Supreme Court of India
Carl Still G. M. B. H. & Another vs The State Of Bihar And Others on 19 April, 1961
Equivalent citations: 1961 AIR 1615, 1962 SCR (2) 81
Author: T V Aiyyar
Bench: Das, S.K., Kapur, J.L., Hidayatullah, M., Shah, J.C., Aiyyar, T.L. Venkatarama

PETITIONER:
CARL STILL G. m. b. H. & ANOTHER

Vs.

RESPONDENT:
THE STATE OF BIHAR AND OTHERS

DATE OF JUDGMENT:
19/04/1961

BENCH:
AIYYAR, T.L. VENKATARAMA
BENCH:
AIYYAR, T.L. VENKATARAMA
DAS, S.K.
KAPUR, J.L.
HIDAYATULLAH, M.
SHAH, J.C.

CITATION:
1961 AIR 1615 1962 SCR (2) 81
CITATOR INFO :
R 1965 SC1655 (24)
R 1969 SC 556 (3)

ACT:
Sales Tax-Construction works-Interpretation of contract--Supply of materials Legality of tax thereon-Sales Tax authorities taking Proceedings to levy tax--Writ Petition to quash Proceedings Maintainability -Bihar Sales Tax Act, 1947 (Bihar 19 of 1947), S. 2-Constitution of India, Arts. 226, 227.

HEADNOTE:
On December 19, 1953, the appellant, a company registered in West Germany, entered into a contract with a company in India to set up a complete coke oven battery ready for production as well as by-products plants at Sindri in the State of Bihar, agreeing to erect and construct buildings, plants and machinery and deliver and supply accessories and articles from Germany and also locally from India, and render services fully described in the First Schedule, for an all inclusive price of Rs. 2,31,50,000. The contract

provided that in case the contractor failed to complete the works within the period specified therein the Indian company might take possession of the works and the materials which would become its property and complete the works and deduct from the agreed price the expenses incurred in such completion. Under cl. 15(ii) of the contract all materials brought by the contractor upon the site shall immediately become the company's property, but such of them as during the progress of the works. were rejected by the company ceased to be Company's property, and after the coke oven and byproducts plants had been constructed the contractor was entitled to remove the surplus materials. The clause further provided that the company shall not be liable for any loss if the materials were destroyed by fire or otherwise. Under the Bihar Sales Tax Act, 1947, in a contract for, execution of works, the materials used
11
82
therein are treated as sold by the contractors and their value is taken as the sale price liable to be taxed. The execution of the works was completed in 1955 as provided in the agreement and on March 20, 1956, the sales tax authorities issued a notice to the appellant to the effect that it was liable to pay tax for the three years 1952 to 1955, under the provisions of the Act. The appellant represented that it had only supplied materials in execution of works contract, that there was no sale of any goods or materials by it and that the proceedings for taxing this supply of materials as if they had been sold were illegal. The sales tax authorities having proceeded to take further steps to levy the tax in spite of its representations, the appellant filed a petition before the High Court of Patna under Arts. 226 and 227 of the Constitution of India for quashing the proceedings. The High Court took the view that under cl. 15(ii) of the contract in question the property in the materials was to pass to the Indian company as soon as they were brought on the site, and that, in effect, amounted to a sale of those materials by the appellant to the company. The Court, however, dismissed the petition on the ground that the facts had not yet been fully investigated and that it would be open to the sales tax authorities to investigate the facts and upon the proper construction of the contract come to the finding whether and if so to what extent, the appellant was liable to pay sales tax.

Held (Shah, J., dissenting): (1) that on its proper construction the agreement dated December 19, 1953, was a contract entire and indivisible for the construction of specified works for a lump sum and not a contract of sale of materials as such and that the sales tax authorities had no right to impose a tax on the materials supplied in execution of that contract on the footing that such supply was a sale. The State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., [1959] S.C.R. 379 and Peare Lal Hari Singh v. The State of

