

PATNA HIGH COURT

State of Bihar

Vs

Indian Copper Corporation Ltd

(S Misra, C.J. G Prasad, J.)

29.03.1965

JUDGMENT

S Misra, J.

1. These applications have been heard together as they involve a common Question of law as to the validity of Section 20A of the Bihar Sales-tax Act, 1959, in the following circumstances. The petitioner in M. J. C. No. 289 of 1963 is a firm incorporated in England and has its registered office and carries on business and trade in India at Ghatsila, district Singhbhum, in the State of Bihar. The company carried on a large volume of trade in copper and various other materials and mineral products, supplying them to persons and agencies beyond the State of Bihar and even outside the Indian territory. The petitioner was a registered dealer under the Bihar Sales-tax Act, 1947, as also under the Bihar Sales-lax Act, 1959. The petitioner used to deposit various sums of money from lime to lime in the sales-lax office as advance payment of sales-tax to be adjusted towards the dues of the department after every assessment. The petitioner made several such payments in respect of the dues for the year 1949-50 so also for the accounting year 1950-51 in respect of the sales of materials by the petitioner to persons outside the State of Bihar. The payment was made in the bona fide belief that such sales were subject to tax under the Bihar Sales Tax Act in due course. But having come to know of the real legal position, the petitioner filed an application under Articles 226 and 227 of the Constitution of India in this Court registered as M. J. C. No. 156 of 1957 for refund of the amount paid as tax on inter-State trade for the year 1949-50.

2. On the 16th of January, 1958, M. J. C. No. 156 of 1957 was allowed by this Court and it was held that the sales effected between the 26th of January, 1950, and the 31st of March, 1950, by the petitioner to persons outside Bihar, if such materials were consumed there, would not be liable to any sales-tax and any amount paid as such was refundable. The petitioner was dissatisfied with the order and made an application for leave to appeal to the Supreme Court; and

leave having been refused, the Supreme Court was moved for grant of special leave and it was allowed.

3. On the 7th of November, 1960, the appeal of the petitioner was allowed by the Supreme Court and it was ruled that refund would be made to the petitioner of sales-tax on sales of materials delivered outside the State of Bihar for purposes of consumption irrespective of whether they were actually consumed in that State or not. In pursuance of that judgment, the Assistant Commissioner of Commercial Taxes, Jamshedpur, asked the petitioner to make an application for refund of Rs. 45,748-8, which was the amount of refund determined by him on a form prescribed under the Bihar Sales Tax Act. The petitioner was not able to receive actual payment of the refundable amount. The Superintendent of Sales Tax assessed the petitioner at Rs. 5,88,833-14-0, the major part of which was in respect of sales to customers for consumption outside the State of Bihar. The matter was taken to the Board of Revenue and by resolution dated the 20th of August, 1953 the local Sales Tax Officer was directed to make fresh assessment and that officer assessed the tax payable by the petitioner in respect of the sales within the State of Bihar at Rs. 36,595-1-0, by his order dated the 11th February, 1956. The petitioner made an application for refund of the excess paid under mistake of law on the 25th March, 1956.

4. Before, however, the refund could be made, the Sales Tax Officer issued a notice on the petitioner directing the forfeiture to the State of Bihar of the entire amount representing the sales-tax realised from the customers outside Bihar under the provisions of Section 14A of the Bihar Sales Tax Act 1947, and a proceeding was actually started to that effect on the 23rd of March, 1956. The petitioner made an application to this Court for a writ under Article 226 of the Constitution which was numbered as M. J. C. 392 of 1956 and the forfeiture proceeding was quashed. The sales-tax authorities, however, did not refund the amount which forced the petitioner to file another application for a writ under Articles 226 and 227 of the Constitution directing the sales-tax authorities to make payment of the amount to be refunded, which was numbered as M. J. C. 405 of 1957.

