
(1968) 08 P&H CK 0015
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ No. 774 of 1966

Baldev Raj

APPELLANT

Vs

State of Punjab and Another

RESPONDENT

Date of Decision : 30-08-1968

Acts Referred:

Constitution of India, 1950 — Article 226
Punjab General Sales Tax Act, 1948 — Section 11(6), 2, 21, 22, 4(5)

Citation : AIR 1969 P&H 181 : (1969) 24 STC 50

Hon'ble Judges : B.R. Tuli, J

Bench : Single Bench

Advocate : G.C. Mittal, for the Appellant; M.R. Sharma, for A.G., for the Respondent

Judgement

1. This petition under Articles 226/227 of the constitution of India has been filed by Dr. Baldev Raj of Muktsar for quashing the order dated 17th January, 1966, passed by the joint Excise & Taxation Commissioner, Punjab, in exercise of the powers u/s 21(1) of the Punjab General sales tax Act, 46 of 1948 (hereinafter called the Act)

2. according to the allegations made in the petition, the petitioner is one of the leading doctors of Muktsar and his only business is to treat the patients by diagnosing their ailments and giving them proper medicines. He is not a chemist but dispenses his own prescriptions for the benefit of his patients. He does not dispense the prescription of any other doctor. He does not charge any consultation fee and the medicines prepared by him for his patients cannot be resold in the market either in whole-sale or in retail like medicines prepared by the chemists. Upto the end of the year 1962, he was never assessed to any sales tax but in 1963, notices were issued to him for the years 1959-60 to 1962-63 under the Act for showing cause why he should not be assessed to sales tax. He gave a reply to the notices stating that he was carrying on the profession of a doctor and, therefore, was not liable to sales tax under the Act. He further

pleaded that he was not a manufacture of medicines and even if by any stretch of interpretation he could be brought under the Act, he could not be considered as a manufacture but could only be taxed as an ordinary dealer. It may be noted that the taxable quantum in the case of a dealer is Rs. 50,000/- while in the case of a dealer who manufactures any goods for sale it is Rs. 10,000/-.

3. The Assessing authority accepted that the petitioner was the registered medical practitioner carrying on the profession of a doctor and that he was not running any business as a chemist. It was also accepted that he did not prepare medicines on the prescriptions of other doctors. He was, however considered as a manufacturer and since his gross turnover was assessed at a figure higher than Rs. 10,000/-, sales tax was imposed on him by order dated 29th June, 1963 u/s 11(6) of the Act.

4. The petitioner filed appeals before the appellate authority which were heard by the Additional deputy Excise & Taxation Commissioner. Patiala, and were accepted on 9-12-1964 by order, copy of which is Annexure "A" to the petition. Before the Appellate Authority it was contended by the representative of the sales Tax Department that the petitioner did not carry on the business of a chemist and did not dispense medicines on the prescription prepared by other qualified doctors. Following the decision of a division Bench of the Allahabad High Court in Dr. Sukh Deo Vs. Commissioner of Sales Tax, the Appellate Authority held that the petitioner was not liable to sales tax as he was not a manufacture.

5. The financial Commissioner, Punjab, held in the case of Dr. Dev Raj Aggarwal V. State of Punjab 1965 Lah L. T. (Rev Rul.) 118 (Punj), on 19th March, 1965, that sales of medicines by dispensing, are sales of goods attracting the levy of sales tax. He is both a dealer and a manufacturer and his turnover as a dealer and a manufacturer can be combined in order to assess his liability. As a result of this decision of the learned Financial Commissioner. Suo motu action was taken in the cases of the petitioner decided by the Appellate Authority and respondent No. 2 passed an order on 17th January 1966, setting aside the order of the Appellate Authority dated 9th December, 1964, and restoring the order of the Assessing authority. A copy of the order is Annexure "B" to the writ petition. The petitioner did not avail to the further remedies by way of revision to the Financial Commissioner and reference through him to this court under sections 21 and 22 of the Act and has filed this writ petition in this Court on the ground that in view of the decision of the financial Commissioner, Punjab, in the case of Dr. Dev Raj Aggarwal, 1965 Lah LT (Rev Rul) 118 (Punj) (supra), the remedy by way of revision to the financial Commissioner is illusory.

