(2000) 09 OHC CK 0019

In the Orissa High Court

Case No : S.J.C. No. 157 of 1996

Asiatic Gases Ltd.	APPELLANT
Vs	
State of Orissa and Others	RESPONDENT

Date of Decision : 21-09-2000

Acts Referred:
Orissa Sales Tax Act, 1947 — Section 2

Citation : (2001) 121 STC 405

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

Bench : Division Bench

Advocate : J.B. Sahoo, B.K. Mishra, S.K. Mohanty and S.K. Sahu, for the Appellant; L. Pangari, Senior Standing Counsel (C.T.), for the Respondent

Final Decision : Allowed

Judgement

P.K. Misra, J.—Being aggrieved by the order of the Orissa Sales Tax Tribunal (for short, "the Tribunal"), petitioner had filed a reference application and the same having been rejected, it has moved this Court for directing the Tribunal to state a case and this Court has directed the Tribunal to state a case on the following question of law ;

"Whether, in the facts and circumstances of the case, the amount received by the petitioner on account of delay in return of cylinders by its purchasers can be held to be taxable u/s 2(g)(iv) of the Orissa Sales Tax Act, 1947 ?".

2. Petitioner is a registered dealer and carries on business in manufacture and sale of medical oxygen and industrial gases amongst other things. Industrial gases and medical oxygen are sold by filling in cylinders. During the year 1986-87 petitioner has collected Rs. 42,496.50 from its customers towards charges for over-detaining cylinders. It has claimed the same consideration as not a part of sale price on the ground that the amount received for over-detention of cylinders does not form a part of sale price. The assessing officer levied sales tax on the ground that the same are nothing but consideration for

transfer of right to use cylinders by manufacturer-dealer to its customers and accordingly taxed the same at 8 per cent. Being aggrieved by the aforesaid order, petitioner preferred an appeal before the Assistant Commissioner. It was urged before him that the amount which has been received for over-detention of cylinders is nothing but penalty and does not fall within the meaning of Section 2(g)(iv) of the Orissa Sales Tax Act, 1947 (for short "the Act") so as to attract levy of tax. The argument of the petitioner did not find favour with the Assistant Commissioner who confirmed the order of the assessing officer. The petitioner thereafter preferred second appeal before the Tribunal. The Tribunal held the same as "rental of cylinders" for transferring right to use for cylinders by the dealer to the customers and held that consideration received towards sale enumerated in Section 2(g)(iv) of the Act, which was rightly taxed.

3. Before the forums below, petitioner filed the contract entered into by the manufacturer with the customers. Its sample copy was produced before us by the counsel in course of hearing of the reference application. In Clause 3 of the contract, it is provided that manufacturers shall deliver full cylinders, that means, cylinders full of gases and collect empty cylinder from the buyers for which the buyers agree to pay delivery charges for the cylinders supplied by the manufacturers. Clause 4 of the said contract further stipulates that the buyers will deposit and always keep deposited with the manufacturers a security deposit for returnable cylinders which would be refunded to the buyers on the termination/determination of the contract. The said clause further provides that this return of security deposit is subject to the condition that the cylinders loaned to the buyers by manufacturers are returned in good condition. Clause 5 of the said contract provides that the cylinders are the property of the manufacturers and are given on loan on free charges for a period of 14 days in respect of oxygen cylinders as well as other cylinders from the date of delivery or despatch and if beyond the said period the buyers detain the cylinders they will be liable to pay Rs. 0.50 paisa per day in respect of each of the cylinders so over-detained beyond the free loan period for first 14 days of over-detention and Rs. 2 per cylinder thereafter. The said clause further stipulates that the cylinders however, shall not be detained for more than four weeks from the date of issue and should be received back at the manufacturers'' factory/depot whether full or empty within the said period and no credit shall however, be given for any gas returned unused in cylinders. In case cylinders are not returned within such stipulated period of four weeks, cylinders shall be considered by manufacturer to be lost or destroyed and at the option of the dealer-buyers will be liable to pay manufacturer compensation for value of such cylinders at the rate specified in the contract, apart from consideration which is termed as rental specified above till the date of payment of compensation value. Clause 6 of the contract provides that irrespective of the aforesaid agreement if petitioner at any time is of the opinion that the cylinders entrusted to the buyers are in danger or being lost to the petitioner by any act of the buyers, petitioner will be entitled to get all steps, civil or criminal for the purpose of taking possession thereof and remove the

same from the custody of the buyers or any person holding the same under the buyers. Clause 7 of the contract provides that cylinders of petitioner supplied to the buyers shall be at the sole risk of the buyers until they are returned to the manufacturer and the buyer agrees to indemnify the petitioner against any loss or destruction of the cylinders not returned within the specified period or damage or lost to the cylinders or any part thereof.