5. M. J. C. No. 405 of 1957 was allowed by this Court by judgment dated the 9th of January, 1959, directing the Commissioner of Sales Tax to deal with the refund application of the petitioner in accordance with law. In pursuance of the judgment of this Court, the excess amount was refunded to the petitioner. Since, however, a review application made by the Commissioner of Commercial Taxes to the Superintendent of Sales Tax, Jamshedpur, was pending, the petitioner was not able to pay the amount to the various customers who were entitled to it and the latter were making repeated requests for payment of the amounts. The petitioner then filed another application in this Court under Articles 226 and 227 which was numbered as M. J. C. 169 of 1960 for quashing the review proceeding. So far as the review petition referred to above

was concerned, the petitioner had raised a preliminary objection against the maintainability of that application on the ground of jurisdiction, but the petitioner's objection was overruled and it was directed to produce evidences without delay; and in the event of failure, the petitioner was to be assessed on best judgment basis. The petitioner again moved this Court against the above order which was numbered as M. J. C. 1180 of 1960. M. J. C. Nos. 169 and 1180 of 1960 were dismissed by this Court on the 12th April, 1961. The petitioner preferred an appeal to the Supreme Court and it is pending disposal in that Court.

6. In the meantime, Bihar Sales Tax Act, 1959, was amended by Bihar Act 20 of 1962 in which there is an elaborate provision for recovery of the amount of sales tax realised by a seller in respect of goods supplied to customers outside Bihar which, however, was not payable and, as such, which would have to be refunded. Under Section 20A of the Act, it has been laid down that the amounts realised by the sellers by way of sales tax on goods supplied from Bihar to customers outside Bihar, which, however, in law could not be payable, must be deposited in the Government treasury and the amount would be payable by the State to such customers direct, if they put forward a claim to that amount within the period of limitation under the Indian Limitation Act. The petitioner is challenging the validity of this provision claiming that the payment of any money by way of sales tax which was not payable by a customer, was a matter between him and the petitioner and the customer would be entitled to receive the amount from the petitioner and the State of Bihar which had no manner of legal title to such money could not by a statutory provision direct the deposit of such amount by the petitioner with the Government, failure to do which has been made punishable under Section 38 of the Act with imprisonment or fine, or with both. It may be stated that V.M. Periyaswami & Co. Ltd., and others, petitioners in M. J. C. No. 1011 of 1963, who are the customers outside the State of Bihar, have also pressed their claim for refund of the excess amount paid by them by way of sales tax. The petitioner's stand is that Section 20A of the Bihar Sales Tax Act, 1959, violates the guarantees to the citizens under Articles 19(1)(f), 20 and 31 of the Constitution of India; such a provision is also beyond the legislative power of the Bihar Legislature. In the circumstances, the application has been filed to this Court for declaring the above provision as invalid so that the petitioner may not be directed to re-deposit the amount with the State of Bihar. Since the petitioners in other applications are also interested in the same relief, these applications have been heard together.

7. Mr. B.C. Ghose has placed before us the various stages of development in the legislation on the levy of sales tax. So far as the State of Bihar is concerned, the Bihar Sales Tax Act, 1947, was passed and received the assent of the Governor-General on the 1st of June, 1947, and it was published in the Bihar Gazette (Extraordinary) on the 21st of June, 1947. "Sale" was defined under Clause (g) of Section 2, "sale-price" in Clause (h) and "turn over" in Clause (i). In Section

4 of the Act, the incidence of taxation was imposed on all sales which took place in and outside Bihar with the restrictions mentioned in that section.

That Act, however, came to be amended by Bihar Act 6 of 1949 wherein there was some amendment of Section 4 of Act 19 of 1947, but the principle was maintained that sales tax was leviable on sales as such. Under Section 14A, which was incorporated by this amendment in the Act of 1947, it was provided--"No dealer who is not a registered dealer shall realize any amount by way of tax on sale of goods from purchasers, nor shall any registered dealer make any collection of such tax except in accordance with such restrictions and conditions as may be prescribed." The Act of 1947, however, was completely recast and gave place to Bihar Sales Tax Act of 1959, being Act 19 of 1959. Clause (k) of Section 2 which is the definition section of this Act defines "gross turnover"; Clause (p) defines "sale" and Section 3 under which tax is charged provides thus:

"3. Charge of tax: (1)(a) Subject to the provisions of this Act and with effect from the date of commencement thereof, every dealer shall pay, if his gross turnover during a period not exceeding twelve months immediately preceding the said date exceeded.....