6. Preliminary objection has been taken by the respondents that this petition is not competent and the petitioner ought to have approached this court by way of reference through the Financial Commissioner u/s 22 of the act. In reply to this objection, the learned counsel for the petitioner has brought to my notice a Division Bench judgment of this court in Jhandu Mal Tara Chand V. Assessing authority Karnal Civil Writ No. 2134 of 1965, decided on 27th October, 1965

(Punj) by Capoor and Dua , JJ. The petitioner of that case filed a petition under article 226 in this court against the assessment order because in the appellate order of the Deputy Excise & Taxation Commissioner. Ambala Division. Dated 20th April, 1965 which also was an appeal from the order of the Assessing authority, Karnal, for the assessment year 1963-64, he held that rice polish was a commodity different from rice bran and which rice bran was husk of rice, rice polish could not be included in the exempted item of rice husk.

Inter alia, the appellate order also mentioned that the rice bran and rice polish are regarded as two different commodities by the department, the former being non-taxable under item 15 and the latter taxable. This view was based on certain instructions issued by the Excise & Taxation Commissioner, Punjab, with regard to the taxability of rice polish. On these facts, it was held by the learned Judges that "since the Deputy Excise & Taxation commissioner, Ambala division, who was the appellate authority from the order of the respondent, felt himself bound by the departmental instructions, the remedy by way of appeal to him from the impugned order would have been futile and illusory and hence the preliminary objection but forward in the return as to this petition being barred on the ground that the petitioner did not avail all the alternative remedies by way of appeal etc. cannot be allowed to prevail.

7. Tek chand. J. in B.K. Bajaj and Another Vs. State of Punjab and Others, , dealing with the similar matter held:

"When the stand to be taken in the case of a matter arising in appeal of revision under the Punjab general Sales Tax Act. 1948, has been predetermined by departmental instructions, no purpose would be served by going through the formality of appeal and revision., the decision of the appellate and revisional authorities being a foregone conclusion in consonance with the departmental instructions. In such a case an assessment could challenge an order of assessment under Article 226 of the construction."

8. following these judgments, I over-rule the preliminary objection and proceed to decide the writ petition on merits especially when the Motion Bench, in its discretion, decided to admit this petition in view of para 8 of the writ petition which is as under.

"That since the point involved in the writ petition has already been decided by the learned financial commissioner, therefore, no purpose would be served by filing further revision before him. A division Bench of this Hon''ble Court in the case of Messrs. Jhandu Mal Tara chand C W No, 2134 of 1965 D/- 27-10-1965 (Punj) has held that the remedy is futile and illusory and, therefore, Hon''ble court."

And did to dismiss it in limine on the ground that the remedies if revision and reference under the Act had not been availed of. It may also be noted that there is no decided case of this court on the point of law involved in this writ petition and that is an additional reason which has impelled me to decide the writ petition

on merits.

9. The first point argued before me by the learned counsel for the petitioner is that he (petitioner) is a medical practitioner and not a dealer inasmuch as his business is not to sell medicines but to treat his patients by this professional skill and to give them medicines to cure their ailments. It was admitted before the appellate authority that the petitioner does not dispense the prescriptions of other doctors but only dispenses his own prescriptions for the benefit of his patients. It is urged that the price which the petitioner charges for the medicines supplied to the patients also includes his fee for his skill in diagnosing the ailments and the contract of treatment being one and indivisible, which includes professional services, cannot be split into two so as to confine one part to merely prescribing the medicines after diagnosing the ailments and the second part relating to the sale of medicines.

For this proposition, he relies upon the judgment of Narula, J., in *Associated Hotels of India Ltd. Vs. Excise and Taxation Officer and Another*, which was affirmed on appeal by a division Bench as reported in *State of Punjab and Another Vs. Associated Hotels of India Ltd.*, . This case related to a hotelier who charged consolidated amount from resident clients which included the supply of various meals and the Learned single judge (Narula, J.) held:

"A transaction between a hotelier and its resident client is an indivisible contract of multiple service and does not involve any sale of food inasmuch as it does not involve any lease of the room made available for the residence of the client. It is not open to the taxing authorities under the Punjab Act after its amendment by Act 18 of 1960 to split up the composite contract so as to make out an agreement of sale where in fact none exists. The transaction as a whole has to be seen to find out it is a sale or not, It partakes more of the nature of a service than a sale."