Punjab, [1959] S.C.R. 438, followed.
(2) that where proceedings are taken before a tribunal under a provision of law, which is ultra vires, it is open to a party aggrieved thereby to move the court under Art. 226 for issuing appropriate writs for quashing them on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course.
The State of Bombay v. The United Motors (India) Ltd., [1953] S.C.R. 1069, Himmatlal Harilal Mehta v. State of Madhya Pradesh, [1954] S.C.R. 1122 and The Bengal Immunity Company Ltd. v. State of Bihar, [1955] 2 S.C.R. 603, relied on.
In the present case, the sales tax authorities sought to maintain the liability of the appellant to pay tax in respect of materials supplied by it only under the contract dated December 19, 953, and on the basis of the legality of the provisions

83

of the Bihar Sales Tax Act, 1947. Consequently, the proceedings taken by them must be held to be illegal and must be quashed.
Per Shah, J.-Under the agreement dated December 19, 1953, there was a contract for the construction of a coke oven battery and by-products plant, and also to deliver and supply accessories and articles. Even if this delivery and supply was incidental to the works contract, it could not be assumed without investigation that it was not a part of a transaction of sale liable to tax. The investigation of facts on the question of liability to pay tax has to be made by the taxing authorities in whom that jurisdiction is vested. Before these facts are ascertained, by merely looking at the terms of the written contract and without any investigation as to the true nature of the transaction, the High Court could not decide whether the contract performed was a pure works or construction contract or was a composite contract. The High Court was, therefore, right in declining to issue the writ prayed for.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 237 and 238 of 1960.

Appeals by special leave from the judgment and order dated July 8, 1958, of the Patna High Court, in Misc. Judl. Cases Nos. 713 and 819 of 1958.

A. V. Viswanatha Sastri, S. R. Banerjee and S. C. Mazumdar, for the appellants.

S. P. Varma, for the respondents.

1961. April 19. The judgment of S. K. Das, J. L. Kapur, M. Hidayatullah and T. L. Venkatarama AIyar, JJ., was delivered by Venkatarama Aiyar, J. J. C. Shah, J., delivered a separate judgment.

VENKATARAMA AIYAR, J.-Both these appeals arise out of the same facts and involve the determination of the same question, and this judgment will govern both of them. The appellant in Civil Appeal No. 237 of 1960 is a company registered at Recklinghausen near Dusseldorf in West Germany, and carries on business in the manufacture and erection of plants and machinery. On December 19, 1953, it entered into a contract with a company called Sinclair Fertilisers and Chemicals (Private) Ltd., hereinafter referred to as the Owner, for assembling and, installing machinery, plants and accessories for a coke oven battery and by-products plant at Sindri in the State of Bihar for an all-inclusive price of Rs. 2,31,50,000. The agreement provides that the appellants were to supply all the materials and labour required for the execution of the works, and that the performance was to be split up into two categories, the German section and the Indian section, that the German section was to consist of deliveries of materials from Germany Free on Board 'European ports, cost of technical drawings and services of German specialists, and that the Indian section was to consist of supply of Indian materials and charges for Indian labour and services to be performed in India. The German section was to be paid out of the lump sum stated above a sum of Rs. 1,31,50,000 in pounds sterling in London on account of the appellant, and the Indian section was to be paid the balance of Rs. 1,00,00,000 in Indian currency in this country, and payments were to be made in instalments related to the progress of the contract. Subsequent to the agreement, the appellant entrusted the work of the Indian section to an Indian company called the Coke Oven Construction Company (Private) Ltd., and the Owner having accepted this arrangement the said company has become the assignee of the contract in so far as it relates to the execution of the Indian section thereof. It is this company that is the appellant in Civil Appeal No. 238 of 1960. The execution of the works was completed in 1955 as provided in the agreement, and the amounts due thereunder were also paid to the two appellants.