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Such tax shall be payable on sales made inside Bihar on and from such date.

(b) A dealer registered under the Bihar Sales Tax Act, 1947 (Bihar Act XIX of 1947) whose liability to pay tax under the said Act subsists on the date immediately preceding the commencement of this Act, shall be deemed to be liable to pay both general sales tax and special sales tax on sales made inside Bihar on and from the date of such commencement: XX XX

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This Act was amended further by Bihar Act 20 of 1962 which also in Section 3, amending the original section, however, makes the dealer liable for the payment of sales tax. Under Section 14 of that Act, however, Section 20A was incorporated in the Act of 1959 which runs thus:

"20A Restrictions on collection of tax, etc. by dealers, (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.

(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.

(3)(a) Notwithstanding anything to the contrary contained in any any law or contract or any Judgment, 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 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 an authorised representative to show cause why he should not deposit into the Government treasury the amount so collected by him.

(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 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.

(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 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 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) Proceedings for the purposes of Sub-section (3) or Sub-section (4) may be taken by the prescribed authority against the transferee, legal representative of the deceased dealer, guardian or trustee or court of wards mentioned in Sections 24, 25, 26 and 27 and also on the persons made liable under Section 27A to pay tax in respect of an undivided Hindu family, firm or other association of persons after its partition, dissolution or disruption; and the provisions of the Act shall, so far as may be, apply accordingly as if such persons were the dealers who had collected the amount referred to in the said sub-section.

(7) Notwithstanding anything to the contrary contained 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 subsection (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 subsection (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.

(9) Any amount which the dealer is ordered to deposit under Sub-section (3) or Sub-section (4) shall, if it remains unpaid, be recoverable as an arrear of land revenue.

(10) No proceeding for the purposes of Sub-section (9) shall be initiated except before the expiry of three years from the date of the order under Sub-section (3) or Sub-section (4):

Provided that where an appeal or application for revision, reference or review has been filed in respect of such order, the period of limitation aforesaid shall run from the date of the order passed on such appeal, application for revision, reference or review or from the date of the order passed in pursuance or as a result of such order, whichever is later." Mr. B.C. Ghose has urged that Section 20A of Bihar Act 20 of 1962 is ultra vires Articles

19(1)(f), 20, and 31 of the Constitution of India so far as it provides for the deposit of sales tax having been realised by the dealers from customers which sales-tax in law was not payable by them in respect of inter-State trade. Mr. Ghose has urged that in view of the basis of the levy of sales tax which was sale itself under the Act of 1947 and which was the liability of the dealer under the subsequent Act, the amount realised by the dealers as sales tax would remain in the custody of the dealers themselves; and the customers who paid them under mistake would be entitled to claim a refund of these amounts from the dealers. Such money remained the property of the customer or, for the matter of that, of the dealers who realised the money, and the State would not by any legislation deprive the dealers of their right to retain such amounts. In support of this contention, Mr. Ghose has cited a number of decisions and has also placed before us the various stages through which this question was protracted by way of applications for writ in this Court and appeals therefrom having been preferred in the Supreme Court. It appears to me unnecessary to refer to the history which resulted in the passing of Act 20 of 1962 by the Bihar Legislature, because the only question for consideration is whether Section 20A incorporated in the Act of 1959 is valid or not.

