

(1973) 06 OHC CK 0007

In the Orissa High Court

Case No : S.J.C. No's. 204 to 207, 240 and 241 of 1970

Bhagirathi Agarwal and Brothers and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 01-06-1973

Acts Referred:

Income Tax Act, 1922 — Section 66
Orissa Sales Tax Act, 1947 — Section 24(1)

Citation : (1974) 34 STC 84

Hon'ble Judges : R.N. Misra, J;B.K. Ray, J

Bench : Division Bench

Advocate : B.K. Mohanty and D.K. Panda, for the Appellant; Standing Counsel (ST), for the Respondent

Judgement

R.N. Misra, J.—The following common question u/s 24(1) of the Orissa Sales Tax Act (briefly referred to as the Act) has been referred to this Court for determination :

Whether, in the facts and circumstances of the case, it can be construed that there was a sale of gunny bags liable to payment of sales tax ?

2. The three separate assesseees at whose instance the references have been made carried on business of purchase and milling of paddy and thereafter sold the paddy (sic) at different places under directions of Government. While assessment proceedings were taken separately of these dealers, the assessing officer came to find that these dealers had not paid tax under the Act in respect of alleged sale of gunny bags. In S.J.C. 204 of 1970, the relevant assessment year is 1965-66; in S.J.Cs. 205 to 207 of 1970, we are concerned with quarters ending September and December, 1964, and March, 1965; and in S.J.Cs. 240 and 241 of 1970, the relevant period is quarters ending June, 1964, and March, 1965. On the basis of estimate representing the sale price of gunny bags, assessment was made and extra tax was demanded.

3. The assessees in their respective appeals to the first appellate authority contended that there was no agreement for sale of gunny bags, the estimate adopted was arbitrary and without any basis and at any rate in respect of gunny bags, there was no liability of tax. The first appellate authority negated the contentions of the assessee and upheld the assessments. Thereupon each of the assessee appealed to the Tribunal.

The Sales Tax Tribunal disposed of many of these appeals by a common judgment as in its view common questions of fact and law fell to be determined therein. As far as relevant for the present question, the Tribunal held:

...A copy of the bill which was produced by the appellant Laxmi Rice Mill (assessee in S.J.Cs. 205 to 207 of 1970) before the first appellate authority (referred to in his order), shows one head towards cost of rice and one head towards cost of gunny bags. Evidently that was under the contract either explicit or implied. Rather the contract was over a particular quality of gunny bags. Clause 3(2) of the Orissa Rice (Maximum Prices) Order of 1961 reads as follows :

The maximum price shall apply both to raw and boiled rice. They are inclusive of the cost of gunny and sales tax or purchase tax payable up to the previous stage.

It is clear from the expression underlined that the cost of gunny bags has not been lost sight of. Added to it, the assessee has charged separately for sewing and bagging. One of the bills produced before me by the learned Advocate for the appellant, Laxmi Rice Mill, is as follows :

Bill Levy No. 22 dated 12th November, 1965. Prime cost per quintal, 225.18 Kg. of mill boiled rice in supply at the rate of Rs. 59.50 per quintal ...Rs. 13,396.42. Incidental charges including sewing, packing, etc., for 225.18 Kg. of rice at the rate of 0.48 per quintal...Rs. 108.07.

This bill shows that incidental charges have been charged separately. Sewing and bagging presupposes supply of gunny bags and that read with total amount including price of gunny as mentioned in Orissa Rice (Maximum Prices) Order of 1964, quoted above, hardly leaves any scope for the contention that gunny bags have not been paid for or that there was no agreement to sell gunnies as such or that gunny bags have only passed as mere containers and no price has been charged for the same. This also answers the second question raised by the learned Advocate for the appellants that gunnies have merely passed as containers without express agreement for sale and, therefore, are (sic) liable to tax as decided in *Hyderabad Deccan Cigarette Factory v. The State of Andhra Pradesh* [1966] 17 S.T.C. 624 (S.C.) where packing materials of cigarette were held to be not taxable. That case can be well-distinguished from the facts of this case. Their Lordships say, it is a question of fact not to be decided on surmises or fictions. If the paddy or rice would have been supplied in cheap baskets which have no value, the matter would have stood in a different footing. But here it was clearly stipulated to be supplied in gunny bags of a particular quality for which price is paid no matter if included in the price for a fixed quantity of paddy

or rice....