The present dispute between the parties is as to whether the appellants in the two appeals are liable to pay sales tax on the value of the materials used by them in the execution of the works under the contract. It will be convenient now to refer to the relevant provisions of the Bihar Sales Tax Act (Bihar Act No. XXX of 1947), hereinafter referred to as the Act. Section2(g)of the Act defines 'sale' as including a transfer of property in goods involved in the execution. of contract. 'Contract' is defined in s. 2(b) as meaning any agreement for carrying out for cash or valuable consideration, the construction, fitting out, improvement or repair of any building, road, bridge or other immovable property; and 'goods' are defined in s. 2(d) as including "all materials, articles and commodities, whether or not to be used in the construction, fitting out, improvement or repair of immovable property." 'Sale price' is defined in s. 2(h)(ii) as meaning the amount payable to a dealer as valuable consideration for the carrying out of any contract, less such portion as may be prescribed, of such amount representing the usual proportion of the cost of labour to the cost of materials used in carrying out such contract. 'Dealer' is defined in s. 2(c) as meaning any person who sells or supplies any goods including goods sold or supplied in the execution of a contract. Section 2(1) defines 'turnover' as meaning the aggregate of the amounts of sale prices received and receivable by a dealer in respect of sale or supply of goods or carrying out of any contract, effected or made during a given period. Section 4 is the charging section, and it provides that every dealer whose gross turnover

during the accounting period exceeded Rs. 10,000 shall be liable to pay tax on sales which take place in Bihar, and s. 5 provides that the "tax payable by a dealer under this Act shall be levied on his taxable turnover at such rate or rates and subject, to such restrictions and conditions as may be laid down from year to year by an annual Bihar Finance, Act." The Bihar Finance Act defines 'taxable turnover' as meaning that part of the dealer's gross turnover on sales which have taken place in Bihar during any period subject to certain deductions. Section 9(1) of the Act provides that "No dealer shall, while being liable under s. 4 to pay tax under this Act, carry on business as a dealer unless he has been registered under this Act and possesses a registration certificate". Section 13(5) of the Act under which the present proceedings have been initiated is as follows:-

" If upon information which has come into his possession, the Commissioner is satisfied that any dealer has been liable to pay tax under this Act in respect of any period and has nevertheless wilfully failed to apply for registration, the Commissioner shall, after giving the dealer a reasonable opportunity of being heard, assess, to the best of his judgment, the amount of tax, if any due, from the dealer in respect of such period and subsequent periods and the Commissioner may direct that the dealer shall pay, by way of penalty, in addition to the amount so assessed, a sum not exceeding one and half times that amount."

The gist of the above provisions is that in a contract for execution of works, the materials used therein are treated as sold by the contractor and their value is taken as the sale price liable to be taxed, and there are provisions for determining that value.

Acting on these provisions, the Superintendent of Sales Tax, Dhanbad, the third respondent herein, issued on March 20, 1956, a notice to the appellant in Civil Appeal No. 237 of 1960, under s. 13 of the Act, stating that on information which had come to his possession he was satisfied that the appellant was liable to pay tax for the periods 1952-53, 1953-54 and 1954-55, that it had wilfully failed to register itself under s. 9 of the Act, and it was directed to show cause why penalty should not be imposed. In response to this notice, the appellant appeared before the third res- pondent and represented that it had only supplied materials in execution of works contract, that there was no sale of any goods or materials by it, and that the proceedings for taxing this supply of materials as if they had been sold were illegal. Disagreeing with this contention, the third respondent directed the appellant to produce all its books, accounts and documents for purposes of assessment, and this is quite understandable, as it was his duty to levy tax in accordance with the provisions of the Act. Thereupon, the appellant filed petitions before the High Court of Patna under Arts. 226 and 227 of the Constitution for the issue of appropriate writs for quashing the proceedings before the third respondent and for prohibiting further proceedings under the Act as being wholly incompetent., The grounds put forward in support of the petition were firstly that the State legislature having authority to enact a law imposing a tax on the sale of goods was not competent to tax what under the law was not a sale, and that as the supply of materials in the course of the execution of works, was not in law a sale of those goods, a tax on such supply was unauthorized; and secondly that, even if there was a sale of materials, that was in the course of import from Germany, and a tax thereon was repugnant to Art. 286(1)(b) of the Constitution. After taking over the Indian section of the contract, the appellant in Civil Appeal No. 238 of 1960 had registered itself on May 11, 1953, as a dealer under s. 9 of the Act and was submitting periodical returns as required by the certificate and the Act. But its

