

Messrs. Burmah Construction Co.

Vs

The State of Orissa and Others

Civil Appeal No. 494 of 1960

(CJI B. P. Sinha, J. L. Kapur, M. Hidayatullah, J. C. Shah, J. R. Mudholkar JJ)

26.10.1961

Judgment

SHAH, J. –

Messrs. Buarmah Construction Company - 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 :-

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Srl. Circle Registration Tax Penalty Total

No. Name. No. paid. paid.

Amount paid.	Rs.	A.	P.	Rs.
A. P. Rs. A. P.1. PU II 1755 35336 7 0 350 0 0 35686 7 02. BA 1596 53990 6 6 310 0 0 54300 5 63. BA 1596A 2719 3 0 2719 3 04. MB 806 3376 6 0 1352 4 0 4728 10 05. BP 1560 5349 1 0 5349 1 06. CU III 1375 10913 12 0 905 7 0 11819 3 07. CU I 3940 6184 6 0 6184 6 0-----	117869	8	6	2917 11 0 120787 3 6-----
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Relying upon the judgment of the Madras High Court in Gannon Dunkerly & Co., Ltd. v. State of Madras [A.I.R. (1954) Mad. 1130], 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.

Following the judgment of this Court in the State of Madras v. Gannon Dunkerly & Co., Ltd. [[1959] S.C.R. 379] 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 his 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.

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 proceedings 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 a 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 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.

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