Ultimately, the Tribunal upheld the assessments and dismissed the appeals.

4. At the outset, learned standing counsel contended that the question referred to this Court is one of pure fact and as such the references were incompetent and we should decline to answer the question. Indisputably, questions of fact are not referable and even if a question of fact is referred to us, we have no jurisdiction to entertain such reference. Strong reliance is placed by the learned standing counsel for the revenue on the decision of the Supreme Court in the case of *SREE MEENAKSHI MILLS LIMITED Vs. COMMISSIONER OF Income Tax, MADRAS.*, where dealing with a reference made u/s 66 of the Indian Income Tax Act of 1922, the court, said :

...The point for decision is whether there arises out of the order of the Tribunal any question which can be the subject of reference u/s 66(1) of the Act. Under that section, it is only a question of law that can be referred for decision of the court, and it is impossible to argue that the conclusion of the Tribunal is anything but one of fact. It has been held on the corresponding provisions in the English Income Tax statutes that a finding on a question of fact is open to attack as erroneous in law only if it is not supported by any evidence, or if it is unreasonable and perverse, but that where there is evidence to consider, the decision of the Tribunal is final even though the court might not, on the materials, have come to the same conclusion if it had the power to substitute its own judgment.

After discussing series of high authorities, the court concluded in paragraph 24 of its judgment thus :

We have discussed the authorities at great length, as some of the observations contained therein appear, at first sight, to render plausible the contention of the appellant, and it seems desirable that the true meaning of those observations should be clarified, lest error and misconception should embarrass and fog the administration of law. The position that emerges on the authorities may thus be summed up :

(1) When the point for determination is a pure question of law such as construction of a statute or document of title, the decision of the Tribunal is open to reference to the court u/s 66(1).

(2) When the point for determination is a mixed question of law and fact, while the finding of the Tribunal on the facts found is final, its decision as to the legal effect of those findings is a question of law which can be reviewed by the court.

(3) A finding on a question of fact is open to attack u/s 66(1) as erroneous in law when there is no evidence to support it or if it is perverse.

(4) When the finding is one of fact, the fact that it is itself an inference from other basic facts will not alter its character as one of fact.

Support for the preliminary objection is sought to be derived by learned standing counsel from the observation of the Supreme Court in the case of Hyderabad Deccan Cigarette Factory v. The State of Andhra Pradesh [1966] 17 S.T.C 624 (S.C.). At page 630 of the Reports, the court said:

A perusal of the orders of the various authorities and the High Court shows that a simple question of fact has been sidetracked by copious citations. Whether there was an agreement to sell the packing materials is a pure question of fact and that question cannot be decided on fictions or surmises. That is what has happened in this case. The Commercial Tax Officer invoked a fiction; the Assistant Commissioner of Commercial Taxes relied upon the doctrine of "finished product"; the Appellate Tribunal relied upon surmises; and the High Court, on the principle of implied agreement. But, none has tackled the real question. The burden lies upon the Commercial Tax Officer to prove that a turnover is liable to tax. No doubt he can ask the assessee to produce the relevant material; and if he does not produce the same, he may draw adverse inference against him. But, he must decide the crucial question whether the packing materials were subject of the agreement of sale, express or implied. To ascertain the said fact he can rely upon oral statements, accounts and other documents, personal enquiry and other relevant circumstances such as the nature and the purpose of the packing materials used.

The result of the analysis so ably indicated in Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras, at all be doubted. The observations made in the tobacco case, referred to above, however, cannot be taken to support the learned standing counsel on the preliminary question. In fact the Supreme Court after laying down the test in the following terms,

The learned Judges, though they differed on the facts, accepted the principle that to attract sales tax the packing material or the container, as the case may be, should have been the subject-matter of an agreement to sell....

remanded the matter to the High Court for a finding. As it appears the question of fact to be found was not one of pure fact but was a mixed question of fact and law. Whether a particular transaction amounted to a sale exigible to tax would admittedly be a mixed question of law and fact : see Khan Bahadur Ahmed Alladin and Sons Vs. Commissioner of Income Tax, Andhra Pradesh, Hooghly Trust v. Income Tax Commissioner, West Bengal [1969] 73 ITR 685 Commissioner of Income Tax, West Bengal II Vs. Rajasthan Mines Ltd.,

5. The Tribunal has referred to the Orissa Rice (Maximum Prices) Order of 1964 and has drawn an inference of agreement to sell from it. A specimen bill has been referred to and an inference has also been drawn from it to support the assessment. Undoubtedly, there is a factual aspect in the dispute, but whether that conclusion flows out of the materials before the Tribunal or is an inference drawable from the materials in the setting of this case seems to be at least a mixed question of fact and law. The Tribunal has, keeping that in view, though

not distinctly indicated in its order, made these references. We are not impressed with the preliminary objection and, therefore, cannot decline to answer the question.

