealer or his authorised representative a reasonable opportunity of being heard and examining such accounts and other evidence as may be produced by or on behalf of the dealer and making D such further enquiry as it may deem necessary, order that the dealer shall deposit forthwith into the Government treasury, the amount found to have been so collected by the dealer and not refunded prior to the receipt of the notice aforesaid to the person from whom it had been collected.

E (4) Where any amount so collected by the dealer and deposited by him into the Government treasury has already been refunded to the dealer in pursuance of or as a result of any judgment, decree or order of any Tribunal, Court or authority, but the dealer has not refunded the amount to the person from whom he had F collected it, the prescribed authority shall, notwithstanding such refund to the dealer, proceed to take action in accordance with the provisions of sub-section (3) for securing deposit of such amount.

(5) Where any such amount has not been refunded to the dealer before the commencement of this Act but G a refund has been directed by a Court, Tribunal or authority, the amount shall, notwithstanding such direction, be deemed to be a deposit made in pursuance of an order under sub-section (3).

(6) . . . . . .

H (7) Notwithstanding anything to the contrary in any law or contract, when any amount is deposited by a dealer in compliance with an order under sub-section (3) or sub-section (4) or is deemed, under sub-section

(5), to have been so deposited, such deposit shall constitute a good and complete discharge of the liability of the dealer in respect of such amount to the person from whom it was collected.

(8) The person from whom the dealer has collected the amount deposited in pursuance of an order under sub-section (3) or sub-section (4) or deemed, under sub-section (5), to have been so deposited shall be entitled to apply to the prescribed authority in the prescribed manner for refund of the amount to him and the said authority shall allow the refund if it is satisfied that the claim is in order :

Provided that no such refund shall be allowed unless the application is made before the expiry of the period within which the applicant could have claimed the amount from the dealer by a civil suit had his liability not been discharged in accordance with the provisions of sub-section (7) :

Provided further that no claim for such refund shall be rejected without giving the applicant a reasonable opportunity of being heard.

. . . . ."

On July 31, 1963, the Assistant Commissioner of Commercial Taxes, Shahabad Circle, issued a notice under s. 20A (3) of the Bihar Sales Tax Act, 1959, requiring the assessee to show cause why an amount of Rs. 23,990-11-0 being the sales-tax on the railway freight which had become refundable under the order of assessment be not forfeited. The assessee in reply contended, *inter alia*, that s. 20A of the Bihar Sales Tax Act was *ultra vires* the State Legislature and that in any case it had no application to his case. The Assistant Commissioner of Commercial Taxes rejected the contention and passed an order directing that the amount of Rs. 23,990-11-0 do stand forfeited to the Government and further directed that the amount be deposited in the Government treasury.

The assessee then moved a petition before the High Court of Patna under Art. 226 of the Constitution for a writ quashing the order of the Assistant Commissioner of Commercial Taxes and for consequential orders restraining recovery of the amount. The High Court of Patna, relying upon the judgment of this Court in *The Orient Paper Mills Ltd. v. The State of Orissa*

A *and Ors.*(1) rejected the petition. With special leave, this appeal has been preferred.

Two questions fall to be determined in this appeal :—

(1) Whether s. 20A of the Bihar Sales Tax Act, 1959 is within the competence of the State
B Legislature; and

(2) Whether an order may be made under s. 20A for depositing with the State Government an amount collected by a registered dealer from his constituent to recoup himself for payment of sales-tax under the Bihar Sales Tax Act, 1947
C which amount, according to law then in force, the constituent was not liable to pay.

Counsel for the assessee, relying upon the judgment in *R. Abdul Quader & Co. v. Sales Tax Officer, Hyderabad*(2), contended that an Act passed by a State Legislature authorising the State Govern-
D ment to recover an amount collected under a sale, by a registered dealer from the purchaser, to recoup himself for payment of sales-tax, which was not liable to tax, is beyond the competence of the State Legislature. In *Abdul Quader's case*(2) the Court was dealing with the interpretation of s. 11(2) of the Hyderabad General Sales Tax Act 14 of 1950. By s. 11(2) it was pro-
E vided :

> "Notwithstanding anything to the contrary contained in any order of an officer or tribunal or judgment, decree or order of a Court, every person who has collected or collects on or before the 1st May, 1950, any amount by way of tax otherwise than in accordance
F with the provisions of this Act shall pay over to the Government within such time and in such manner as may be prescribed the amount so collected by him, and in default of such payment the said amount shall be recovered from him as if it were arrears of land revenue."