contention at all times has been that it is not liable to pay sales tax on the transactions in question, as there were only supplies of materials in execution of works contract and that they did not amount to sale of goods. This contention was overruled by the Superintendent of Sales Tax, Dhanbad, the third respondent herein, and the appellant was assessed to sales tax successively for the years 1952-53 and 195354. While proceedings by way of appeal or revision by the appellant against these orders of assessment were pending, the third respondent issued further notices for assessment of tax for the years 1954-55 and 1955-56, and directed the appellant to produce all its books and accounts for the above period. Thereupon the appellant filed in the High Court of Patna, petitions under Arts. 226 and 227 of the Constitution, similar to those filed by the appellant in Civil Appeal No. 237 of 1960, for issue of appropriate writs to quash the orders of the Sales Tax authorities on the ground that the provisions of the Act, in so far as they sought to tax supply of materials in works contracts, were ultra vires. By the time the above petitions came up for hearing, the decision of this Court in The State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. (1), had been reported, wherein it was held that the expression "sale of goods" in Entry 48 in List II of Sch. VII to (1) [1959] S.C.R 379.

the Government of India Act, 1935, corresponding to Entry 54 in List 11 of Sch. VII to the Constitution of India had the same meaning that it has in the Sale of Goods Act, 1930, that where there is a building contract, under which specified work is to be executed for a lump sum, there is no contract of sale, as such, of materials used in the works, and that accordingly, a tax on the supply of those materials treating it as a sale was ultra vires the powers of the State Legislature under Entry 48 in List 11 of Sch. VII to the Government of India Act, 1935. The learned Judges were of opinion that this decision was distinguishable because there was a term in the agreement before them that the property in the materials was to pass to the owner as soon as they were brought on the site. Dealing next with the contention of the present appellants that, as there was no agreement for the payment of price for the materials, as such, they could not be held to have been sold, the learned Judges noticed without comment the contention of the Government Pleader for the respondents, based on s. 9 of the Sale of Goods Act, that even though no price had been fixed for the materials, that could be determined from the account books and invoices and the course of dealings between the parties. The learned Judges then proceeded to observe:

> "I wish, however, to state that I do not express any concluded opinion on the question whether there is sale of materials liable to be taxed in the present case. The facts have not been fully investigated by the sales tax authorities and the petitioners have not furnished all the account books and documents and other relevant information for the purpose of deciding this question. It would be open to the sales tax authorities to investigate the facts and Upon proper construction of the contract come to. the finding whether and if so to what extent, the petitioners are liable to pay sales tax. I have no doubt that in deciding this question the sales tax authorities will keep in view the principles laid down by the Supreme Court in State of Madras versus Gannon Dunkerley and Company (Madras) Limited (9 Sales Tax Cases 353)".

With these observations the learned Judges dismissed the petitions. It is against this judgment that the present appeals by special leave are directed.

The first question that arises for our decision is ,whether on the construction of the agreement dated December 19,1953, it could be held that there was a sale by the appellants of the materials used in the construction works, apart from the execution of those works. In The State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. (1), after stating that building contracts could assume several forms, this Court observed as follows:

> "It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration and other for the payment of remuneration for services and for work done. In such a case there are really two agreements, though there is a single instrument embodying them and the power of the State to separate the agreement of sale from the agreement to do work and render service and to impose a tax thereon, cannot be questioned and will stand untouched by the present judgment."

The point for determination, therefore, is whether on its true construction, the contract in question is a Combination of two distinct agreements, one to sell materials and the other to supply labour and services, or whether it, is only one agreement entire and indivisible for execution of the works. We will now refer to the relevant portion of the agreement dated December 19, 1953. The preamble to the agreement states that the Owner had agreed with the contractor that the latter was to set up a complete coke oven battery ready for production as well as by-products plants according to specifications given therein, that the installation was to be made at a site selected by the Owner and that the contractor was to "erect and construct buildings, plants and machineries and deliver and supply accessories and articles from Germany and also locally from India and render services fully (1) [1959] S.C.R. 379.

described in the First Schedule..... for an all-inclu- sive price of Rs. 2,31,50,000." Then cl. I provides that the contractor shall execute and complete the works mentioned in the Schedule, and el. 2 that the Owner shall pay to the contractor for executing the contract the sum of Rs. 2,31,50,000. Clause 4 requires the contractor to "provide all labour, materials, machinery, plant, tools, tackles and other implements for performing the works in a workman-like manner." Under cl. 11, the contractor guarantees "to accomplish full production within 22 months from the 15th September, 1952" and further undertakes to fulfill the guarantees prescribed in Schedule II to the agreement "to the satisfaction of the Owner within a period of three months from the date of accomplishment of full production." Clause 28 provides that in case the contractor fails or is unable to complete the works within the period, the Owner might take possession of the works and of the materials, "which will become the property of the owner," and complete the works and deduct from the agreed price the expenses incurred in such completion.