6. Learned counsel for both sides agree that the real test to be adopted for resolving the dispute is as to whether the packing material had been the subject-matter of an agreement of sale. In fact, after referring to the cases of Mohanlal Jogani Rice and Atta Mills v. The State of Assam 1953 4 S.T.C. 129 Gau, Indian Leaf Tobacco Development Co. Ltd. v. The State of Madras [1954] 5 S.T.C. 354, Hanumantha Rao v. The State of Andhra [1956] 7 S.T.C. 486, Varasuki and Co. v. The Province of Madras [1951] 2 S.T.C. 1 and Chidambara Nadar Sons and Co. v. State of Madras [1960] 11 S.T.C. 321(Mad) the Supreme Court in the tobacco case, already referred to, Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh [1966] 17 S.T.C. 624 (S.C.), laid down that as the test and required the High Court to come to a finding in that case by adopting that test. To the same effect was their earlier decision in the case of Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd.,

Several cases were cited to us at the Bar dealing with the question as to whether the turnover of packing materials was exigible to tax. We do not think it at all necessary to refer to the catena of decisions in view of the agreed position that the test which we have referred to above is the proper one to be applied. We shall, however, in brief refer to a decision of this Court in the case of Shamsuddin Akbar Khan & Co. v. State of Orissa [1970] 26 S.T.C. 280, and a few recent decisions of other High Courts and of the Supreme Court.

7. The last proviso to Section 5(1) of the Act is to the following effect:

5. (1) The tax payable by a dealer under this Act shall be levied at the rate of 2 per cent on his taxable turnover...:

Provided also that the sale of containers of taxable goods, when sold with such goods but not charged separately, shall be subject to payment of tax at the same rate as the goods contained therein.

In the present case, as we have already indicated, the bill clearly shows two separate heads one for the goods contained in the gunny bags and the other item relating to incidental charges including sewing, packing, etc. If it can be found as a fact that there was a stipulation for sale of gunny bags, either express or implied, in respect of the transactions in question, certainly the turnover of the dealer shall be inclusive of the price paid for gunnies. The provisions of the Orissa Rice (Maximum Prices) Order of 1964 do not have any bearing on the point in issue. It purports to fix the maximum selling price which shall be inclusive of cost of gunny and sales tax or purchase tax payable up to the previous stage, i.e., in the hands of the selling dealer, the price charged shall be inclusive of those heads and the maximum that the selling dealer can charge shall be as limited under the Order. No inference is available by referring to the Order that there was a statutory contract for sale of gunny bags. On the other

hand, the sample bill which has been relied upon by the appellate authorities shows the price of rice under one head and the incidental charges including sewing, packing, etc., under a different head. Re. 0.48 per quintal has been charged by way of incidental charges which admittedly covered sewing, packing, et cetera. Though not referred to or relied upon by the Tribunal, we allowed learned Counsel for the revenue to refer to the other part of the very bill which has been extracted in the appellate order. Therein there is indication of the total number of bags supplied. But in the billing portion, the price of gunny bags has not been specifically charged. Under the arrangement, good gunny bags are undertaken to be supplied by the dealers so that the rice as the essential commodity contained in the bags may not be spoiled during transit or storage. That again is a feature which cannot be taken into account for resolving a dispute as to whether between the parties there was a contract of sale--express or implied.