4. Petitioner has filed one sample copy of the bill charged for over-detention of the cylinders which indicated that the same was collected as detention charges. Prom a reading of the contract, the following aspects emerge.

(i) possession of cylinders full of gases was handed over to the buyers as a loan for a period of 14 days without charging any additional charges ;

(ii) from the date cylinders are handed over to the buyers the same remain in the custody of the buyers ;

(iii) for first 14 days petitioner agrees that such possession and custody of cylinders shall remain with the buyers ; and

(iv) thereafter if cylinders are detained beyond free loan period, buyers have to pay certain amount indicated in the contract.

We are concerned here with the last aspect--whether such cylinders which have been over-detained by the buyers can still deemed to be in possession and custody of the buyers and secondly, whether the amounts paid for such over-detention are consideration for transfer of right to use of the cylinders by the manufacturer to the buyers for such over-detained period.

5. After the Constitution Amendment brought in Article 466 of the Constitution of India by inserting Clause (29A), certain transactions are held to be deemed sales and accordingly, provisions of the Act have been amended. Section 2(g) which defines "sales" was substituted with effect from April 7, 1984 by inserting the following :

"2. Definitions.-- In this Act, unless there is anything repugnant in the subject or context--

....

(g) ''sale'' means with all its grammatical variations and cognate expression, any transfer of property in goods for cash or deferred payment or other valuable consideration and includes,--

....

A reading of this provision will indicate that to bring in transaction within mischief of the aforesaid provision requires transfer by the seller of right to use of any goods to the buyer. There is no dispute that cylinder comes within the meaning of goods. But the contract has to be interpreted -whether there is a transfer of right to use such cylinder after the grace period of 14 days. In case on interpretation of the contract it is held that there is no transfer of right to use, then consideration received for over-detained period cannot be included in the sale price. The word "use" in the contract is penalty for over-detention. The, contract also used detention charges and rental with regard to sale, the same consideration received for over-detention period. But the nomenclature of the word in the contract will have no effect. We have to really find out whether such consideration is penalty, or rental for over-detaining cylinders. Though Clause 5 mentions that cylinders are the property of the manufacturer, Clause 6 mentions about possession and custody of the cylinders by the buyers. So there is no doubt that till cylinders are returned the same are in possession and custody of the buyers and the manufacturers during that period are deprived of possession and custody of the cylinders given on rent to the buyers. This possession and custody of the buyers till 14 days is permissible but beyond 14 days is without authority for which petitioner as provided for charging certain amount for early return of the cylinders. In other words, after 14 days there is no permission for keeping possession and custody of the cylinders from the petitioner to the buyers. Therefore, consideration received is by way of penalty. Let us take the case of a goods wagon being sent to a consignee. Freight was charged for transportation of the said goods in wagon but if goods are not unloaded from the wagon within a stipulated period, demurrage is required to be paid. Can in this case the demurrage for over-detention of the wagon can be termed as transfer of right to use ? The answer is obviously in the negative as there is no permission for using the wagon beyond the free period. Therefore, in this case over-detention beyond 14 days is without permission of the petitioner and the buyers are required to pay certain amount which can only be termed as penalty till possession and custody of the cylinders are handed over by them to the petitioner. The term "transfer of right to use" denotes an agreement between two parties. Here, there is an agreement of transfer of right to use of the cylinders for first 14 days only. But beyond 14 days detention is without authority or in total disregard of the terms of the contract and as such, there is no transfer of right to use of the cylinders beyond the free loan period of 14 days.

6. Having come to this conclusion, we will now deal with certain decisions rendered on this point by different High Courts. In Bank of India Vs. Commercial Tax Officer and Others, the question for consideration was whether rental received from the locker is taxable on the ground that there was transfer of right to use the lockers. It was held that consideration received is not for transfer of right to use the lockers as the same are in custody and possession of the bank. In State Bank of India and Others Vs. State of Andhra Pradesh, in paragraph 10, at page 223, it was held as follows :

"10......He, however, has an exclusive right of user thereof and access thereto during the period of agreement. The hirer has no right to assign or sublet the locker ; nor permit it to be used to any purpose other than the deposit of documents, jewellery or other valuables. The hirer is forbidden from using the locker for the deposit of any property of an explosive or destructive character."