G This Court held that s. 11(2) of the Hyderabad General Sales Tax Act provided for recovery of an amount collected by way of tax, as arrears of land revenue though the amount was not due as tax under the Act. In rejecting the contention that the provision fell within Entry 54 List II, the Court observed at (p. 872) :

> "The provision however is attempted to be justified
H on the ground that though it may not be open to a State Legislature to make provision for the recovery of an

(1) [1962] 1 S.C.R. 549. (2) [1964] 6 S.C.R. 867.

amount which is not a tax under Entry 54 of List II in a law made for that purpose, it would still be open to the legislature to provide for paying over all the amounts collected by way of tax by persons, even though they really are not exigible as tax, as part of the incidental and ancillary power to make provision for the levy and collection of such tax. . . . . But where the legislation under the relevant entry proceeds on the basis that the amount concerned is not a tax exigible under the law made under that entry, but even so lays down that though it is not exigible under the law, it shall be paid over to Government, merely because some dealers by mistake or otherwise have collected it as tax, it is difficult to see how such provision can be ancillary or incidental to the collection of tax legitimately due under a law made under the relevant taxing entry."

An attempt to sustain the validity of the provision as one imposing a penalty was also negatived, and the Court held that s. 11(2) of the Hyderabad General Sales Tax Act was not within the competence of the State Legislature.

In *Abdul Quader's case*(1) this Court hold that in exercise of the power under Entry 54 List II, the State Legislature is incompetent to enact a law authorising the State Government to call upon a dealer to pay an amount which he has collected from the purchaser of goods under a sale, to recoup himself for payment of tax which he is not liable to pay in respect of that transaction, for such a law authorises a levy of tax which the State Legislature is incompetent to levy.

The learned Advocate General for the State of Bihar, however, contended that the legislation impugned in this case is in truth not for levy or collection of an amount as tax which the State is not competent to levy or collect, but for compelling a registered dealer to pay over the amount collected on behalf of the State as tax so that it may be made available to a person from whom it was unlawfully recovered. He contends that the legislation which is not of the nature which this Court was called upon to interpret in *Abdul Quader's case*(1) falls within Entry 54 List II and that in any event it falls within Entries 6, 7 and 13 of List III.

Counsel strongly relied upon the judgment of this Court in *The Orient Paper Mill's case*(2). But the principle of that case,

(1) [1964] 6 S.C.R. 867. (2) [1962] 1 S.C.R. 549.

in our judgment, has no bearing on the question whether the State by statute was competent to enact s. 20A of the Bihar Sales Tax Act in exercise of the power under Entry 54 List II of the Seventh Schedule. In that case a registered dealer had collected, in respect of sales-tax, from the purchasers amounts for recoupment of tax which he would have to pay to the State Government under the Orissa Sales Tax Act, 1947, in the belief that the tax was payable. The dealer was assessed to and paid tax on the turnover which included inter-State sales. After the decision of this Court in *State of Bombay v. United Motors (India) Ltd.*(1) the dealer applied under s. 14 of the Act for refund of tax paid on the plea that the turnover from inter-State sales was not taxable. The High Court of Orissa issued writs directing the amount of tax collected by the State to be refunded. Thereafter by an amendment of the Act, the State Legislature incorporated s. 14A providing that refund of tax may be claimed only by the person from whom the dealer had realised the amount by way of sales tax or otherwise. At the hearing of the petition, the tax-payer challenged the levy on the ground that it infringed his fundamental right under Art. 19(1)(f) and did not press the contention that the State Legislature was incompetent to enact s. 14A of the Orissa Sales Tax Act. This Court observed 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, obligation and indemnity of those officers. It was then observed :

> "The Legislature of the Orissa State was therefore competent to exercise power in respect of the subsidiary or ancillary matter of granting refund of tax improperly or illegally collected, and the competence of the Legislature in this behalf is not canvassed by counsel for the assessees. If competence to legislate for granting refund of sales-tax improperly collected be granted, is there any reason to exclude the power to declare that refund shall be claimable only by the person from whom the dealer has actually realised the amounts by way of sales-tax or otherwise ? We see none."

The Court then rejected the contention that s. 14A was invalid, because it impaired the fundamental right under Art. 19(1)(f) of the Constitution. That case does not support the plea that the State Legislature is competent to legislate for demanding payment of or retaining amounts recovered by a registered dealer but which are not due as sales-tax to the State.

(1) [1953] S.C.R. 1069.