As we have just mentioned, the bill indicates a charge of Re. 0.48 per quintal by way of incidental charges. We take judicial notice of the fact that rice is usually sold or purchased in gunny bags of quintal size. Sewing and packing have been specifically mentioned by way of incidental charges. As rightly indicated by Mr. Mohanty for the assessee, the word "et cetera" used after sewing, packing, goes to show that there might be also other heads to be covered by incidental charges. When the total incidental charges are Re. 0.48 per quintal and this claim relates to several heads of expenditure made by the dealer and claimed by way of reimbursement from the purchaser, it is not known as to how much of it, if at all, is with reference to the gunny bag. Prima facie, there is no intrinsic evidence in the bill that the gunny has been separately charged for. The Tribunal in making an analysis of the bill stated :

This bill shows that incidental charges have been charged separately. Sewing and bagging presupposes supply of gunny bags and that read with total amount including price of gunny as mentioned in the Orissa Rice (Maximum Prices) Order of 1964, quoted above, hardly leaves any scope for the contention that gunny bags have not been paid for or that there was no agreement to sell gunnies as such or that gunny bags have only passed as mere containers and no price has been charged for the same.

The conclusion which the Tribunal has reached does not flow out of the bill or, as we have already indicated, from the Orissa Rice (Maximum Prices) Order, 1964.

What was necessary to be established was that there was a contract--express or implied--of sale of the gunny bags by way of containers and as indicated by the Supreme Court in *Hyderabad Deccan Cigarette Factory v. The State of Andhra Pradesh* [1966] 17 S.T.C. 624 (S.C.), the burden lay on the Sales Tax Officer to prove that the turnover relating to the alleged sale of gunnies was liable to tax. For discharge of that burden lying on the revenue, the assessee could be called upon to produce the relevant material because the evidence would be in his custody and if he failed to produce the same, adverse inference could be drawn

against the assessee. But until there was a categorical decision of the crucial question that packing materials were the subject-matter of the agreement of sale--express or implied--there could be no levy of tax. On reading the original order of assessment and the appellate orders of both the forums, we have not the least doubt in our mind that the matter has not been examined from the proper view-point.

If the burden lay on the revenue and if it has not been discharged, who would lose is not in doubt. If the Tribunal had applied its mind from the proper angle to the matter, there could have been a thorough enquiry even at the second appellate stage because as the final fact finding authority the Tribunal has got wide powers. It is not for us to direct whether the Tribunal would make a further enquiry into the matter or dispose of the dispute by finding that the department has failed to establish that there was an agreement to sell in respect of gunnies. Ends of justice could only be served if a further enquiry was undertaken and a fair opportunity was given both to the assessee as also to the department to establish their rival claims as to whether the turnover relating to gunnies was exigible to sales tax on the footing that there was or there was not an agreement of sale of gunnies.

8. We are, however, surprised to find that the sale price of gunnies has been estimated at arbitrary rates. In one of the orders of assessment (S.J.C. 204 of 1970) the assessing officer said :

The price of each gunny has been calculated at Rs. 1.50.

If Re. 0.48 was charged per quintal by way of incidental charges covering several heads of expenditure including the alleged price of gunny (and in view of what we have said a gunny is necessary for a quintal of rice), we are at a loss to find that the estimate is without any basis.

9. Mr. Mohanty for the assessees contended relying on the observations of the Supreme Court in the two cases, referred to above Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd., and Hyderabad Deccan Cigarette Factory v. The State of Andhra Pradesh [1966] 17 S.T.C. 624 (S.C.)), that merely because the bill separately showed expenses for the use of packing, it did not mean that there was any contract of sale--express or implied--in respect of gunny bags. The value of packing materials was so insignificant to the value of the contents that it is not possible to imply any separate contract of sale regarding the packing materials. He also relies upon a decision of the Kerala High Court in the case of Tushar Trading Co. v. State of Kerala [1971] 28 S.T.C. 214, where the law has been so laid down relying upon the decision of the Supreme Court. It is a matter for the Tribunal to take into consideration if an enquiry is ultimately to be undertaken by the Tribunal and we need not deal further with this aspect of the matter.