It is clear from the above clauses that the subject matter of the agreement was the installation of the coke oven battery and it accessories, that the sum of Rs. 2,31,50,000 was the price agreed to be paid for the execution of those works, and that there was no agreement for the sale of materials, as such, by the appellants to the Owner. In other words, the agreement in question is a contract entire and indivisible for the construction of specified works for a lump sum and not a contract of sale of materials as such. Now the contention that found favour with the learned Judges in the High Court

was that there was in the contract a clause that the property in the, materials was to pass to the owner when they are brought on the site, and that, in effect, amounted to a sale of those materials by the appellant to the Owner. The clause in question is as follows:-

> "15 (ii). All materials and plant brought by the Contractor upon the site under the German and Indian Sections in connection with the construction of the Coke Oven and by-products Plant shall immediately they are brought upon the site become the Owner's property and the same shall not on any account whatsoever be removed or taken away by the Contractor or by any other person without the Owner's prior authority in writing. Such of them as during the progress of the works will be rejected by the Owner in accordance with the terms agreed upon between the Contractor and the Owner in this respect shall on such rejection, cease to be the Owner's property..... The Owner shall not be liable for any loss or damage which may happen to or in respect of such materials and plant by the same being lost, stolen or injured or destroyed by fire, tempest or otherwise for which the contractor will be liable..... The Owner agrees that after the Coke Oven and by-products Plants have been constructed according to the agreed terms, the Contractor will be entitled to remove from the site their tools, tackles, machines, packing materials, protection roof and other materials as are surplus to the requirements of the normal operation of the Coke Oven and by- products Plant provided that no claim for increased cost is made in respect of anything so removed."
>
> In Peare Lal Hagri Singh v. The State of Punjab (1), a building contract contained the following clause:-
>
> "All stores and materials brought to the Site shall become and remain the, property of Government and shall not be removed off the Site without the prior written approval of the G. E. But whenever the works are finally completed, the contractor shall at his own expense forthwith remove from the Site all surplus stores and materials originally sup- plied by him and upon such removal, the same shall revest in and become the property of the Contractor."

Discussing the question whether by reason of this clause there was a Contract of sale of the materials by the Contractor, distinct from the works contract, this Court held that its object was only to ensure that (1) [1959] S.C. R. 438.

materials of the right sort were used in the construction and not to constitute a contract of purchase of the materials separatism. In the present case, el. 15 is even clearer that no sale of materials, as such, was intended, because it expressly provides that if they were destroyed by fire, tempest or otherwise, the loss would fall not on the owner, which must be the result if the property is taken to have been absolutely transferred to it, but on the contractor.

The argument based on s. 9 of the Sale of Goods Act is, in our opinion, equally unsound. What that section enacts is that where there is a contract of sale of movable but the price is not mentioned, it

has to be fixed either in the manner provided in the agreement or by having regard to the course of dealings between the parties, and where that is not possible, the buyer has to pay the seller a reasonable price. But the section presupposes that there is a Contract of sale of goods, and, as held in The State of Madras V. Gannon Dunkerley & Co. (Madras) Ltd. (1), such a contract requires that there must have been an agreement between the parties for the sale of the very goods in which eventually property passes. If, as held by us, cl. 15 does not embody an agreement for the sale of materials as such, there is no contract of sale with respect to them and s. 9 of the Sale of Goods Act can have no application. The contention, therefore, that el. 15 of the agreement could be read as amounting to a contract of sale of materials, and that the price therefor could be fixed as provided in s. 9 of the Sale of Goods Act by recourse to the account books of the appellants or the invoices or the course of dealings between them and the owner, must be rejected as untenable. It follows that the agreement dated December 19, 1953, being a contract for the construction of works, one and indivisible, the respondents have no right to impose a tax on the mate- rials supplied in execution of that contract on the footing that such supply is a sale.

