

(1972) 09 PAT CK 0004

In the Patna High Court

Case No : C.W.J.C. No. 882 and 883 of 1972 & Civil Writ Jurisdiction Case No's.
882 and 883 of 1972

Bihar State Agro-Industries Development Corporation Ltd.

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

Date of Decision : 07-09-1972

Acts Referred:

Bihar Sales Tax Act, 1944 — Section 2(g), 2(h), 7(2)

Citation : (1973) 6 PLJR 173 : (1973) 31 STC 484

Hon'ble Judges : S. Akbar Hussain, J;N.L. Untwalia, J

Bench : Division Bench

Advocate : K.D. Chatterji and G.C. Bharuka, for the Appellant; Balabhadra Prasad Singh, Nagendra Prasad Singh and Keshav Srivastava, for the Respondent

Final Decision : Allowed

Judgement

N.L. Untwalia, J.—These two writ applications have been heard together as the facts are similar and some of the points involved in them are identical. They are being disposed of by a common judgment. Bihar State Agro Industries Development Corporation Ltd. is the sole petitioner in these two writ applications, in which the State of Bihar is respondent 1 and the Assistant Commissioner of Commercial Taxes, Urban Circle, Patna, is respondent 2. The petitioner is a Government Undertaking incorporated under the Companies Act, 1956. It deals in, and supplies, tractors pumping sets, threshers and other agricultural equipments to the agriculturist for development of agriculture and agriculture-based industries in the State of Bihar. The petitioner Company is a registered dealer under the Bihar Sales Tax Act, 1959 (Bihar Act XIX of 1959), hereinafter called the Act. The petitioner's case is that one of its modes of effecting sales is to make deliveries on the basis of hire-purchase agreements executed by intending purchasers to suit their convenience. A specimen copy of the agreement is Annexure 1 in both the cases. What seems to have happened in the case of the petitioner Company is that according to the revised return filed

by it for the assessment period 1968 69 a gross turnover of Rs. 92,51,290/97 being the amount of sales was shown. During the said period the petitioner had also delivered pumping sets and tractors worth Rs. 2,39,06,588/65 on hire-purchase basis to the agriculturists on execution of agreements, like the one contained in Annexure 1. Respondent 2 assessed the petitioner Company and passed an assessment order dated 18.4.72. A copy of the order is Annexure 2 in C. W. J. C. 883 of 1972. In this assessment order the learned Assistant Commissioner of Commercial Taxes added the sum of Rs. 2,39,06,588/65, the amount of the hire-purchase transactions, as being the sales during the assessment period 1968-69, The only grievance of the petitioner in this writ application is that respondent 2 has committed an error of law in treating the hire-purchase transactions as sales taxable to sales tax during the period in question. In C.W.J. C. 882 of 1972 the period of assessment is 1967-68. In respect of this period an assessment order dated 13. 6. 70 was made by another Assistant Commissioner of Commercial Taxes, respondent 2; a copy of this order is Annexure 2 to this writ application. In this assessment order the hire-purchase transactions entered into by the petitioner Company were not treated as sales and were not added to the gross turnover. Later on the Assistant Commissioner who had made the assessment order for the period 1968-69 issues a notice dated 18.4.72 u/s 18 of the Act proposing to re-assess, as, in his opinion certain turnover had escaped assessment He has passed fresh assessment order dated 22.5.72 (Annexure 3) which is the subject-matter of challenge in C. W. J. C, 882 of 1972. In this assessment order he has added the sum of Rs. 1,44,76 061/84 to the turnover of the petitioner Company in exercise of his power under the second proviso to Subsection (2) of Section 7 of the Act. The petitioner objects to this action and challenges it.