After analysing the contract, the Andhra Pradesh High Court disallowed the claim as such amount received as rental cannot be held to be consideration for transfer of right to use the locker. In paragraph 14, at page 227, it was held as follows :

"14........the law envisaged the levy of tax in respect of sums paid for securing the right to use the goods, of which possession or delivery has been taken by him. It does not apply to cases where the person concerned is merely a licensee without possession of the goods."

In Rashtriya Ispat Nigam Ltd. Vs. Commercial Tax Officer, Company Circle, Visakhapatnam, the question was whether rentals were received for giving on hire machineries the same are not sale transaction and for this purpose, at page 188, their Lordships of the Andhra Pradesh High Court held as follows :

"......From a close reading of all the clauses in the agreement, it appears to us that the contractor is entitled to make use of the machinery for purposes of execution of the work of the petitioner and there is no transfer of right to use as such in favour of the contractor, We have reached this conclusion because the effective control of the machinery even while the machinery is in the use of the contractor is that of the petitioner-company. The contractor is not free to make use of the same for other works or move it out during the period the machinery is in his use. The condition that he will be responsible for the custody of the machinery while the machinery is on the site does not militate against the petitioners'' possession and control of the machinery. For these reasons, we are of the opinion that the transaction does not involve transfer of the right to use the machinery in favour of the contractor.....".

This Court in Krushna Chandra Behera v. State of Orissa [1991] 83 STC 325 had the occasion to interpret the scope of term "transfer of right to use" when the banner scheme was introduced and the buses were running under the said scheme. This Court has held that such amount received by the bus owners would amount to consideration for transfer of right to use. In paragraph 4, at page 327, it was held as follows :

"4. ...... There is a conceptual distinction between a contract of sale as defined in Section 4 of the Sale of Goods Act and a transfer of the right to use goods without being accompanied by transfer of the ownership in the goods in favour of the hirer. Unlike sale, in a case of transfer of any right to use goods, the proprietary right in the goods remains with the transferor. The owner of a property has a bundle of rights in it, namely, right to possess, right to use and enjoy, right to usufruct, right to consume, to destroy, to alienate or transfer, etc......".

At page 328 in para 8 it was observed as follows :

"8. In so far as the question of transfer is concerned, it has a double aspect. It is the acquisition of a right by the transferee and loss of it by the transferor, as stated at page 332 of Salmond''s Jurisprudence, 12th Edition."

In paragraphs 11 and 13 at pages 329 and 330 it was further held as follows :

"11. We have, therefore, to see in the present case whether possession of the vehicle had been delivered to the hirer. For this purpose, effective control or general control of the vehicle by the hirer would be enough in view of what has been stated in this regard in Salmond''s Jurisprudence.

13. The above would show that for all practical purposes, the effective or general control of the vehicle under the agreement rests with the Corporation. Though the owner has to provide a driver and has to carry out necessary repairs, we do not think if it can be held that the effective control of the vehicle remains with the owner after the agreement is executed. According to us, there is acquisition of possession of the bus, as distinguished from its custody, by the Corporation, and loss of possession so far as the owner is concerned. There is thus transfer of possession of the bus as both the aspects mentioned by Salmond in this regard, which have been noted above, are satisfied and consequently there is transfer of the right to use the same."

In Industrial Oxygen Company Pvt. Ltd. Vs. State of Andhra Pradesh, in a similar situation at page 542 it was held as follows :

".....The cylinders were goods and they were actually being handed over to the customers by the petitioner, and the customers were having physical possession of the cylinders."

At page 543 it was further held as follows :

".......In the present case, however, the cylinders did not continue to be in the possession of the petitioner herein ; possession of the cylinders was delivered to the customers. These facts satisfy the requirement of Section 5-E."

Accordingly, it was held that consideration received for such over-detention of the cylinders amounts to transfer of right to use.

In Harbans Lal v. State of Haryana [1993] 88 STC 357 the High Court of Punjab and Haryana had the occasion to interpret the similar transaction as in this case and at pages 368 and 369 it was held as follows :

"From the perusal of the case law, referred to above, it can safely be deduced that delivery of possession of the goods to the transferee by the transferor is one of the essential ingredients where the transferee is put in effective and general control of the goods as distinguished from a mere custody or a licence to use the same. Whether there is a transfer of the right to use the goods or not is essentially a question of fact which has to be determined in each case having regard to the terms of the contract under which there is said to be transfer of the right to use goods......".