8. Mr. Ghose has urged that Section 20A of the Act of 1959 would be beyond the competence of the Bihar Legislature because, in terms of the Sales Tax Act itself, the moneys realised as sales-tax on inter-State trade by the petitioner and other dealers liable to pay sales-tax will be the money of the customers lying in the hands of the dealers. To pass any law, therefore, bringing such funds in deposit in the State treasury would be clearly a violation of a person's right to hold property. It appears to me unnecessary to go into the question as to whether the amounts realised as sales-tax would be a part of the gross turnover of the dealers and as such their money, or it would remain the money of the customers, because Mr. Ghose has conceded that, once the Court declared that the amounts realised by the dealers as sales-tax were not payable in the eye of law, all such moneys must be taken to belong to the customers and not to the dealers. In that view of the matter, the present petition and all the other petitions filed by the dealers are liable to be dismissed on this ground alone. No question of violation of any fundamental right to hold property arises in the circumstances, because the property in this case being the amounts of sales-tax is not the property of the dealers. It is, no doubt, contended that legislation like Act 20 of 1962 will not exonerate the dealers from their liability to the persons who paid such amounts. If, however, a legislation to that effect is passed by the legislature, there is no reason why the liability of the dealers shall not cease. Apart from this general consideration, however, the position is covered by the decision of the Supreme Court, to which our attention has been drawn by Mr. Ghose himself, reported in, *Abdul Quader and Co. v. Sales Tax Officer, Second Circle, Hyderabad*¹. That was a case relating to the validity of Section 11(2) of the Hyderabad General

Sales Tax Act, 1950, which provided that any amount collected by way of tax by any person otherwise than in accordance with the provisions of the Act must be paid over to the Government and in default of such payment, the said amount would be recovered from such person as if it were arrears of land revenue. The Supreme Court held that such a legislation was not within the competence of the State Legislature under Entry 54 of List II of Schedule VII of the Constitution. It could also not be protected under Entry 26 of List II, because there was no element of regulation of trade and commerce in it. Wanchoo, J., who delivered the judgment of the Court, laid down the proposition upon which considerable reliance has been placed by Mr. Ghose. He observed:

"If a dealer has collected anything from a purchaser which is not authorised by the taxing law, that is a matter between him and the purchaser, and the purchaser may be entitled to recover the amount from the dealer. But unless the money so collected is due as a tax, the State cannot by law make it recoverable simply because it has been wrongly, collected by the dealer. This cannot be done directly for it is not a tax at all within the meaning of Entry 54 of List II, nor can the State Legislature under the guise of incidental or ancillary power do indirectly what it cannot do directly. We are therefore of opinion that Section 11(2) is not within the competence of the State Legislature under Entry 54 of List II."

It may be stated that Section 11(2) of the Hyderabad General Sales Tax Act, 1950 (Act 14 of 1950) corresponds to Section 20A of the Bihar Sales Tax Act, 1959. Mr. Ghose has urged, therefore, that similar consideration should arise in the present case and Section 20A of the Bihar Act also should be struck down as invalid. Mr. Lalnarain Sinha for the State of Bihar has, however, urged that the principle of law laid down in the above case is not applicable to the facts of this case inasmuch as under Section 11(2) of the Hyderabad Act the sales tax realised by the authorities was to be made over to the State whereas in the present case the amounts to be deposited by the dealers are to remain in the State treasury for payment to the customers to whom the money belonged and not to the State as such. This is how the Supreme Court distinguished the decision of that very Court reported in *Orient Paper Mills Ltd. v. State of Orissa*². In that connection the Court observed thus:

"The respondent in this connection relies on the decision of this Court in 1962-1 SCR 549: (AIR 1961 SC 1438). That case in our opinion has no application to the facts of the present case, In that case the dealer had been assessed to tax and had paid the tax. Later in view of the judgment of this Court in *State of Bombay v. United Motors (India) Ltd*³, the amounts paid in respect of goods despatched for consumption outside the State were held to be not taxable. The dealer then applied for refund of tax, which was held to be not exigible. The refund was refused and the dealer went to the High Court by a writ petition claiming that it was entitled to refund under