It was further held by the learned single Judge that the supply of meals to the residents in the hotel did not amount to the sale of foodstuffs within the meaning of section 2(h) of the act but that the supply of meals and other eatables to the casual and other non-resident visitors was sale of foodstuffs. The view of Narula, J. that no sale of food took place was held to be correct by the Letters Patent Bench. In my opinion, these judgments do not apply to the facts of the instant case. It is possible that the medical practitioner gives his consultation free and does not charge anything from the patient for diagnosing the ailment and only charges the price of the medicine and in that case, he is a person whose normal trade is the purchase and sale of medicines and for that reason, he is a dealer within the meaning of section 2(d) of the Act. The patient after getting the prescription from the doctor may choose to get the medicines from him or from a chemist in the market.

It can only be found out by the Assessing Authority whether the price of medicine sold by the doctor includes anything for his professional services.

Further, in my view, the professional services come to an end the moment the prescription is written out. Thereafter no particular skill of the doctor is involved in the preparation of the medicine from that prescription. Any Compounder or chemist can prepare the same. The giving of medicine for a price to the patient is definitely a contract of sale of medicine to the patient and it is, therefore, taxable. The decision of the financial Commissioner in Dr. Dev Raj Aggarwal's case 1965 Lah LT 118 (Punj) (Supra) is, in my opinion, correct inasmuch as it has been held therein that sales of medicines by medical practitioners, whether patent or dispensed, are sales of goods attracting the levy of sales tax and that the doctor in such a case is both a dealer and a manufacturer. The other point decided by the financial Commissioner does not arise in the present case.

10. Reliance has been placed by the learned counsel for the petitioner on the decision of a division Bench of the Allahabad High Court in Dr. Sukh Deo Vs. Commissioner of Sales Tax, in which the following question of law was considered:

"Whether the preparation of medicines on prescriptions of the applicant amounted to a manufacture of 'medicines and pharmaceutical preparations' within the meaning of Notification No. ST-3504/X dated 10th May, 1956 and whether the applicant was assessable to tax on the turnover of the medicines so dispensed."

That decision was, therefore, in reference to a particular Notification and the decision was mainly confined to the determination of the point whether the preparation of medicines on prescriptions amounted to manufacture of medicines and pharmaceutical preparations. In that connection, it was held as under:

"I have no doubt that the assessee cannot be said to be a manufacturer of the medicines. 'Manufacture' has been interpreted in a wide sense by a Bench of this Court of which I was a member in Badri Prasad Prabha Shanker and Another Vs. Sales Tax Commissioner, . However wide a meaning may be given to the word, I do not think it includes preparation of mixtures in accordance with prescriptions to be used solely by the named patients. A notification u/s 3A is meant for an article which is excepted to be sold more than once. u/s 3 every dealer who sells it is liable to pay sales tax on its turnover and power has been conferred by section 3A upon the Government to declare that in respect of it to pay one of the dealers will be liable to pay sales tax and not every dealer who successively sells it. When sales tax is payable on an article the burden ultimately falls on the consumer and, if an article passes through several dealers, each of whom adds to the price the sales tax paid by him, the consumer would ultimately have to pay a very heavy price for the article. The Legislature was anxious that in respect of articles of common use the burden upon the consumer should not be so great and, therefore, conferred power upon the government to declare that in respect of them only one dealer will pay the tax and not others. This necessity could not arise in respect of an article that was incapable of being sold by more than one dealer and was not excepted to be sold except directly to

the consumer. In the case of an article that could be sold only once, there could not arise any question of the state Government's Laying down that it shall be liable to pay tax at only one point. Medicines prepared according to prescriptions are meant to be sold only to particular patients and in respect of them there cannot be more than one point of sale and the State Government could not have intended that the notification issued by them u/s 3A could cover them. In other words, preparing medicines according to the prescriptions could not have been intended by the State Government to come within the word "manufacture" as used in the notification.