2. The relevant portion of the definition of "Sale" given in Clause (p) of Section 2 of the Act is as follows :-

""Sale" means any transfer of property in goods for cash or deferred payment or other valuable consideration including such transfer of property in goods made by society, club or association but does not include a mortgage or hypothecation of or a charge or pledge on goods; and all grammatical variations and cognate expressions shall be construed accordingly and "purchase" means such acquisition of property in goods;

Explanation:-(1) A transfer or acquisition of goods on hire purchase or under any other system in which payment of valuable consideration is made by instalments shall notwithstanding the fact that the seller retains the title in the goods as security for the payment of the valuable consideration or for any other reason, be deemed to be a sale or purchase."

Under Explanation (1) a transfer of goods on hire-purchase will be deemed to be sale although within the meaning of word it is not so. Such an explanation was there appended to the definition of "sale" given in Clause (g) of Section 2 of the 1947 Bihar Sales Tax Act. A case went upto the Supreme Court. The decision is

reported in (1) Damodar Valley Corporation Vs. State of Bihar and Others, . It will be noticed from the Report at page 107 of the S. T. C. volume the Dimodar Valley Corporation, the appellant before the Supreme Court, took a new point that the "proviso" to Section 2 (g) of that Act was ultra vires the Bihar Legislature. But this point being a new point was not allowed to be taken in the Supreme Court. On a consideration the terms of the agreement in that case, it was held that the effect of the agreement was effecting a sale and, therefore, the transaction was liable to be taxed under the Act. Following this decision, the Kerala High Court did not accept the contention put forward on behalf of the assessee that such an Explanation was ultra vires the State Legislature, although it may be noticed that this point had not been allowed to be argued in the case of Damodar Valley Corporation. The matter went up to the Supreme Court and by its judgment reported in (2) Marikar (Motors) Ltd. V. Sales Tax Officer (XIX Sales Tax Cases 18) the Supreme Court struck down the Explanation as being ultra vires because by that time the decision of the Supreme Court in (3) K.L. Johar & Company V. Deputy Commercial Tax Officer (XVI Sales Tax Cases 213 : AIR 1965 SC 1052) had taken the field.

3. In the case of (3) Johar & Company, the appellant before the Supreme Court, the facts were that the appellant was a financing Company. Its main business was to advance money to persons to purchase motor vehicles, who were themselves not in a position to find ready money to pay the price. Transactions were entered into between the dealer of the motor vehicles, the financing Company and the ultimate purchaser. The financing Company entered into hire-purchase agreements with the intending purchasers. On such transaction, in accordance with Explanation I to Section 2 (b) of the Madras Sales Tax Act. sales tax was levied. The Company challenged the levy on two grounds- (i) that the sale to the purchaser was by the dealers and the Company's transaction with them did not involve any sale by the Company to the ultimate purchaser and (ii) that the transactions of hire-purchase were not sales and the artificial definition given in Explanation I which is on identical terms of Explanation I of the Bihar Act was" ultra vires the State Legislature. On the first point the Company was overruled by the Madras High Court as also by the Supreme Court, It was held that financing Company was the purchaser of the motor vehicles from the dealers in the first instance and then it had entered into the transactions of hire-purchase with the ultimate purchasers. It would be seen from the Report at Page 222 of the S. T. C. volume that the matter first came up for hearing before the Constitution Bench of August 31, 1964 and since provisions similar to Explanation 1 of Section 2 (h) of the Madras Act were to be found in many State Acts, notice was given to the Advocates-General of all States. Many States intervened. The Supreme Court held that the State had power to levy tax on sales under Entry 48 of List II of the Government of India Act, 1955. The corresponding Entry was Entry 54 of List II in the 7th Schedule to the Constitution of India. "Sale" in that Entry would mean sale under the Sales of Goods Act and by an artificial definition a transaction which was not a sale could not be taxed as sale under the law

made by the State Legislature. It would be noticed from the Report at page 224 that a transaction is a sale only when the property in the goods passes to the purchaser. The price may be payable later by instalments; but if the property has passed, the transaction is one of sale. On the other hand, a hire-purchase agreement, as its very name implies, has two aspects.

"There is first an aspect of bailment of the goods subjected to the hire-purchase agreement, and there is next an element of sale which fructifies when the option to purchase, which is usually a term of hire-purchase agreements, is exercised by the intending purchaser."