It is next contended for the respondents that, whatever the merits of the contentions based on the construction of the contract, the proper forum to agitate (1) [1959] S.C.R. 379.

them would be the authorities constituted under the Act to hear and decide disputes relating to assessment of tax, that it was open to the appellants to satisfy those authorities that there have been no sales such as are liable to be taxed, that indeed they were bound to pursue the remedies under the Act before they could invoke the jurisdiction of the court under Art. 226 and that the learned Judges of the High Court were, therefore, right in declining to entertain the present petitions. It is true that if a statute sets up a Tribunal and confides to it jurisdiction over certain matters and if a proceeding is properly taken before it in respect of such matters, the High Court will not, in the exercise of its extraordinary jurisdiction under Art. 226, issue a prerogative writ so as to remove the proceedings out of the hands of the Tribunal or interfere with their course before it. But it is equally well settled that, when proceedings are taken before a Tribunal under a provision of law, which is ultra vires, it is open to a party aggrieved thereby to move the court under Art. 226 for issuing appropriate writs for quashing them on the ground that they are incompetent, without his being obliged to wait until those proceedings run their full course. That has been held by this court in The State of Bombay v. The United Motors (India) Ltd. (1), Himmatlal Harilal Mehta v. The State of Madhya Pradesh (2). and The Bengal Immunity Company Limited v. The State of Bihar (3). The position that emerges is that, if the proceedings before the Sales Tax Officer are founded on the provisions of the Act, which authorizes the levy of the tax on the supply of materials in construction contracts, then they must in view of the decision in The State of Madras v. Gannon Dunkerly & Co. (Madras) Lid. (4), be held to be incompetent and quashed. But if the proceedings relate to any extent to sales otherwise than under the contract, then the enquiry with respect to them must proceed (1) [1953] S.C.R. 1069, 1077.

(2) [1954] S.C.R. 1122, 1127.

(3) [1955] 2 S.C.R. 603, 617-619, 764-766. (4) [1959] S.C.R. 379.

before the authorities under the Act and the application under Art. 226 must fail.

We must now examine the true scope of the proceedings before the Sales Tax Officer in the light of the above principles. We start with this that the Act contains provisions imposing a tax on the supply of materials under a construction contract. The appellants were indisputably engaged in construction works under the agreement dated December 19, 1953, and it is not suggested that they were carrying on any independent business as dealers in the State of Bihar. Presumably, therefore, when the sales tax authorities took proceedings against them, it was in respect of materials supplied by them under their contract dated December 19, 1953. When the appellants, in response to the notice issued by the third respondent, contested their liability to be taxed, it was on the ground that the supplies of materials under the contract were not sales. When the appellants next moved the court tinder Art. 226 for quashing the proceedings, they urged that the provisions of the Act, in so far as they purported to impose a tax on the materials supplied in the performance of the contract, as if they were sold, were ultra vires. If the respondents sought to tax the appellants on the footing that sales of materials were effected outside the contract, it was their duty to have put that case forward in answer to the petition. They did nothing of the kind. They did not file even a counter-statement. At the time of the argument, when faced with the decision of this Court in the case of The State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. (1), their entire case was that the agreement between the parties should be construed as involving a sale of materials, and that their value could be ascertained from the invoices, account books and the course of dealings between the parties. No contention was urged that there were sales of materials which fell outside the agreement between the appellants and the Owner. The learned Judges of the High Court in dismissing the petitions made it clear that the investigation before the sales (1) [1959] S.C.R. 379.

tax authorities must be as regards their liability to pay sales tax "upon proper construction of the contract." In this Court also, the respondents seek in their statement to maintain the liability of the appellants only on the basis of the contract, reliance being placed on cl. 15 already referred to and on s. 9 of the Sale of Goods Act. There is no claim that the appellants are liable on the basis of sales falling outside the agreement. It was stated before us for the appellants, and not contradicted by the respondents, that the Sindri Fertilisers and Chemicals (Private) Ltd., is a company controlled by the Government. If that is so, the respondents were at all times in possession of facts which would have shown whether the appellants entered into any transaction decors the agreement, and it is significant that at no stage have they alleged any such facts. We are satisfied that the proceedings have at all stages gone on the footing that the liability of the appellants arose under the contract and not otherwise. In that view, we must hold, following the decision in The State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. (1) that the proceedings taken by the respondents for imposing sales tax on the supplies of materials by the appellants, pursuant to the contract dated December 19, 1953, are illegal and must be quashed. In the result, the appeals are allowed and appropriate writs as prayed for by the appellants will be issued. The appellants are entitled to their costs throughout.