There cannot be a manufacture unless the resulting produce is a commercially different article. When the assessee mixes together the ingredients mentioned in a prescription and supplies the mixture to the patient, he does not produce an article commercially different from the ingredients from which it is produced. The resultant article has no same other than "mixture" and a mixture" cannot be said to be an article commercially different from the ingredients that are mixed. The ingredients are only added together and the resultant is not at all different in from, nature, effect etc. from the ingredients. Every different prescription results in a different mixture; the assessee prepares as many mixtures as there are prescriptions. For every prescriptions he prepares just one mixture. In the circumstances it is difficult to say that he manufactures every time he dispenses a prescription. In north Bengal Stores Ltd. V. Member, Board of Revenue, Bengal (1946) 1 S. T. C. 157 (Cal), a dispensing chemist was held to come within the definition of a dealer because the word was defined in the relevant statute to mean a person who manufactures or produces any goods. If the chemist was held to be a dealer because he produces goods the decision is of no help in this case. But Das, J., held him to be a dealer also on the ground that he manufactures goods. The word "manufacture" cannot be given the same meaning in every statute regardless of context and I do not think that the word used in the notification can be given the same meaning as the word used in the statute dealt with in that case. I would answer the first limb of the question in the negative."

With respect, I regret my inability to agree to the above observations of the learned Judges of the Allahabad High Court if the decision lays down a general principle,. It is confined to the particular Notification then there may not be any quarrel with that, I prefer, with respect, the view of the learned Judges of the Calcutta High Court expressed in (1946) 1 S. T. C. 157 (Cal), Gentle. J. observed as under:

"I think the answer to the question, whether a dispensing chemist is such a dealer, is to be found by reference to the goods which he sells and what is done by him with respect to those goods before they are supplied.

Prescriptions specify the components of resultant mixture or compounds which are obtained when the prescriptions are dispensed.. They may be for internal use, for example liquids in bottles, and solids in capsules, or for out-word

application, for example, ointments plasters and powders. When customers give prescriptions to a dispensing chemist to be made up, thereby they place orders for the resultant compounds or mixtures to be supplied, and by accepting to dispense the prescriptions, the chemist agrees to sell to his customers such compounds or mixtures. Dispensing is necessary for the purpose of obtaining the mixtures. Until prescriptions are dispensed and the compounds obtained the chemist has not got the goods, which his customers have ordered and which he has agreed to sell. The process of dispensing is carried out for the purpose of producing the contract goods. When dispensing has taken place, but not before, the chemist has the goods with which to supply his customers and which he has agreed to sell to them. The resultant mixtures, after dispensing prescriptions are the goods sold by a dispensing chemist to his customers; the process of dispensing is to produce those goods for sale, without which process sales of mixtures or compounds cannot be effected by a chemist. Even if that process is not the manufacture of goods, as articles of furniture, mechanical appliances and paints are made from raw materials, nevertheless, since it is the production of goods for the purpose of selling to customers, the chemist who dispense prescriptions thereby produces goods for sale.

In my opinion, section 4 sub-section (5) clause (a) of the Act applies to a dispensing chemist whose gross turnover exceeds Rs. 10,000 during the prescribed year. Upon the assumption that questions (ii) and (iii) in the reference include the words "produces any goods" in addition to the word "manufacturing" in those two questions. In my opinion the answers to the three questions should be in the affirmative."

Das J., observed in that case as under:

"There is no definition of the terms "manufactures" and "produce" in the act. These expressions therefore, will have to be construed in their ordinary natural meaning according to the accepted usage of English speech and having regard to the context in which they are used in the Act. Etymologically "to manufacture" is, "to make by hand". The term "manufacture" is, however, used in common parlance in a wider sense. According to the Oxford Dictionary "to manufacture" is "to work up (material) into forms suitable for use". Or "to make a fabricate from material ; to produce by labour (now especially on a large scale)." As a noun the term connotes "the action or process of making articles or material (in modern use on large scale) by the application of physical power or mechanical power" or "an article or material produced by the application of physical labour or mechanical power". These meanings may help but are not decisive for, what we have to ascertain is what those expressions mean in the context in which they are used in the Act. I shall not, therefore, attempt to formulate any abstract definition of such general expressions as "manufacture" or "produce". In the absence of any definition in the Act of these particular terms. I have to read the section itself and then to ascertain the meaning from the words used;

The relevant words in clause (a) are:

"in relation to any dealer who..... himself manufactures or produces any goods for sale."