4. In the case of (1) Sales Tax Officer V. Messrs Budh Prakash Jai Prakash (V Sales Tax Cases 193) it was held that Entry 48 in the Provincial List of the Government of India Act conferred power on the provincial Legislature to impose a tax only when there had been a completed sale and not when there was only an agreement to sell. This decision was affirmed in the case of (5) State of Madras V. Gannon Dunskerly & Co. (XI Sales Tax Cases 353). In (3) Johar Company's case their Lordships were asked to reconsider their decisions in (4) Budh Prakash's case and (5) Gannon Dunkerly's case. It was urged that the definition of sale under the central Sales Act had a wider meaning although the word used Entry 92 A of List 1 of the 7th Schedule to the Constitution was the same as in Entry 54. Their Lordships rejected this argument by saying that the power of the Central Legislature was not confined to Entry 92- of List 1 of the 7th Schedule to the constitution, but the power had to be tested with reference to Article 248 (2) of the Constitution read with Entry 97 of List 1 of the 7th schedule. But in a State legislation the extended meaning cannot be given because the power must be found in Entry 54. In that case it was said"-

"The essence of sale under the Sale of Goods Act is that the property should pass from the seller to the buyer when a contract of sale is made except in a case of conditional sale. Hire purchase agreements are not conditional sales. Therefore, any legislation by the State Legislature marking any agreement or transaction in which the property does not pass from the seller to the buyer a sale would be beyond its legislative competence."

At page 227 it has been observed that a hire-purchase agreement has two elements-

(i) element of bailment, and (ii) element of sale, in the sense that it contemplates an eventual sale. The element of sale fructifies when the option is exercised by the intending purchaser after fulfilling the terms of the agreement."

5. In the case of (2) Marikar (Motors) Ltd. I have already stated that the decision of the Supreme Court in (3) Johar Company's case was followed. Reliance was sought to be placed upon the decision of the Supreme Court in (6) Instalment Supply (Private) Ltd, V. The Union of India XII STC 489. This case was distinguished on the ground that the legislative competence was upheld because the legislation was in respect of Union Territory by the Central Parliament. It was

pointed out that in the case of (7) Mithan Lal Vs. The State of Delhi and Another, similar questions arose whether Parliament could enact a law imposing tax on the supply of materials used in building contracts. Gannon Dunkerley's case was distinguished, and it was held that it was within the competence of Parliament to impose such a tax. In the case of (6) Instalment Supply Co. 9 S.T.C. 489) the nature of hire purchase agreements and the law governing them were examined with reference to the English decisions and the English Act of 1938 and the judgment says-

"It is clear that under the law, as it now stands, which has now been crystallised into the Section of the Hire-purchase Act, quoted above, the transaction partakes of the nature of a contract of bailment with an element of sale, as aforesaid added to it. In such an agreement, the hirer may not be bound to purchase the thing hired; he may or may not be. But in either case, if there is an obligation to buy, or an option to buy, the goods delivered to the hirer by the owner on the terms that the hirer, on payment of a premium as also of a number of instalments, shall enjoy the use of the goods, which ultimately may become his property, the transaction amounts to one of hire-purchase, even though the title to the goods has remained with the owner and shall not pass to the hirer until a certain event has happened, namely that all the stipulated instalments have been paid, or that the hirer has exercised his option to finalise the purchase on payment of a sum, nominal or otherwise."

It may be mentioned here that from the quotations made earlier from the Halsbury's Laws of England, Third Edition, Volume 19, a distinction has been pointed out between the two types of hire-purchase contracts-(i) where an intending purchaser is under an obligation to purchase and (ii) where he has no obligation but an option to purchase. In the former case, it has been held that the hirer can pass a good title to a purchaser or pledge dealing with him in good faith and without notice of the right of the true owner, whereas in the case of latter it cannot be so, as, there is no binding obligation on the hirer to buy. In other words, a hire-purchase agreement casting an obligation on a hirer to purchase is more or less agreement of sale and purchase. But when there is no such obligation then there is no agreement to sell or purchase as such and ultimately the transaction fructifies into a sale when the option is exercised by the hirer.

