
(2001) 03 OHC CK 0057

In the Orissa High Court

Case No : Original Jurisdiction Case No's. 9724, 10613, 10617, 10618, 10669, 10686, 10693, 10694, 10695, 10787, 10788, 10792, 10801, 10802, 10837, 10828, 10829, 10830, 10831, 10832, 10874, 10875, 10876, 10877, 10944, 10945, 11115, 11121 and 11122 of 2000

Ashok Biri and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 28-03-2001

Acts Referred:

Central Sales Tax Act, 1956 — Section 3
Orissa Kendu Leaves (Control of Trade) Act, 1961 — Section 3
Orissa Kendu Leaves (Control of Trade) Rules, 1962 — Rule 5B, 6

Citation : (2001) 1 OLR 586

Hon'ble Judges : R.K. Patra, J;P.K. Misra, J

Bench : Division Bench

Advocate : G. Rath, Pradeep Mohanty, B.P. Ray, M.M. Dhal, S. Pujari, P.K. Patnaik, B. Sahoo, J.A. Reddy, R.P. Kar, A.N. Ray, N. Paikray, B.P. Mohanty and M.K. Badu, for the Appellant; A.G.A. for O.P. No. 1 S.D. Das, Senior Standing Counsel (C.T.) for O.P. No. 2 B. Panda and D.K. Das for O.P.No. 3, for the Respondent

Judgement

R.K. Patra, J.—Is the purchase of kendu leaves by the petitioners an inter-State trade or intra-State trade ? This is the limited question that arises for consideration in this batch of writ petitions. As common issue is involved in all these cases, they were heard together and are disposed of by this judgment. For the sake of convenience, we have referred to the pleadings and documents of O.J.C. No. 9724 of 2000.

2. The case of the petitioners briefly stated is as following :

Petitioner No. 2 is one of the shareholders of petitioner No.1 which is a private limited company having its registered head office at Calcutta. It carries on business in tobacco and kendu leaves. It prepares bidi with kendu leaves in the name and style of "Ashok Bidi" at its factory situated in the State of West

Bengal. The Orissa Forest Development Corporation Limited, opposite party No. 3 (hereinafter referred to as "O.F.D.C.") is a Government of Orissa undertaking. Trade in kendu leaves in the State of Orissa being the State's monopoly, it is being transacted by the O.F.D.C. which sells processed and phal kendu/tendu leaves by way of tender and auction every year. The petitioner No.1 is a registered dealer in West Bengal both under the West Bengal Sales Tax, Act, 1994 and Central Sales Tax Act, 1956. As usual O.F.D.C. issued tender call notice for sale of processed and phal kendu (tendu) leaves for the year 2000-2001 inviting sealed tenders from purchasers duly registered with it. The petitioner No.1 being a registered purchaser with O.F.D.C. submitted its tender which was duly accepted. As required, it has entered into an agreement with O.F.D.C. After the sale of kendu leaves and payment of the sale value, lifting orders were issued by the O.F.D.C. to its respective Divisional Managers permitting the petitioner No.1 to lift the goods. Thereafter, the concerned Divisional Forest Officer issued transport permit in the prescribed form on the basis of which the petitioners transported kendu leaves to its place of business in West Bengal. According to the petitioners. the sale/purchase of kendu leaves shall be deemed to have taken place in course of inter-State trade because the sale/purchase had occasioned the movement of kendu leaves from the State of Orissa to the State of West Bengal and as such, it is exigible to Central Sales Tax under the Central Sales Tax Act, 1956 and not to local sales tax. They have accordingly prayed for a declaration that levy and collection of sales tax under the Orissa Sales Tax, 1947 are unauthorised and without jurisdiction and the excess amount collected from them under the guise of Orissa Sales Tax should be refunded.

3. The Commissioner of Commercial Taxes has filed counter affidavit justifying the levy of the Orissa Sales Tax. The O.F.D.C. has also filed a separate counter affidavit in support of its collection of the Orissa Sales Tax.