The learned Advocate-General contended that in any event the impugned provision is not of the nature which this Court was concerned to interpret in *Abdul Quader's case*(1). He said, that whereas in *Abdul Quader's case*(1) the Court dealing with a case in which the State Legislature enacted a law authorising the State to recover and appropriate to itself amounts collected by a dealer on the representation that he—the dealer—was entitled to recoup himself for payment of sales-tax which he was not liable to pay, in the present case the amount either collected or retained by the State from the dealer is to be held for the benefit of the person from whom it has been improperly collected. On that account, the Advocate-General contended, the Legislature exercised its power for setting up machinery for compelling refund of amounts collected by the dealer under the authority of the Legislature which he could not in law collect. Counsel argued that Entry 54 List II authorises the State Legislature to legislate for collection of an amount which has been improperly collected by a registered dealer as tax on behalf of the State and for refunding the amount to the person from whom it has been improperly collected.

This argument proceeds upon two assumptions: (1) that under the Bihar Sales Tax Act the purchaser of goods is liable to pay sales-tax to the State, and the registered dealer collects the tax from the purchaser as an agent of the State; and (2) that the amount recovered from the registered dealer under s. 20A is intended only to be refunded to the person from whom it has been collected by the registered dealer, and the State is merely an agency for enforcing the obligation of the dealer.

The first assumption is plainly contrary to the scheme of the Bihar Sales Tax Act, 1959. By s. 3 charge of tax lies upon every dealer whose gross turnover during a period not exceeding twelve months immediately preceding exceeds the specified amount. The expression "gross turnover" is defined in s. 2(k) as meaning "the aggregate of the amounts of sale-prices received and receivable by a dealer, during any given period, in respect of sale of goods (. . .)", and the expression "sale-price" is defined in s. 2(q) as meaning "the amount payable to a dealer as valuable consideration in respect of the sale of goods". By sub-s. (2) of s. 3 tax is made payable by a dealer on sales made inside the State, and when the dealer sells goods, the price received by him for sale of goods forms a component of the gross turnover and the dealer is liable to pay tax on the turnover. The Act does not impose liability to pay tax upon the purchaser either directly or indirectly. Under s. 7, it is true, the taxable turnover of a dealer is determined to be that part of the gross turnover which remains

(1) [1964] 6 S.C.R 867.

after deducting several items including the amount of sales-tax actually "collected as such", along with the sale-price received or receivable in respect of sale of goods. It is implicit that the dealer may recover from the purchaser in addition to the value of the goods a certain amount which he will have to pay as tax on that value. The price payable by the purchaser on that account is the value of the goods and the amount paid for recouping the dealer for payment of tax. The Act enables the dealer to pass on the liability of sales-tax to the purchaser and if by invoice or otherwise the dealer charges in respect of the goods sold by him the value of the goods and the tax which he may have to pay on the value, sales-tax will be computed on the value of the goods and not on the total amount paid by the purchaser. The amount payable by the purchaser is however the consideration paid by him for purchasing the goods. The dealer may apportion the value of the goods and the sales-tax payable by him on the sale to the State. If he does so, he is liable to pay sales-tax only on the value and not on the amount of tax collected by him which he is payable as sales-tax to the State. If he does not apportion the value and the tax, he is liable to pay sales-tax on the total amount received by him, calculated at the appropriate rate. In either case the liability to pay tax under the Act lies upon the dealer : he does not collect any tax for and on behalf of the Government. The dealer may recover from the purchaser the tax payable by him as part of the price, but on that account the purchaser is not the person liable to pay tax on the sale to the State.

A provision which enables the dealer to pass on the liability for payment of tax is incidental to legislation for sales-tax. But we are unable to hold that a provision under which a dealer is called upon to pay to the State an amount which has been collected by him on a representation—express or implied—that an equal amount is payable by him under the Bihar Sales Tax Act, is a provision incidental to the power to levy "tax on sale or purchase of goods" within the meaning of Entry 54 List II of the Seventh Schedule. Entry 54 List II, of the Seventh Schedule, comprehends the power to impose tax, to prescribe machinery for collecting the tax, to designate officers by whom the liability may be imposed and to prescribe the authority, obligation and indemnity of the officers. The State Legislature may under Entry 54 List II be competent to enact a law in respect of matters necessarily incidental to "tax on the sale and purchase of goods". But a provision compelling a dealer who has deliberately or erroneously recovered an amount from the purchaser on a representation that he is entitled to recover it to recoup himself for payment of tax, to pay over that amount to the State cannot, in our judgment, be regarded as necessarily incidental to Entry 54 List II. In effect the provision is one for levying an amount as tax

which the State is incompetent to levy. A mere device cannot be permitted to defeat the provisions of the Constitution by clothing the claim in the form of a demand for depositing the money with the State which the dealer has collected, but which he was not entitled to collect.