Section 14 of the Orissa Sales Tax Act (which was the law under consideration in that case). The High Court allowed the petition in part and there were appeals to this court both by the dealer and the State. In the meantime, the Orissa Legislature amended the law, by introducing Section 14-A, in the principal Act, which provided that refund could be claimed only by a person from whom the dealer had actually realised the amount as tax. That provision was challenged in this Court but was upheld on the ground that it came within the incidental power arising out of Entry 54 of List II. That matter dealt with a question of refund and it cannot be doubted that refund of the tax collected is always a matter covered by incidental and ancillary powers relating to the levy and collection of tax. We are not dealing with a case of refund in the present case. What Section 11(2) provides is that something collected by way of tax, though it is not really due as a tax under the law enacted under Entry 54 of List II must be paid to the Government. This situation in our opinion is entirely different from the situation in the Orient Paper Mills Limited's case." If, therefore, Section 14-A of the Orissa Act can be taken to be on all fours with Section 20A of the Bihar Sales Tax Act, 1959, then it is obvious that the petition is covered by the authority of the Supreme Court in the Orient Paper Mills Limited's case, 1962-1 SCR 549: (AIR 1961 SC 1438) itself. Apparently, there is no difference between the provisions of Section 14-A of the Orissa Act and Section 20A of the Bihar Act. Section 14-A of the Orissa Act was inserted in the Orissa Sales Tax Act, 1947, even as Section 20A has been inserted in the Bihar Sales Tax Act of 1959. Section 14-A of the Orissa Act is in the following words:

"14-A. Refund of Tax in special cases. Notwithstanding anything contained in this Act where any amount is either deposited by any person under Sub-section (3) of Section 9-B or paid as tax by a dealer and where such amount or any part thereof is not payable by such person or dealer, a refund of such amount or any part thereof can be claimed only by the person from whom such person or dealer has actually realised such amounts whether by way of sales tax or otherwise and the period of limitation provided in the proviso to Section 14 shall apply to the aforesaid claim."

There is a period prescribed for claiming a refund of sales-tax by the person making the payment within the period prescribed under Section 14 of the Orissa Act which lays down thus:

"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."

Hence, it seems clear that the provisions of the two Acts are in pari materia and it is difficult to distinguish the provisions of Section 20A of the Bihar Sales Tax Act 1959 from the Orissa Act. Mr. Ghose, however, has urged that the Orissa Act should be distinguished, firstly, because it was a prospective law to be applied to realisation of sales-tax by a dealer which in the eye of law he is not entitled to realise, but unlike that the Bihar Act has been made retrospective. Secondly, the Orissa Sales Tax Act makes the realisation of taxes a purchase tax and unlike that in the Bihar Act sales tax is levied on transactions of sale as such and not as a purchase tax. In the Orissa Act, moneys lying in deposit alone can be retained by the State for payment to the customers through its own agency and not to be refunded to the customers through the dealers who realise such amounts. Reference is made in this connection to Section 2 of the Orissa Sales Tax Act. Lastly, it is said that under the Orissa Act authority to realise the tax is given under the Act itself, whereas in the Bihar Act there is no similar provision. In my opinion, however, there is no substance in any of these contentions urged on behalf of the petitioner. The history of the Orissa Sales Tax Act referring to the enactment of Section 14A, mentioned above, is parallel to the incorporation of S, 20A by the Amending Act 20 of 1962, in the Bihar Sales Tax Act, 1959. The occasion for inserting Section 14-A in the Orissa Sales Tax Act arose on account of the decision of the Supreme Court in the case of 1953 SCR 1069: (AIR 1953 SC 252) relating to the amounts paid in respect of goods despatched for consumption outside the State which were held not to be taxable. In that case also the dealer had applied for refund of sales tax which was not exigible. The refund was refused and the dealer moved the High Court for a writ claiming refund under Section 14 of the Orissa Sales Tax Act. It was in these circumstances that the Orissa Legislature introduced Section 14-A in the principal Act. That provision in regard to the refund only through the agency of the State and not through a dealer of sales tax, which was actually not payable, was upheld by the Supreme Court on the ground that it was a matter relating to the incidental power of the State Legislature connected with Entry 54 of List II of the Seventh Schedule of the Constitution. In the Bihar Act as well Section 20A has come into existence in similar circumstances, upon which Mr. Ghose himself has, in course of his argument, laid stress characterising this measure as mala fide on the part of the Bihar Legislature. In my opinion, Section 14-A was intended to cover realisation of the tax by the dealer under a bona fide belief that such a tax was payable and, in fact, it was held by the Supreme Court that it was not so payable in accordance with the Orissa Sales Tax Act, 1947. To say, therefore, that the Orissa Act was only prospective, referring only to the realisation of sales-tax by a dealer, which, in fact, was not payable, and that a provision with regard to the refund through the agency of the State to the customer would apply only to such amounts, is not correct. The very history of the enactment of