4. Shri G. Rath, learned Senior Counsel for the petitioners by referring to certain documents (which will be dealt with hereinafter) and relying on the decision of the Supreme Court in Commissioner of Sales Taxes, U.P. v. Bakhtawar Lal Kailash Chand Arhti 1992 (87) STC 196 and decisions of the Patna High Court in D.R. Garg and Company v. The State of Bihar 1986 (63) S.T.C. 183 and Indian Explosives Limited v. State of Bihar 1993 (89) S.T.C. 417 contended that the transaction in question is out and out an inter-State trade. Shri S. D. Das, learned Standing Counsel for the Department on the other hand submitted that the contract envisaged in the tender call notice did not provide for movement of goods from one State to another. The seller viz.. the O.F.D.C. is no way concerned with that the petitioners do with respect of the kendu leaves purchased by them and the movement of kendu leaves to West Bengal has not link with the sale itself. According to him, the sale did not occasion in the movement of goods so as to constitute inter-State trade and therefore, it has been rightly assessed with the local sales tax. In support of this, he placed reliance on the decision of the Supreme Court in Commissioner of Sales Tax, U.P. v. Suresh Chand Jain 1988 (70) S.T.C. 45 and of this Court in Similipahar Forest

Development Corporation Ltd: v. State of Orissa 1995 (96) S.T.C. 627(Ori) and State of Orissa Vs. Vijayalaxmi Timber Depot,

5. Before proceeding to consider the rival submissions, a short preface is necessary to be made here. Kendu tree is a wild growth. Its leaf is used mainly for manufacture of bidi. To regulate the trade in kendu leaves, the State of Orissa had been adopting different executive and legislative measures. The State legislature enacted the Orissa Kendu Leaves (Control of Trade) Act, 1961 under which the State has assumed monopoly of trade in kendu leaves. In some of the provisions of the said Act and the Rules framed thereunder i.e. the Orissa Kendu Leaves (Control of Trade) Rules, 1962 were referred to by the counsel for the parties in course of hearing, we may also indicate the same at this stage. Under Sub-section (1) of Section 3 of the said Act, no person other than (a) the government; (b) an officer of the government authorised in that behalf: or (c) an agent in respect of the unit in which the leaves have grown; shall purchase or transport kendu leaves. Sub-section (2) of Section 3 contains two Clause (a) and (b). Since we are not concerned with Clause (a), we need not refer to it. Clause (b) [i.e. Section 3 (2)(b)] lays down that notwithstanding anything contained in Sub-section (1), leaves purchased from government or any officer or agent specified in the said sub-section by any person for manufacture of bidis within the State or by any person for sale outside the State may be transported by such person outside the unit under a permit to be issued in that behalf by such authority and in such manner as may be prescribed and the permit so issued shall be subject to such conditions as may be prescribed.

Now coming to the rules, it may be seen that rule 5-B deals with disposal of kendu leaves. It provides that kendu leaves shall ordinarily be sold by entering into a contract in advance for which tender shall be invited. Under Sub-rule (10) of Rule 5-B, a person or party who is selected as purchaser for the particular unit shall purchase the entire quantity of kendu leaves procured or likely to be procured from such unit or such lesser quantity out of it as may be offered to him. Under Sub-rule (11), the purchaser is required to execute an agreement in the prescribed Form "H" within 15 days from the date of receipt of an order relating to his selection as purchaser, failing which, the said order of selection shall be liable to be cancelled. Sub-rule (13) provides that purchaser shall take delivery of kendu leaves from such depots or stores as intimated by the Divisional Forest Officer during the currency of the purchaser's agreement. Under Sub- rule (14) if the purchaser during the currency of the agreement establishes a bidi factory in order to provide employment to the residents of the State, he shall be entitled to rebate of two per cent of the annual purchase price paid by him. Rule 6 deals with grant of transport permit. Sub-rule (1) of Rule 6 lays down that an application for issue of permit u/s 3(2)(b) in the prescribed Form "C" has to be made to the Divisional Forest Officer. Sub-rule (2) states that the permit shall be in the prescribed Form "D" Rule 9 deals with grant of certificate of sale. It laid down that the government or their officer or agent while selling kendu leaves to any such person shall grant to such person a certificate of

sale in Form "F".