At page 373 it was further held as follows :

"......That contract further stipulated a condition that in case cylinders are not returned within a specified period then charge of Re. 1 per day per cylinder would be made which would be in continuation of sale and any money thus charged shall be included within the ''turnover'' of the petitioner because sale of gas with cylinder as container and the retention of the cylinder beyond a particular period shall fall within the definition of ''goods''. As it involved the transfer of the right to use the goods, any charges made thereupon shall be included in the total ''turnover'' of the petitioner."

7. A reading of the aforesaid decisions clearly indicates that the owner of a property has a bundle of rights and even remaining the owner of property a person may create charge in property. In a transaction of sale simpliciter all rights of owner are transferred to the purchaser. But in a lease or a transfer of right to use, transfer to enjoy such property is transferred.

In Salmond on Jurisprudence.--Twelfth Edition, at page 424 it has been opined that a lease of land and a bailment of chattels are transactions of essentially the same nature. "Bailment", "bailor" and "bailee" has been mentioned in Section 148 of the Contract Act.

"148. ''Bailment'', ''bailor'' and ''bailee'' defined.--A ''bailment'' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the ''bailor''. The person to whom they are delivered is called the ''bailee''.

Thus in bailment there is transfer of goods for a particular period and thereafter the goods have to be returned to the person delivering them. One of the categories of bailment is hire of chattel. In Halsbury''s Laws of England (Fourth Edition), at paragraph 1551 it is defined as follows :

''It is a contract by which the hirer obtains the right to use the chattel hired in return for the payment to the owner of the price of the hiring''."

In Salmond''s Jurisprudence (Twelfth Edition, at pages 332 and 333), in Corpus Juris Secundum "transfer" is defined :

"The common use of the word ''transfer'' is to denote the passing of title in property, or an interest therein, from one person to another, and in this sense the term means that the owner of property delivers it to another person with the intent of passing the rights which he had in it to the latter."

In Corpus Juris Secundum, Volume 87, page 892, it has been held as follows :

"The essence of transfer is passage of control over the economic benefits of property which results in terminating rights and other relations in one entity and creating them in another. While construing the word ''transfer'' due regard must be had to the thing to be transferred. A transfer of the right to use the goods necessarily involves delivery of possession by the transferor to the transferee.

Delivery of possession of a thing must be distinguished from its custody. It is not uncommon to find the transferee of goods in possession while transferor is having custody. When a taxi cab is hired under ''rent-a-car'' scheme, and a cab is provided, usually driver accompanies the cab ; there the driver will have the custody of the car though the hirer will have the possession and effective control of the cab. This may be contrasted with the case when a taxi car is hired for going from one place to another. There the driver will have both the custody as well as the possession ; what is provided is service on hire. In the former case, there was effective control of the hirer (transferee) on the cab whereas in the latter case it is lacking. We may have many examples to indicate this difference."

8. The words "detain" and "detainer" as defined in Webster''s Encyclopaedic Unabridged Dictionary means :

"Detain"--(1) to keep from proceeding, keep waiting ; delay ;

(2) to keep under restraint or in custody ;

(3) to keep back or withhold as from a person.

"Detainer"--(1) the wrongful detaining or withholding or what belongs to another ;

(2) a writ for the further detention of the person already in custody ;

9. Applying this test to the facts of the present case, it would follow that admittedly the buyer is entitled to use goods beyond free loan period on payment of detention charges for further period of two weeks. So during this period the buyer has a right to use goods without being a transfer of right to use by the petitioner. Therefore, the Andhra Pradesh High Court in Industrial Oxygen Company Pvt. Ltd.''s case [1992] 86 STC 539 and the Punjab and Haryana High Court in Harbans Lal''s case 19931 88 STC 357 did not take into consideration this distinction. Therefore, with great respect we humbly disagree with the conclusions reached in the aforesaid two decisions in view of absence of a transfer of right to use beyond the period of 14 days to the buyer. Therefore, as there is no transfer of right to use by the buyer beyond free loan period of 14 days, consideration received for over-detention of the cylinders cannot be held to be a sale price for transfer of right to use of the cylinders and as such, all the forums, i.e., assessing officer, Assistant Commissioner and the Tribunal have erred in law in concluding otherwise.

10. In view of the aforesaid discussions, we answer the question in favour of the dealer in the following manner :

"In the facts and circumstances of the case, the amount received by the petitioner on account of delay in return of cylinders by the purchaser cannot be held to be taxable u/s 2(g)(iv) of the Orissa Sales Tax Act."

The reference application is allowed.

R.K. Patra, J.

11. I agree.