10. A Bench of this Court in the case of Shamsuddin Akbar Khan & Co. v. State of Orissa [1970] 26 S.T.C. 280, in paragraph 7 of the judgment has indicated:

...The taxing authority must establish that there was an intention to sell either express or implied. Admittedly, there is no express agreement to sell containers. The question is whether there is any implied agreement to sell containers which can be inferred from the findings of fact recorded. It need hardly be stated that in the case of an implied agreement it would be a reasonable inference from various facts and circumstances established in a case. The inference would naturally vary from case to case, according to the facts and circumstances. It was accordingly held in *Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh* [1966] 17 S.T.C. 624 (S.C.) that no broad and general proposition of law can be laid down that in no case containers would not be taxable. An illustration was given to the effect that if cigarettes are sold in a gold casket, there cannot be an inference that there was no implied agreement to sell the gold casket which is more valuable than the cigarettes. The converse would be the position when the value of the containers is so insignificant that a reasonable inference can be drawn that the title to the containers passed not as a result of an implied agreement to sell, but passed as incidental thereto, as a part of the normal business dealings. As their Lordships put it the real point to consider would be :

Whether the packing materials, which were comparatively of insignificant value, were used only as a convenient vehicle to put the purchasers in possession of the cigarettes sold.

Applying the tests to the facts of that case where a gudaku dealer was contending that in respect of the tins used as containers, there was no sale, this Court said:

Applying the aforesaid principles to the facts of this case, on the findings recorded, one cannot escape the conclusion that the containers constituted no integral part of the agreement to sell. Whether the gudaku was sold in tins or loose, the sale price was the same. Obviously, nothing extra was charged for the container at the time of the sale of the gudaku. The present case comes within the second part of the dictum, namely, that the containers were of comparatively insignificant value and were used only as a convenient vehicle for putting the purchaser in possession of the gudaku.

11. Mr. Mohanty also relied upon a decision of the Supreme Court in the case of *State of Tamil Nadu etc. Vs. Cement Distributors Private Ltd. etc. etc.*, The question of chargeability of sales tax over cement gunny bags was in dispute. Relying on the decisions of *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*, and *Chhitter Mal Narain Das Vs. Commissioner of Sales Tax*, of their own court, the learned Judges came to hold that with regard to cement there can be no sales exigible to sales tax. Then the learned Judges dealt with the question of exigibility of sales tax over the turnover of the packing material. The Central Government's direction under the Cement Control Order of 1958 was extracted which ran thus:

Packing charges for cement for period commencing First April to Thirtieth June,

Nineteen Fifty-nine, will be Rupees Eleven Decimal Five Four (Rs. 11.54) per ton in New Gunny Bags.

On 24th June, 1959, the packing charges were revised to Rs. 11.04 per ton in new gunny bags. This rate was subsequently revised again on the acceptance of the Tariff Commission's recommendations and the rate became Rs. 17 per ton from 20th February, till 31st March, 1961. The learned Judges stated:

...From these orders, it is clear that the Government of India was purporting to fix the price of the gunny bags in which the producers were required to supply cement to the State Trading Corporation. The learned Advocate-General of Tamil Nadu contended that the Central Government under Clause 6(4) of the Cement Control Order, 1958, could have fixed only the maximum price of gunny bags and not the actual price; that being so, there was scope for bargaining between the producers of the cement and the State Trading Corporation. This contention has not been taken in the High Court; nor in the appeal memo. The Central Government has not put in its appearance in this Court. Hence we cannot go into the question whether the Central Government had power to fix the actual price of the gunny bags. The fact remains that the Central Government had fixed the actual price of the gunny bags. Its right to fix the price had not been disputed in the pleadings before the High Court nor does it appear from the judgment of the High Court that that question was urged before it. It is raised for the first time at the hearing.

In the result, for the reasons mentioned above, the contention that supplies of gunny bags by the producers amounted to "sales" must be rejected.

The ultimate conclusion in this decision supports Mr. Mohanty's contention undoubtedly. But we are not prepared to attach any importance to this decision in view of the earlier decision of the Supreme Court in the case of Salar Jung Sugar Mills Ltd. etc. Vs. State of Mysore and Others, A larger Bench of seven learned Judges had already held that the two decisions referred to in the later case were not good law. Yet, in State of Tamil Nadu etc. Vs. Cement Distributors Private Ltd. etc. etc., reliance was placed on those decisions which were no more good law. In view of this feature in the case, it would follow that the principle indicated in State of Tamil Nadu etc. Vs. Cement Distributors Private Ltd. etc. etc., may not be available to support Mr. Mohanty's contention.

12. The question as referred to this Court can have only one answer in view of what has been stated above and that answer shall be :

On the facts and in the circumstances of the case, it cannot be construed that there was a sale of gunny bags liable to payment of sales tax.

We make no order as to costs of the references.

B.K. Ray, J.

I agree.