6. Central issue :

Sec. 3 (a) of the Central Sales Tax Act, 1956 so far relevant. reads as follows :

" A sale or purchase of goods shall be deemed to take place in the course of inter- State trade or commerce if the sale or purchase -

(a) occasions the movement of goods from one State to another; or"

It is now fairly settled by series of decisions of the Supreme Court that conditions essential for a sale in the course of inter-State trade or commerce within the meaning of Section 3 (a) are :

(i) there must be a sale of goods ;or

(ii) such sale must occasion the movement of goods from one State to another.

The word "occasions" in Section 3 (a) is used as a verb and means to cause or to be the immediate cause. In other words, the movement of goods from one State to another must be the necessary incidence - necessary consequences - of sale or purchase. The case of cause or effect, the cause being the sale/purchase and the effect being the movement of goods to another State. What is decisive is whether the sale is one which occasions the movement of goods from one State to another. The inter- state movement must be the result of a covenant expressed or implied in the contract of sale or the incident of the contract. It is not necessary that the contract of sale must itself provides for and cause the movement of goods. It is enough if the movement was in pursuance of or incidental to the contract of sale. The question whether it is an inter-State sale or intra-State sale does not depend upon the circumstances as to in which State the property in goods passes. It may pass in either State and yet the sale can be an inter-State sale. Where the transaction between the parties constitute ,a sale or purchase in course of inter-State trade or commerce, the Court should have regard to the entire course of dealing between the parties (See *Kelvinator of India Ltd. v. State of Haryana* (1973) 32 S.T.C. 629(P&h), *Oil India Ltd. v. Superintendent of Taxes* (1975) 35 S.T.C. 445, *Union of India v. K. C. Khosla* (1979) 43 S.T.C. 457 and *Commissioner of Sales Tax, U.P. v. Bakhtawar Lal Kailash Chand Arhti* (1992) 87 S.T.C. 196).

7. At this stage, let us examine the decisions cited on behalf of the petitioners and the department in support of their respective stand. Learned counsel for the petitioners relied upon the following to press his point that the transactions in question were inter-State sale :

(i) *D. N. Garg and Company v. State of Bihar* (1986)63 S.T.C. 183.

It is a case from Patna High Court. The question came up for examination was whether the purchases of Khair billets and/or forest products from the forest department in the State of Bihar constituted inter-State sale ? The writ

petitioners purchased Khair billets and Khair woods in the State of Bihar for consumption in their factory in Uttar Pradesh at Ijatnagar. The contract of sale provided that buyers should pay sales tax or any other tax as applicable on the Khair billets in the State of Bihar and the delivered produce would be transported duly covered by permit issued by Corporation and routed through the check posts prescribed by the Corporation. The Court found that there was agreement and as an incident of the contract the purchasers were not entitled to any personal volition with respect to the goods. The physical delivery of goods with the right of disposal occurred in the State outside Bihar pursuant to the purchase made in the State of Bihar. In the circumstances, it was held to be sale in course of inter-State trade."

(ii) Commissioner of Sales Tax, U.P. Bakhtawar Lal Kailash Chand Arhti (1992) 87 STC 196 :

The question that arose before the Supreme Court was whether the goods purchased by the principals after their movement to outside the State would constitute inter-State sale. The Court found that the purchase of goods and their despatch were part of the same transaction and the movement of goods from one State to another was occasioned by and was the result or incident of the purchases.

(iii) Indian Explosives Limited v. State of Bihar (1993) 89 S.T.C. 417.