SHAH, J.-In my view these appeals must fail. The appellants claim that they are not liable to be taxed in respect of the transaction dated December 19, 1953, because it is not a sale within the meaning of the Bihar Sales Tax Act, 19 of 1947, but is a contract to assemble and install machinery, plants and accessories of a coke oven battery and other plants which under the principle of the

decision of this Court in The State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. (1) is not subject to sales-tax. The Act defines "sale" as meaning-omitting parts not material-any-transfer of property in goods for (1) [1959] S.C.R. 379.

cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract. "Contract" is defined as meaning any agreement for carrying out for cash or deferred payment or other valuable consideration, the construction, fitting out, improvement or repair of any building, road, bridge or other immovable property. The expression "goods" means all kinds of movable property other than actionable claims, stocks, shares or securities and includes all materials, articles and commodities whether or not to be used in the construction, fitting out, improvement or repair of immovable property. "Sale price" means the amount payable to a dealer as valuable consideration for-(1) the sale or supply of any goods, less any sum allowed as cash discount according to ordinary trade practice, but including any sum charged for anything done by the dealer in respect of the goods at the time of, or before, delivery thereof, other than the cost of freight or delivery or the cost of in- stallation when such cost is separately charged; or (ii) the carrying out of any contract, less such portions as may be prescribed , of such amount, representing the usual proportion of the cost of labour to the cost of materials used in carrying out such contract.

These definitions in so far as they seek to treat goods supplied or used in the execution of a works or construction contract, as sold and liable to sales-tax under the Act, must, on the decision of this Court in Gannon Dunkerley's case (1) be regarded as beyond the legislative competence of the State Legislature. In Gannon Dunkerley's case (1), this Court held that in a building contract, the contractor constructs the building according to the specifications contained in the agreement and in consideration therefor receives payment as provided therein, and in such an agreement, there is neither a contract to sell the materials used in the construction, nor does property pass therein as moveables, and accordingly in a building contract which is one, entire and indivisible, there is no sale of goods and it is not within the competence of the Provincial Legislature under Entry 48 in List 11 in (1) [1959] S.C.R. 379.

Sch. VII of the Government of India Act, 1935, to impose a tax on the supply of the materials used in such a contract treating it as a sale. Relying upon the decision of this court in Gannon Dunkerley's case (1), the appellants contend that the amount received by them under the contract dated December 19, 1953, is not liable to be assessed to sales- tax. But the question whether the contract is a pure works contract or a composite contract has never been investi- gated. Undoubtedly, the formal document evidencing the contract suggests, prima facie, that it is a works contract, but in assessing liability to tax, the taxing authority is not restricted merely to the letter of the document: he has to enquire into the true nature of the transaction on all the relevant materials and to ascertain whether it partakes of the nature of the transaction which the statute renders taxable. He is, in ascertaining the true nature of the contract, also entitled to consider how the contract"was performed. The Act entrusts power to ascertain the facts on which the liability to tax depends to the taxing authorities and in that behalf, the Act is exhaustive in scope and content. The appellants in approaching the High Court by petitions under Arts. 226 and 227 of the Constitution sought to eliminate the entire procedure and machinery set up by the Act for ascertaining facts on which the

liability to tax depends.

I strongly deprecate the practice of the taxpayer being permitted to invoke the jurisdiction of the High Court to issue high prerogative writs on certain assumed facts-facts the truth of which has never been subjected to scrutiny in the only manner in which the law provides they should be scrutinised. The power to assess the facts on which the decision as to the true nature of the taxable transaction depends by the statute lies solely with the taxing authorities: it does not lie with any other body or tri- bunal. Invoking the jurisdiction of the High Court to adjudicate upon the facts, directly or indirectly, on which the liability to tax depends, in my view, (1) [1959] S.C.R. 379.

