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December, 21.

BHOPAL SUGAR INDUSTRIES LTD.,
MADHYA PRADESH

v.

D. P. DUBE, SALES TAX OFFICER,
BHOPAL REGION, BHOPAL

(B. P. SINHA, C. J., P. B. GAJENDRAGADKAR,
K. N. WANCHOO, K. C. DAS GUPTA
and J. C. SHAH, JJ.)

Sales Tax—Nature of transaction—High Court's Jurisdiction to go into—Constitution of India, Art. 226.

The appellant, a manufacturer of sugar and a dealer in petroleum products, was assessed to sales tax in respect of the consumption by it for its own motor vehicles of the petroleum products in which it dealt. The appellant challenged the assessment in respect of the consumption by it by way of a petition under Art. 226 of the Constitution before the High Court of Madhya Pradesh on the grounds that its own consumption did not amount to a sale under the relevant provisions of the Madhya Bharat Sales of Motor Spirit Taxation Act, 1953, and that if such a transaction was held to be taxable under the provisions of the Act the provisions were unconstitutional and beyond the legislative competence of the State and therefore the assessment would be an infringement of the rights of the petitioner under Art. 19 (1) (f) and (g) of the Constitution. The High Court called for the agreement between the appellant company and Caltex (India) Limited and by construing the agreement came to the conclusion that the appellant was not the owner of the petrol and rejected the petition though no point was taken by the Sales Tax Officer before it that the appellant was not the owner.

Held, that the investigation of the nature of the transaction was not a matter for the High Court but one for determination by the taxing authorities and that the High Court was in error in having itself determined the nature of the transaction. The order passed by the High Court cannot therefore, be upheld.

CIVIL APPELLATE JURISDICTION : Civil Appeal
No. 578 of 1962.

Appeal by special leave from the judgment and order dated January 25, 1961, of the Madhya Pradesh High Court in Misc. Petition No. 223 of 1960.

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S. T. Desai, J. B. Dadachanji, O. C. Mathur
 and *Ravinder Narain*, for the appellant.

B. Sen, K. L. Hathi and *I. N. Shroff*, for the respondent.

1962. December 21. The Judgment of the Court was delivered by

SHAH, J.—This is an appeal against the judgment of the Madhya Pradesh High Court dismissing a petition filed by the Bhopal Sugar Industries Ltd.—hereinafter called ‘the Company’—for a writ under Art. 226 of the Constitution quashing the order of the Sales Tax Officer dated May 1, 1960, which imposed liability upon the Company for payment of sales-tax under the Madhya Bharat Sales of Motor Spirit Taxation Act, 20 of 1953 in respect of motor spirit and lubricants used for its own vehicles.

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The Company carries on the business of manufacturing sugar, and maintains for the purpose of that business a fleet of motor trucks and other motor-vehicles. The Company is also registered under the Act as a retail dealer of motor spirit and lubricants. During the period April 1, 1957, and March 31, 1958, the Company consumed a part of its stock-in-trade of motor spirits and lubricants for its own vehicles. The Sales Tax Officer, Bhopal Region, by order dated May 1, 1960, assessed the Company to pay tax in respect of motor spirits and lubricants consumed for its vehicles. The Company then filed a petition in the High Court of Madhya Pradesh at Jabalpur under Art. 226 of the Constitution for a

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writ in the nature of *certiorari* quashing the order dated May 1, 1960, passed by the Sales Tax Officer and the notice of demand issued in pursuance thereof, and for a writ of prohibition or *mandamus* restraining the Sales Tax Officer from recovering any tax in pursuance of the order.