In this case, the dealer entered into contract for sale of explosives through its head office at Calcutta with customers in West Bengal. The explosives were supplied from the dealer's factory at Gomia in the State of Bihar. The question fell for consideration before the Patna High Court was whether the sales were inter-State sales. The Court held that it is wholly immaterial whether there was any contractual obligation on the part of the seller to move the goods from one State to another. The decisive factor was the movement of goods from the State of Bihar to the State of West Bengal pursuant to and as an incident of the contract of sale. It was accordingly held to be inter-State sales.

Learned counsel for the department by referring to the following cases submitted that the transaction of kendu leaves was nothing but pure and simple intra-State sale.

(i) Commissioner of Sales Tax, U.P. Suresh Chand Jain (1988) 70 S.T.C. 45.

It was a case decided by the Supreme Court in which the assessee carried on the business in tendu leaves. His case was that the entire sales of tendu leaves were effected in Uttar Pradesh. The Sales Tax Tribunal held that he carried on business in tendu leaves for the year 1976-77 and was assessed on inter-State sale of Rs. 21,050/- whereas the assessee claimed that there was no inter-State sale. According to him, out of the total sales of Rs. 21,050/- tendu leaves worth of Rs. 10,000/- were sold to one Gulam Mohammad of Kanpur and the balance worth of Rs. 11,050/- were sold in cash, at Lalitpur. Before the Sales Tax Tribunal, the

assessee filed an affidavit stating that he had not effected any sale of tendu leaves during the course of inter-State trade and that he had never applied to the Forest Department for issue of timber permit and no such form was ever issued to him and the tendu leaves in dispute were not booked by him through railways or trucks for places outside Uttar Pradesh. The Tribunal accepted those facts and rejected the contention of the department. In the reference made at the instance of the Revenue, the High Court found that the goods were moved out of Uttar Pradesh in pursuance of agreement for sale entered into between the assessee and the customers. The existence of transit form was taken note of but it was not decisive. As the goods moved out of the State in pursuance of the contract entered into between the seller and purchaser, the High Court held the transaction amounting to Rs. 21,050/- to be inter-State sale. The Commissioner of Sales Tax filed an appeal against the decision of the High Court. The Supreme Court concurred with the finding recorded by the High Court and rejected the appeal.

It may be seen that as a matter of fact, it was found by the Supreme Court that the goods were moved out of Uttar Pradesh in pursuance of an agreement of sale entered into between the assessee and the customers.

(ii) Similipahar Forest Development Corporation Limited v. State of Orissa (1995) 96 STC 627.

It was a case decided by this Court. The Similipahar Forest Development Corporation (in brief "Corporation") was carrying on the business; in timber, firewood and other minor forest produce. During the assessment year 1981 -82, it sold timber in heaps and stacks by public auction. There was some purchasers who were not the residents of the State of Orissa and, therefore, the commodities moved out of Orissa either by rail or by truck. The Corporation treated those sales to be inter-State sales and accordingly paid tax under the C.S.T. Act. When the matter came to the Sales Tax Tribunal in second appeal, by majority it came to hold that the sale to the non-resident buyers was inter-State sale. The minority however held to the contrary. This Court found that from the terms and conditions of the contract it is difficult to hold that the movement of goods had occasioned from one State to other as a result of any covenant and the contract of sale and even as an incidence of the contract. In absence of any "conceivable link" between the sale and the movement of goods, this Court concurred with the finding reached by the minority and held that the transactions in question were not inter-State sale but intra-State sale. It was therefore a case decided on the finding arrived at by the fact-finding Tribunal.

(iii) State of Orissa Vs. Vijayalaxmi Timber Depot,

It is a case decided by this very Bench, The assessee at Berhainpur in the State of Orissa was carrying on business in timber and logs. It sold some logs to purchasers who were outside the State. The purchasers after purchasing the goods transported the same on their own to respective destinations outside the

State of Orissa. The assessee claimed the sales to be inter-State sale. But the assessing officer rejected the plea of the assessee and held the sale to be inter-State sale. The assessment was annulled in appeal filed by the assessee which was confirmed in second appeal by the Sales Tax Tribunal. Both the first appellate authority and the Sales Tax Tribunal held the transaction to be intra-State sale because there was nothing on record to indicate existence of agreement either express or implied basing on which the goods moved from Orissa to outside the State and merely because the purchasers were from outside State, the transaction cannot be regarded as inter-State sale.