amounts to inviting the High Court to exercise jurisdiction which it does not possess. This is however not to say that the jurisdiction of the High Court to issue a writ of prohibition restraining the levy of tax under a statute can never be entertained. If, for instance, the statute is beyond the legislative competence of the legislature or defies a constitutional restriction or infringes a fundamental right or the taxing authority arrogates to himself powers which he does not possess or attempts to levy tax more than once in respect of the same transaction when it is not permitted by the statute, or the taxing authority threatens to recover tax on an interpretation of a statutory provision imposing tax which is on the face of the statute erroneous, jurisdiction to issue writ of prohibition from the High Court may properly be invoked. But the High Court cannot be asked to ascertain disputed facts bearing upon the taxability of a transaction, because that jurisdiction is vested elsewhere.

The contract in question is principally a works contract. The preamble states that the appellants had agreed with the Sindri Fertilizers and Chemicals Ltd. to set up a complete coke oven battery ready for production as well as by- products plant on the site specified and to construct buildings, plants and machineries and deliver and supply accessories and articles and to render services fully described in the first schedule, subject to the guarantees to be fulfilled on the part of the appellants and terms and conditions mutually agreed and settled and mentioned in the second schedule for an all-inclusive price in accordance with the preliminary site plan. It is manifest from the preamble that there is a contract for the construction of a coke oven battery and by-products together with the plant, and also to deliver and supply accessories and articles. Undoubtedly, the price agreed to be paid is an "inclusive price" in respect of the entire contract, but that does not affect the nature of the contract to deliver and supply accessories and articles. The appellants have undertaken, subject to the terms and conditions mentioned in the contract, to execute and complete the works mentioned in the first schedule.

The contract in so far as it relates to the installation of plant and construction of building was a works contract and notwithstanding the definition of "sale" and "contract" in the Act, was not taxable but the contract contemplates delivery and supply by the appellant of accessories and articles. Even if this delivery and supply of accessories and articles is incidental to the works contract, it cannot be assumed without investigation that it was not a part of a transaction of sale liable to tax. The appellants asked the High Court to assume that the contract in question was a pure works contract, but the High Court declined to make that assumption. Ramaswami, C. J., in dealing with that plea observed:

> "I wish, however to state that I do not express any concluded opinion on the question whether there is sale of materials liable to be taxed in the present case. The facts have not been fully investigated by the sales tax authorities and the petitioners have not furnished all the account books and documents and other relevant information for the purpose of deciding this question. It would be open to the sales tax authorities to investigate the facts and upon proper construction of the contract come to the finding whether and if so to what extent, the petitioners are liable to pay sales tax,"

In my view, the learned Chief Justice was right in so approaching the question. The sales tax authorities have made no assessment; they merely issued a notice purporting to do so under s. 13(5) of the Act and required the appellants to produce their books of account and records for ascertaining whether the transaction or any part thereof was in the nature of sale of goods. The sales tax authorities had jurisdiction to do so and by merely looking at the terms of the written contract and without any investigation as to the true nature of the transaction the High Court could not decide whether the contract performed was a pure works or construction contract or was a composite contract. It was urged that in the petition filed by the appellants before the High Court, an affidavit in rejoinder challenging the correctness of the averment made in the petition that it was a pure works contract was not filed by the taxing authorities and therefore the High Court was bound to decide the dispute on the footing set up by the appellants. But the taxing authorities could not be expected without investigation to assert a state of facts which was not and could not be within their knowledge, and their statutory authority could not, because of their failure to so assert, be nullified.

As I have already observed, the investigation of facts on the question of the liability to pay tax has to be made by the taxing authorities in whom that jurisdiction is vested. Before the facts on which the liability to tax depends are ascertained, the High Court could not be asked to assume that the transaction was in the nature of a pure works contract and to decide the question as to the liability of the appellants on that footing. There is no ground for assuming that the taxing authorities will not give effect to the decision of this court in Gannon Dunkerley's case (1) after the true nature of the transaction is ascertained. In my view, the High Court was right in declining to issue the writ prayed for.

By COURT: In accordance with the opinion of the majority, the appeals are allowed and it is directed that appropriate writs as prayed be issued. The appellants are also entitled to their costs throughout.

Appeals allowed.

(3) [1959] S.C.R. 379.