6. It would thus be seen that there is no escape from the position that Explanation I appended to the definition of "Sale" given in Clause (p) of Section 2 of the Act is ultra vires the Bihar Legislature. It must be deemed to have been struck down by the Supreme Court in (3) K.L. Johar and Co. Vs. The Deputy Commercial Tax Officer, Coimbatore III, and must be expressly struck down in this judgment. The mere transaction of hire-purchase entered into by the petitioner Company with the different hirers cannot amount to sale in the assessment period 1968-69. The transactions will amount to sale as and when options of the intending purchasers will be exercised and they would fructify into

completed sales. It may be mentioned here that the terms of the agreement contained in Annexure 1 make it a typical hire-purchase agreement where the hirer has been given an option to purchase the property finally at Re. 1/-. There is, therefore, no difficulty in allowing C.W.J.C. 883 of 1972 and striking out the addition of Rs. 2,39,06,588/65 from the turnover of the petitioner, as assessed by respondent 2. The said sum has got to be excluded in the period of assessment, namely, 1968-69.

7. In the C.W.J.C. 882 of 1972 the point which falls for decision is of first impression and difficult one. We have given our due thought and consideration to it, and this case also has got to be decided in favour of the petitioner Company.

8. I shall first read the relevant portions of Section 7 of the Act.

"For the purpose of the Act, the taxable turnover of a dealer shall be-

"(2) in respect of special sales tax, that part of the gross turnover which remains after deducting therefrom.

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(b) Subject to the provisions of Section 5 sale-prices on account of sales to a registered dealer other than a dealer liable to pay tax under Sub-section (8) of Section 3, of goods specified in his registration certificate as being required

(i) For re-sale by him inside Bihar or in the course of inter-State trade or commerce or export out of the territory of India, or

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Provided that in the case of such sales a declaration in the prescribed form duly filled up and signed by the registered dealer to whom the goods are sold or by his manager declared u/s 10, is furnished in the prescribed by the selling dealer :

Provided further that where any goods exempted from the levy of tax by a notification issued by the State Government in this behalf under Subsection (3) of Section 4 are purchased by a dealer after furnishing declaration mentioned in the notification or where any goods specified in the certificate of registration of a dealer are purchased by him after furnishing a declaration as provided in the first proviso of Clause (2) but are utilised by him for any purpose other than those specified in such a notification or specified in item (i) or (ii) of Subclause (b) of Clause (2) as the case may be, the sale-price of the goods so purchased shall, without prejudice to any action which is or may be taken u/s 38, be deducted from the gross turnover of the selling dealer but shall be included in the taxable turnover of the purchasing dealer."

A declaration in form 9 has to be given by the registered dealer to his seller in accordance with Rule 8 (3) of the Sales Tax Rules. The form requires the registered dealer to give the declaration-

""Certified that goods ordered for in our purchase order No.dated.....

purchased from you as per bill cash memo, stated below supplied under your chalan No.dated.....are-

(1) For re-sale in Bihar or in course of inter-State trade or commerce or export outside India."

The scheme of the Act and the Rules, therefore, is that a registered dealer on giving such a declaration is not required to pay sales tax to his seller and the said transaction is not included in the turnover of the seller for the purpose of assessment of sales tax. But then the second proviso says that if a dealer purchases any goods specified in the certificate of registration of the dealer as being required for resale after furnishing a declaration but has utilised the goods for any purpose other than those specified in item (i), i. e. for re-sale then the sale-price of the goods so purchased shall be deducted from the gross turnover of the selling dealer but shall be included in the turnover of the purchasing dealer. In other words, if the declaration given by the registered dealer is found to be false then that dealer is subjected to the payment of sales tax in regard to the amount of purchases made by him on the basis of his declaration. It would be noticed that the action of taxing such turnover of the dealer is without prejudice to any action which may be taken u/s 38. Section 38 is a penal provision and it says-