The Company set up two grounds in support of its petition :

- (1) That the Sales Tax Officer had power to levy tax on 'sale' only i. e. on transfer of property for a price, and as there was no sale of motor oil and lubricants consumed by the Company for its own vehicles there being no transfer of property to any one, and no price being paid or promised, consumption of the articles was not taxable. That it was submitted is manifest from the charging section 3 read with the definition under s. 2(k) of the Act of 'retail sale' which does not include consumption by a retail dealer of his own goods.
- (2) That power of the State to levy tax on the sale or purchase of goods (other than newspapers) could be exercised only under Entry 54 of List II of the 7th Schedule to the Constitution. Therefore the attempted levy of tax was illegal and without authority of law, and infringed the Company's fundamental right to carry on business and to hold and acquire property as guaranteed by Art. 19(1) (f) and (g) of the Constitution.

At the hearing of the petition the High Court did not consider the grounds set up in support of the petition, but called upon the Company to produce a

copy of its agreement with Caltex (India) Ltd., under which the supply of motor-spirits and lubricants was obtained by the Company, and proceeded to adjudicate the claim for relief in the light of the covenants of the agreement. The High Court dismissed the petition holding that the assumption made in the petition that the Company was the owner of the motor spirits and lubricants obtained from Caltex (India) Ltd., was not warranted. It was observed :

“These clauses and other clauses relating to the responsibility for loss, safeguard against contamination of petrol, sale by the dealer of the products of Caltex (India) Limited only, settlement of accounts—all point to the fact that the petitioner (the Company) was not constituted a full and absolute owner of the petrol supplied by Caltex (India) Limited at the petrol pump maintained by the petitioner at Sehore. The petrol remained the property of Caltex (India) Limited, and the petitioner sold it as an agent of the supplying Company. When, therefore, the petitioner obtained petrol for itself at the pump and used it in its own vehicles, there was a sale of the petrol by the petitioner as an agent of Caltex (India) Limited to the petitioner-company as a consumer. It was nothing but a purchase by the agent of property belonging to the principal. That being so, there was retail sale by the petitioner as agent of Caltex (India) Limited of the petrol consumed in its vehicles.”

Against the order dismissing the petition this appeal is preferred with special leave.

In our judgment the High Court was in error in proceeding to decide the petition on a ground which was not set up in the affidavit of the Sales Tax Officer. The Company claimed relief on the

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assumption that motor spirits and lubricants used by it for its own vehicles were of its ownership, and appropriation by a retail dealer of the stock in trade owned by him for his own use does not constitute sale within the meaning of the Act. The Sales Tax Officer submitted that the consumption of motor spirits and lubricants by the Company amounted to sale, because there was transfer of property "from one establishment of the retail dealer to another." On the pleadings two questions arose for determination :—

- (a) whether the appropriation of goods amounted to transfer of property by the retail dealer to another person; and
- (b) whether such transfer amounted in law to sale.

The Legislature has set up an elaborate and self-contained machinery for investigating whether a transaction is liable to be taxed because it is of the nature of a retail sale within the meaning of the Act. The taxing Officer is invested with authority to determine the nature of the transaction and its liability to tax, and against his decision there is an appeal to the appellate authority and a further right of revision to the Commissioner. It is true that the jurisdiction of the High Court under Art. 226 is extensive, but normally the High Court does not exercise that jurisdiction by entertaining petitions against the orders of taxing authorities, when the statute under which tax is sought to be levied provides a remedy by way of an appeal or other proceeding to a party aggrieved and thereby by-pass the statutory machinery. That is not to say that the High Court will never entertain a petition against the order of the taxing Officer. The High Court has undoubtedly jurisdiction to decide whether a statute under which a tax is sought to be levied is within the legislative

competence of the Legislature enacting it or whether the statute defies constitutional restrictions or infringes any fundamental rights, or whether the taxing authority has arrogated to himself power which he does not possess, or has committed a serious error of procedure which has affected the validity of his conclusion or even where the taxing authority threatens to recover tax on an interpretation of the statute which is erroneous. The High Court may also in appropriate cases determine the exigibility to tax of transactions the nature of which is admitted, but the High Court normally does not proceed to ascertain the nature of a transaction which is alleged to be taxable. The High Court leaves it to the tax payer to obtain an adjudication from the taxing authorities in the first instance.