I find that there are two expressions in this clause, namely, "dealer" and "goods" which have been defined in there Act. I apply those definitions to those words, and find that the clause fevers to any person... engaged in the business of selling or supplying any kind of movable property (other than certain things) who himself manufactures or produces that kind of movable property for sale. The goods, the manufacture or production of which is contemplated, clearly refers to goods in respect of which "the business of selling or supplying", in which the person is engaged, is carried on, In short, the words "manufactures or produces goods for sale" in clause (a) refer clearly to the manufacture or production of goods for the purpose of selling the same in course of the business If selling or supplying in which the dealer is engaged.

"To manufacture goods" in common parlance means "to bring goods into being". To manufacture or produce goods for sale meansto bring into being or to produce something in a form in which it will be capable of being sold or supplied in course of business. The essence of manufacturing. I apprehend, is that something is produced or brought into existence which is different from that out of which it is made, in the sense that the thing produced is by itself commercial commodity which is capable as such of being sold or supplied. It does not mean that the materials with which the thing is manufactured must necessarily lose their identity or become transformed in their basic or essential properties. When a goldsmith takes up a lump of gold and fashion it into an ornament produced is, commercially, as well as in common parlance, something different from a mere lump of gold. When a cobbler uses leather and kakes a pair of boots, the leather does not lose its existence, it still remains leather, but the pair of boots is, commercially as in ordinary speech, a thing different from the leather with which it is made. When a carpenter makes a box out of wood, the box, though it is still wood, is different from mere wood. When a tailor makes a suit of clothes, it does not cease to be cloth, but commercially it is a different thing. In each of these cases a thing is made which is capable of being sold or supplied as a particular commercial article.

When a dispensing chemist mixes different drugs according to the prescription of a physician the drugs may or may not be transformed into a different matter. The mixture may become a chemical compound in which the drugs used may have been transformed into a totally different thing in their character and properties, or it may result in what is called a mechanical or physical mixture, in which each drug retains its original properties. But in either case the resulting mixture is a distinct product brought into being in a particular form suitable for the particular I use for which it is intended and capable of being sold or supplied for a price. When a man goes into a chemist's shop with a prescription he does not ask for this, that or the other drug mentioned in the prescription, but he really wants the finished product in a form in which as a medicine it will b suitable for the use of

the patient and when the chemist compounds the drugs according to the prescription he produces those medicines and sells, not so many different drugs of different quantities or measures, but the finished product. The selling of the finished product is his business and he brings it into being for sale in his business. This finished product is different from the ingredients with which it is made, just in the same sense as an ornament is different from the lump of gold or a pair of boots is different from the leather or a suit of clothes is different from the cloth or a box is different from the wood but it is the article which he brings into being for sale in course of his business.

I decline to be drawn into an academic discussion as to the abstract meaning of the term "manufacture" or as to whether the application of the creative faculty is of the essence of manufacture and so forth. I do not think it is useful to refer to the definition of the term in other Statutes of this country e.g., Patents and Designs Act or of other countries, e.g., the English Finance Act or the Australian Sales Tax Act. All we have to ascertain is the meaning in which the term has been used in this particular Act. I have come to the conclusion that in common parlance "to manufacture is to bring into being. "To manufacture or produce goods for sale" within the meaning of the Bengal Finance (Sales Tax) Act, which is concerned with "dealers" i.e., persons engaged in the business of selling or supplying goods, must mean to bring into being a commercial article for sale in the business in which the dealer is engaged, i.e., an article which by itself has a commercial value and which can be the subject-matter of a sale for a price in course of the business of selling or supplying in which he is engaged. Although the term, "manufacture" may in a modern sense, cannot production on a large scale, that in my opinion, is not at all a test for the Act itself has indicated some scale by fixing the taxable quantum. Nor do I think that production for general public use is the essence of manufacture for the purpose of this Act. A goldsmith or a tailor or a shoemaker who only makes things to the order of particular customers is not any the less a manufacturer or producer than a goldsmith or a tailor or a shoemaker who makes and keeps ready-made things for all and sundry."

11. On the basis of the above discussion and the judgments referred to, I hold that the petitioner in this case is a clear within the meaning of section 2(d) of the Act and he himself manufactures or produces goods for sale as contemplated in section 4(5)(b) of the Act. There is, in my opinion, no difference between the case of a chemist who prepares medicines on the prescriptions of any doctor and the doctor who has his own dispensary to dispense his own prescriptions for his patients. In the result, there is no merit in the petition which is hereby dismissed but in the circumstances of the case, there will be no order as to costs.

12. Petition dismissed.