"(1) whoever-

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(d) having purchased any goods or class or description of goods after giving the declaration mentioned in Sub-section (2) of Section 6A or in a notification issued under Sub-section (3) of Section (4) or the proviso to Subclause (b) or Clause (Sic) (2) of Section 7, utilises the said goods for a purpose other than that for which the goods were so purchased by him;

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shall be punishable with imprisonment of either description which may extend to six months or with fine not exceeding one thousand rupees or with both, and when the offence is a continuing one, with a daily fine not exceeding fifty, rupees during the period of the continuance of the offence.

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9. The question in this case is whether the petitioner Company entering into transactions of hire-purchase with its customers utilised the goods purchased from its seller on furnishing of declaration that they are required for re-sale for any purpose other than the purpose of re-sale. If the petitioner Company has done so, not only the sale-price of such goods has to be added to its taxable turnover, as has been done by the impugned order (Annexure 3) but it would also be liable to be prosecuted u/s 38 of the Act. The question is : is it correct to say that the petitioner has utilised the goods for any purpose other than the re-

sale? The learned Assistant Commissioner of Commercial Taxes had held by his order dated 18-4-72 (Annexure 2 in C.W.J.C. 883 of 1972) that the transactions of hire-purchase were sales. Having done so, it is difficult to follow his addition made for the assessment period 1967-68 under the second proviso to Subsection (2) of Section 7 of the Act, because if the transactions are sales then obviously the goods purchased by the petitioner Company have not been utilised for any purpose other than re-sale. Respondent 2 says in his impugned order that if the hire-purchase transactions are not to be treated as sales then the addition can be made under the said provision of law. He has done so accordingly. To say the least, there is an obvious inconsistency in his order which is the subject-matter of consideration in C.W.J.C. 883 and the one which is impugned in C.W.J.C. 882. But the point of difficulty arises when I have held in C.W.J.C. 883 that the transactions of hire-purchase are not sales. Is it then possible to say in C. W. J. C. 882 that the petitioner Company after having purchased the goods from its seller as being required for re-sale utilised them for any purpose other than re-sale?

10. Transactions on the basis of hire-purchase agreements are so well known to the commercial world that it does not seem possible to take the view that a registered dealer after having purchased goods for re-sale utilised them for any purpose other than re-sale by merely entering into such transactions. It is well known that such transactions are entered into with the ultimate object of passing the property in the goods to the hirer. In finality and reality such transactions are not hire agreements only. As repeatedly pointed out by the Supreme Court, there is an element of bailment in it when a part of the agreement is for letting out on hire and the other element is the element of sale. The transaction is a process for achieving the ultimate transaction of sale. Since many purchasers do not find it easy to pay the full price of tractors, motor vehicles or the like for which generally such agreements are entered into and the seller is not prepared to lose his ownership and pass property in the goods to such a purchaser without payment of the full price, hire-purchase agreements are entered into. The interest of the seller or the financier is amply safeguarded. The hirer for a certain period of few years uses the vehicle which remains the property of the seller, pays instalments on that account which, as observed by the Supreme Court at pages 228 and 229 in (3) Johar Company's case (XVI S.T.C. 213), consists of two parts.-(i) the hire rent and (ii) a part of the price. Of course, the Supreme Court has indicated that the sale-price which ultimately can be taxed when a transaction of hire-purchase fructifies into a transaction of completed sale can neither be Re. 1/- the price which is mentioned generally in the hire-purchase agreement, nor the full price which was determined at the time of the hire-purchase agreement, but it would be something in between the two. The Legislature has not given any indication as to the determination of the final sale-price in such cases. The Supreme Court has given some indications of it. It is not uncommon to find that in such transaction what really happens is that the price of the vehicle to be supplied is fixed at the time of the hire-purchase agreement,