Section 14-A of the Orissa Act shows that it was intended to be retrospective in the sense that it would bar the claim of the dealer to get the amount back from the State of Orissa for payment to the customers as a matter of his own responsibility and not through the state agency. As for the next contention of Mr. B.C. Ghose that the Orissa Act made it a purchase tax appears to me to be equally devoid of any substance. The Orissa Sales Tax Act also (Act 14 of 1947) is not a purchase tax but a sales-tax. If it were so, the very title of the Act would have been "Purchase Tax" as is the position in regard to certain enactments in England. I do not think it necessary to enter into the legal distinction which may arise on account of this difference in the nomenclature. That is not relevant for the present purpose. The further argument of Mr. Ghose that in regard to the Orissa enactment it was held by the Supreme Court that it related to the amounts already deposited by the dealers and it did not cover the case of a direction to the dealers to deposit the amounts in the State treasury, that too is hardly a distinction of any substance. Section 14-A is in general terms prohibiting the dealers from making the payment of such unauthorised realisation of sales-tax direct to the customers, but that such refund could be claimed only from the State by the payers of the tax. There is no provision in Section 14-A that this section would be applicable only to the amounts of unauthorised collection which was already deposited in the State treasury, but it was in general terms so that its consequences would affect the dealers who would have to deposit the amount of such collections in the State Treasury for payment to the customers in the same way as is the position under Section 20A of the Bihar Act, 1959. The distinction, if any, is only in the terminology but not so far as the substance of the two provisions is concerned. In the result, therefore, I am satisfied that the decision of the Supreme Court in the case of 1962-1 SCR 549: (AIR 1961 SC 1438) covers Section 20A of the Bihar Act itself, relating to a refund of unauthorised collection of sales tax.

9. Mr. Ghose has also raised a question with regard to Section 72 of the Contract Act, which is a Central Act, being affected by this provision in the Bihar Act. He has urged that in the Orissa Act there was no provision to the effect that the dealers would have to deposit such amounts notwithstanding any law to the contrary. It is, no doubt, true that these words find place in Sub-sections 3(a) and (7) of Section 20A. This again appears to me to be a distinction of drafting and terminology but not a difference of substance, because when the Orissa Legislature provided in Section 14-A that refund could be claimed by the customers in regard to the sales-tax paid by them only from the State and not from the dealers as such, that contemplates that Section 72 of the Contract Act would be hit by that provision in the same manner as in the Bihar Act, if, in fact, there be conflict between the two provisions. In my opinion, however, there is no such conflict because Section 72 of the Contract Act is a general provision whereas Section 20A of the Bihar Sales Tax Act, 1959, and Section 14-A of the Orissa Sales Tax Act, 1947, were enacted on account of the power conferred upon the State Legislature under Entry 54 of List II of the

Seventh Schedule of the Constitution and, prior to that, a similar provision existed in the Government of India Act, 1935, under which sales-tax legislations were undertaken by the provincial legislatures. Further argument of Mr. Ghose that it is colourable legislation by the State of Bihar is equally without any substance, this matter also being covered entirely in the decision of the Supreme Court referred to above. I may set out here the argument of Mr. Ghose as he has formulated the points before us:

(a) The tax as entered in the selling price of commodities is one to which the State is not entitled as that is the property of the dealers who were liable to pay sales-tax and not of the State;

(b) Sales were made outside the State of Bihar in course of inter-State trade and as such the Bihar Legislature was not competent to levy any tax on such sales and, therefore, as a necessary corollary, it could not deal with the amounts so collected even as tax;

(c) What was collected was not sales tax according to law and there is no authority in the State of Bihar to levy that nor is it competent for the State of Bihar to refund or forfeit that amount;