The learned Advocate General contended that sub-s. (8) of s. 20A authorises the person from whom the dealer has collected the amount deposited in pursuance of an order under sub-ss. (3), (4), or deemed to have been so deposited under sub-s. (5), to apply to the prescribed authority for refund of the amount to him and the authority is obliged, if satisfied about the claim, to make that refund. The power to demand an amount collected by the dealer applies to transactions governed by the Bihar Sales Tax Act, 1959, as well as to the pre-existing Acts. There is no period of limitation prescribed within which the demand for payment of amounts collected by the dealer may be made. But an application for refund is to be made before the expiry of the period within which the purchaser could have claimed the amount from the dealer by a civil suit. In the light of the scheme of the Act and the various provisions made, it would be futile to expect that a purchaser would normally be able to enforce the liability of the State to pay the amount collected by the dealer and which is deposited or deemed to be deposited with the Government. The period of limitation does not commence to run from the date on which the money is deposited or deemed to be deposited into the Government treasury but from the date on which the purchaser may be entitled to file a suit against the dealer in a civil court. The State is in law under no obligation to hold the amount as trustee for the purchaser. The amount to be recovered or appropriated remains part of the Consolidated Fund of the State and becomes the property of the State.

Sub-section (8) of s. 20A, in our judgment, does not alter the true nature of the demand or appropriation which can be made under sub-ss. (3), (4) & (5) of s. 20A. The intention underlying sub-ss. (3), (4) & (5) is to enable the State to collect from the dealer tax which the State is not entitled to levy and to appropriate it to itself except in the very rare cases in which the purchaser may approach the State and be able to satisfy that he has a claim, that the claim is in order, and that it is within limitation. Notwithstanding the addition of sub-s. (8), in our judgment, the amount received by the State or appropriated by the State continues to have the character of a tax collected which the State is not entitled to collect.

The learned Advocate-General contended that assuming that the first proviso of sub-s. (8) of s. 20A which prescribes the period of limitation is indicative of the nature of the claim, that proviso

A alone may be declared *ultra vires,* and the remaining provisions declared valid. But the first proviso to sub-s. (8) does not invest the recovery with the character of tax : the provisions of sub-ss. (3), (4) and (5) invest the recovery with the nature of a levy of tax which the State is not entitled to collect, and sub-s. (8) is merely an attempt to disguise the true nature of the claim. We are, B therefore, unable to accede to the contention of the learned Advocate-General.

It was then contended that the power to legislate in respect of recovery of the amount collected by a dealer which in law he is not entitled to collect, falls within Entries 6, 7 and 13 of List III. These entries are in the Concurrent List and provide :

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> "6. Transfer of property other than agricultural land; registration of deeds and documents.
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> 7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.
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> D 13. Civil Procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration."

We fail to appreciate how power to legislate in respect of Entries 6, 7 and 13 would authorise the State Legislature to legislate in respect E of recovery from the dealer of an amount which the dealer was in law not entitled to collect, but which he has collected. The power to legislate in respect of sub-ss. (3), (4) and (5) of s. 20A does not fall under Entries 6, 7 and 13 of List III expressly, nor can it be said that the power to legislate is necessarily incidental to the power contained in Entries 6, 7 and 13 List III. As already pointed out, this Court in the judgment in *Abdul Quader's case*(1) has F clearly held that the State has no power to legislate for recovering amount which is collected by the tax-payer in order to recoup himself for payment of tax which under the law he is not bound to pay. Even though the competence of the State to legislate was not sought to be supported under Entries 6, 7 and 13 of List III, the decision of the Court plainly implies that the State has no such G power under any Entry in the third List.

On the view we have expressed, we do not deem it necessary to express any opinion on the second question. We may observe that validity of sub-ss. (1) and (2) of s. 20A has not been challenged.

H We are, of the view that the appeal must be allowed, and the petition of the assessee must be granted. It is declared that sub-

(1) [1964] 6 S.C.R. 867.

ss. (3), (4) and (5) of s. 20A are *ultra vires* the State Legislature. As a corollary thereto sub-ss. (6) and (8) shall be deemed invalid. The assessee will be entitled to its costs in this Court and the High Court. There will be one hearing fee in C.As. 2004 and 2005 of 1966. A

R.K.P.S. B

Appeal allowed.