say, at Rs. 20,000. The said sum of Rs. 20,000, let us assume, is to be paid by the intending purchaser during the course of 5 years. Then interest at the said sum of Rs. 20,000 is calculated, say at the rate of 12 per cent per annum for a period of 2 1/2 years, which will come to Rs. 6,000. In the price of Rs. 20,000 the sum of Rs. 6,000 is added, the hire purchase agreement mentions the sum of Rs. 26,000, to be paid by the hirer by instalment in 5 years. It is obvious that a major portion of the instalment will go towards the price and a minor one will go towards payment of interest in the shape of hire rent. It is a matter of common experience that if any vehicle is let out by the owner only for the purpose of hire, the rent is considerably high as compared to the hire rent which is charged in hire-purchase agreements. Viewed from any angle, I have not been able to persuade myself to subscribe to the view as argued by learned Advocate-General en behalf of the State that the utilisation of the goods is for a purpose other than re-sale. In my considered judgment, the utilisation of the goods by the Company was for re-sale although re-sale was not to be effected immediately but it was to be achieved later through the process of the hire-purchase transaction. It is not possible to take this view in the case of hire-purchase transactions, pushed to its logical conclusion, the transactions of agreement for sale will not be re-sale at the time the agreements are entered into. The completed sale may be some time later when the property in the goods to be sold passes to the buyer. But yet the Department may say that the goods which were delivered, say, to the Railway Company for the purpose of despatch to buyer in pursuance of the agreement to sell, were utilised for a purpose other than re-sale. It would bear repetition to say that the act of the dealer utilising the goods for any purpose other than re-sale is a criminal act punishable u/s 38 of the Act. That being so, the second proviso to Sub-section (2) of Section 7 is attracted for the unlawful and illegal act of a registered dealer in utilising the goods purchased for re-sale for any other purpose. I do not find anything in Section 7 or in the form of the declaration to pin down the registered dealer purchasing goods for re-sale to enter into straight transactions of re-sale only. It is difficult to say that he cannot enter into transactions of agreement to sell or hire-purchase agreement, the ultimate object of which is re-sale. It will be useful to explain the matter by taking an example in contrast. Supposing a registered dealer purchases, say, 5 tractors from his seller on furnishing a declaration that they are required for re-sale, the dealer thereafter uses the tractors for cultivating his own land and then sells them as second-hand tractors after certain period. In such a situation, although the dealer may have finally re-sold the tractors, but putting them to his own use of cultivation will undoubtedly be utilising them for any purpose other than re-sale because the said utilisation will have no causal connection with the final transaction of sale of second hand tractors while in the cases of hire-purchase transactions the property is delivered to the intending purchaser, he utilises it for his own use and ultimately becomes the purchaser by exercising his option of purchase. In such a situation it will be stultifying the well known methods of ultimate sales in commercial world by taking the view that the registered dealer by entering into such transactions

utilises the goods for a purpose other than resale. In C. W. J. C. 882 of 1972 also it has got to be held that inclusion of the sum of Rs. 1,44,76,061/84 in the taxable turnover of the petitioner for the period 1967-68 under proviso 2 of Sub-section (2) of Section 7 of the Act is unjustified and illegal. The facts are not in dispute and in one case the vires of the statute was challenged and in the other the point depended upon the interpretation of certain provisions of the Act and, therefore, we thought it proper to entertain the writ applications from the two assessment orders in question. For the reasons stated above, C. W. J. C. 883 of 1972 is allowed and the addition of Rs. 2,39,06,588/65 in the taxable turnover of the petitioner as made in Annexure 2 is struck down. C. W. J. C 882 of 1972 is also allowed and the addition of the sum of Rs. 1,44,76,061/84 in the taxable turnover of the petitioner in Annexure 3 is also struck down. The result of knocking down this figure is that the revised assessment order contained in Annexure 3 becomes bad and the original assessment order contained in Annexure 2 comes into force. In the circumstances, there would be no order as to cost in either.

S. Akbar Hussain, J.

I agree.