(d) The penal clause contained in the Act ran counter to Article 21 of the Constitution. It appears to me unnecessary to go over these contentions in detail because they are answered in the judgment of the Supreme Court; nor is it necessary for me to refer to the cases in detail cited by Mr. Lalnarain Sinha for the State of Bihar to the effect (a) that power to legislate about a tax must also include the power to legislate about the refund of the tax; (b) that the State had the competence not only to tax but also to legislate on ancillary matters, such matters relating to the realisation of the tax and (c) that a person who has utilised the machinery of law, and gained an advantage by doing so, cannot repudiate the application of that Act by pleading that the subject matter was outside the scope of that Act or that the Act was ultra vires. The last proposition is referred to in *W. Shepard v. O.E.D. Barron*⁴, *W.B. Daniels v. Tearney*,⁵; *Booth Fisheries Co. v. Industrial Commission of the State of Wisconsin*⁶ and *W.E. Wall v. Parrot Silver & Copper Co.*⁸., Reference was made, however, by him, incidentally to the decision of the Supreme Court in *Tata Iron and Steel Co. v. State of Bihar*⁷, in which the question of legality of the retrospective levy of sales-tax together with the theory of the territorial excess was considered and it was held by the majority of the Bench that such a power was vested in the State Legislature and the Bihar Sales Tax (Amendment) Act, 1948 (Act 6 of 1949) amending Sections 4(1) and 2(g) of the Bihar Sales Tax Act, 1947, was a valid amendment.

10. For the reasons aforesaid, it must be held that there is no substance in the argument urged by the learned counsel on behalf of the petitioner and the application, M. J. C. No. 289 of 1963 must be dismissed.

11. M. J. C. Nos. 415 and 1054 of 1963 which are by other dealers also must fail on a similar ground, because although the details of the collection of taxes differ, but the point involved is a common one.

12. As to M. J. C. No. 1011 of 1963, the petition by the customers, Mr. B.C. Ghose urged that, in any case, their application must succeed, because they have a right to claim a refund from the State of Bihar of the amount of sales-tax realised by the Indian Copper Corporation Ltd., petitioner in M. J. C. No. 289 of 1963. Mr. Lalnarain Sinha appearing for the State of Bihar has not contended that the petitioners are not entitled to get the benefit of Section 20A and they could certainly lay their claim before the State of Bihar for refund of their amount; but before that is done, their application for a writ is not maintainable, because there is no refusal as yet by the State of Bihar to pay them the amount. Mr. B.C. Ghose urged that, in any view, the provision in Section 20A with regard to the law of limitation must be declared ultra vires the power of the Bihar Legislature. The argument, however, must be overruled in view of the decision of the Supreme Court in *Burmah Construction Co. v. State of Orissa*⁹, . In that case an identical question arose in regard to the provision in Section 14 of the Orissa Sales Tax Act, 1947. In that section also there was a provision for refund of the excess tax unlawfully collected from a dealer and with regard to limitation it was laid down:

"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."

On the argument with regard to limitation the Supreme Court ruled as follows:

"The High Court normally does not entertain a petition under Article 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 leave 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 Article 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."

The order of the High Court on this point was modified and it was directed:

"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."

It is thus clear that the provision in Section 20A of the Bihar Act enacting that the application for refund must be filed within the period of limitation allowed by law cannot be struck down as invalid. I must, however, make it clear that I am saying nothing in regard to whether the purchasers who paid the sales-tax which has been held to be ultra vires will be entitled, in the circumstances of this case, to a refund. They are at liberty to make an application to the State Government which will decide whether the application is within the period allowed by law or not.

13. In the result, this application also fails and is dismissed.

G.N. Prasad, J.

14. I agree.

Cases Referred.

11964-15 STC 403: (AIR 1964 SC 922)
21962-1 SCR 549: (AIR 1961 SC 1438)
31953 SCR 1069: (AIR 1953 SC 252)
4(1903) 194 US 553:48 Law Ed 1115
5(1879-81) 102 US 415:26 Law Ed 187
6(1925) 271 US 208:70 Law Ed 908
71958 SCR 1355: (AIR 1958 SC 452)
8(1916) 244 US 407:61 Law Ed 1229
91962 SC 1320