In the present case the Company invoked the jurisdiction of the High Court on question of fact as well as on the constitutionality of the taxing statute and breach of fundamental rights. The High Court instead of determining the Constitutional questions, on which alone the petition could normally be entertained, proceeded to investigate the correctness of an assumption made by the Company, and thereby decided the case which was not expressly raised by the other party. In doing so the High Court fell into an error: it assumed jurisdiction to decide the dispute which had to be decided by resort to the machinery provided under the Act after ascertainment of the true nature of the transaction in the light of the agreement and surrounding circumstances. The order passed by the High Court cannot therefore be upheld.

The next question is about the order to be passed in this appeal. For that purpose we must consider the two grounds set up in the petition by the Company. The challenge to the action of the Sales Tax Officer on the plea of infringement of fundamental

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rights must fail. It is common ground that the State of Madhya Pradesh had power to levy tax on sale or purchase of motor spirits and such power could be exercised only in respect of sales traditionally so understood. *The State of Madras v. Gannon Dunkarley & Co. (Madras) Ltd.* (1). Section 2 (k) of the Act defines a 'retail sale' as meaning "a sale of motor spirit by a retail dealer for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased, and the expression 'sell in retail' shall be construed accordingly." But there is nothing in the definition of s. 2 (k) 'retail sale' nor in the charging section (s. 3) which indicates that the Legislature had enacted legislation beyond its competence. If the taxing authority had sought to bring to tax a transaction which is made taxable by a competent enactment it would not be open to the High Court exercising power under Art. 226 of the Constitution to consider whether the taxing authority was justified in taxing the transaction. Levy of a tax lawfully imposed under a statute within the competence of the Legislature cannot be deemed to infringe the fundamental rights guaranteed by Art. 19 (1) (f) and (g), and whether the tax is properly levied in respect of a transaction is for the taxing authority to determine and not for the High Court.

The levy and collection of sales tax on motor spirits and lubricants consumed by the Company cannot therefore be regarded as illegal unless it is found that the goods were of the ownership of the Company; and for reasons already set out the question whether the goods consumed belonged to the Company must be left to be determined under the Act. The first question raised in the petition cannot therefore be determined by this Court as it could not be determined by the High Court.

On the view taken by us this appeal must fail and is dismissed. It will of course be open to the

(1) [1959] S. C. R. 379.

Company in an appeal properly filed before the taxing authorities to contend that under the terms of the agreement with Caltex (India) Ltd., the Company is the owner of the goods received by it and that on that account consumption of those goods by it for its own vehicles did not amount to sale and the Sales Tax Officer will be entitled to consider that question on its merits and will not be bound by any expression of opinion by the High Court as to the interpretation of the agreement produced before it. Having regard to the circumstances, there will be no order as to costs.

Appeal dismissed.

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ITTAVIRA MATHAI

v.

VARKEY VARKEY AND ANOTHER

(S. J. IMAM, K. SUBBA RAO, RAGHUBAR DAYAL,
and J. R. MUDHOLKAR, JJ.)

Limitation—Suit filed beyond time—Decree, if a nullity—Point of limitation not raised in High Court, if entertainable by Supreme Court—Receiver's possession, if must ensure to successful party—Appeal—Forum—Abrogated by subsequent legislation—If and when can be challenged—Travancore High Court Act, 1099 (IV of 1099), s. 11 (1), as repealed by Ordinance II of 1124—Indian Limitation Act, 1908 (9 of 1908), s. 3. Arts. 47, 142.

One Ittiyavira, the deceased father of the appellant purchased properties and paid part of the consideration for the transaction in cash and for the balance executed two hypothecation bonds in favour of his vendors, Ramalinga Iyer and Raman Vela Yudhan. Ramalinga Iyer assigned his hypothecation bond in favour of one Sankara Rama Iyer. He had executed a promissory note in favour of one Anantha Iyer who, after his death, instituted a suit against his son Sankara Subha Iyer for recovery of the amount thereunder and obtained a decree. Treating the deed of assignment executed by Ramalinga

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