It may be seen that in that case there was total absence of any agreement either express or implied between the seller and the purchasers and the sale/purchase did not occasion movement of goods from State of Orissa to outside the State. The basic ingredients to attract Section 3(a) of the Act were found absent. Therefore, the sale was held to be intra- State sale and not inter-State.

8. Keeping the aforesaid legal position in view, let us examine the facts and circumstances of the case at hand. There is no dispute that the petitioner No. 1 is a purchaser duly registered with the O.F.D.C. It duly submitted its tender pursuant to the tender sale notice (Annexure-1). Its bid was accepted pursuant to which agreement was executed between the petitioner No. 1 and the Managing Director of the O.F.D.C. (Annexure-3). The Divisional Manager, O.F.D.C, Bolangir Kendu Leaf Division, in his letter dated 13.11.2000 wrote to the Sub-Divisional Manager. Padmapur Sub-Division requesting him to give delivery of the stock to the petitioner No. 1 on receipt of the transport permit from the Divisional Forest Officer. Kendu Leaf, Padmapur. In the copy which was forwarded to the Divisional Forest Officer, Kendu Leaf, Padmapur Division, the Divisional Manager requested him to issue necessary transport permit in favour of the petitioner No. 1. The challan (Annexure-1) indicates ,that the goods were to travel from Mithapali Chief Godown to Aurangabad (West Bengal). The transport permit in the prescribed form issued by the Divisional Forest Officer. Padmapur Kendu Leaf Division at Annexure-15 reads as follows :

"M/s. Ashok Biri Factory, Calcutta is permitted to transport 100 bags of Kendu Leaves with a total weight 60.00 quintals from Mithapali to Aurangabad (W.B.) by the following routes, means of transport and during the following period.

Validity 15 days Permit No. 60/2000. The permit shall be presented for check and examination at the following : Mithapali C.G. to Aurangabad (W.B.) via-Jamsola and to be checked at Padmapur and any other check gate coming on route by road."

9. From the facts discussed above and the averments made in the writ petition; which have not been controverted by the opposite parties, it is evident that kendu leaves can only be delivered after submission of necessary transport permit and the sale can only be completed after delivery of the goods, that is to say, after the goods have been directed to move to definite places, as mentioned

in the transport permit. The transport permit clearly indicates the destination and also checking and examination at Check Gates in between the point of despatch and destination so as to avoid diversion of the goods, i.e. kendu leaves. In this case, the petitioner had to move the goods to West Bengal and. as such, transport permit had been issued for removal of the goods to Aurangabad in West Bengal which was a condition precedent for delivery of the goods to it. Having regard to the facts and circumstances mentioned above and the entire gamut of dealings between the parties, we are inclined to hold that (i) the O.F.D.C. sold kendu leaves to the petitioners and (ii) the sale occasioned the movement of goods from the State of Orissa to the State of West Bengal as a necessary incident or necessary consequence. As the pre-conditions essential for a sale in course of inter-State trade have been satisfied, the transaction has to be held an inter-State sale within the meaning of Section 3(a) of the Act.

10. For the reasons aforesaid, the petitioners are entitled to get refund of the excess amount collected from them under the Orissa Sales Tax Act, 1947. The opposite parties are hereby directed to refund it to the petitioners within two months of receipt of writ from this Court. If the excess amount is not paid within the time granted, the petitioners would be entitled to receive interest at the rate of 16 per cent per annum on the differential amount from the date of default.

The writ petitions are allowed. No costs.

P.K. Misra, J.

11. I agree.