
(1970) 04 OHC CK 0015
In the Orissa High Court
Case No : S.J.C. No's. 78 and 79 of 1968

Biraja Prasad Ray

APPELLANT

Vs

The State of Orissa

RESPONDENT

Date of Decision : 01-04-1970

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 2(g), 24(1)

Citation : (1971) 27 STC 588

Hon'ble Judges : G.K. Misra, C.J.; S. Acharya, J

Bench : Division Bench

Advocate : J.K. Patnaik, for the Appellant; S.C. Mohapatra, for the Respondent

Judgement

G.K. Misra, C.J.—The petitioner is a contractor who undertook construction of roads under different sub-divisions of the Public Works Department after entering into agreements with the department in P.W.D. F-2 agreement form. The agreement was to the effect that he would construct and repair roads. The petitioner used to collect materials for construction of roads. From time to time he was getting advances to be ultimately adjusted against the final bill.

2. The sales tax authorities, right up to the stage of the Tribunal, assessed the petitioner to sales tax separately in respect of materials collected for construction of roads. A reference was sought u/s 24(1) of the Orissa Sales Tax Act. A copy of the order of the Tribunal was served on the petitioner on 26th April, 1968. The reference application u/s 24(1) was filed on 24th June, 1968, within 60 days. The Tribunal, however, passed the order of reference on 5th November, 1968, about 134 days from the date of filing of the application. The Tribunal ultimately referred the following question for the opinion of the court:

Whether a contract in P.W.D. F-2 agreement as made in the case of the applicant with the P.W.D. involves two contracts--one for labour and the other for sale of goods--put in one agreement form and as such that part which involves supply of materials for money consideration is liable to sales tax?

3. The office raised a preliminary objection that the reference was barred by limitation as the reference judgment was not delivered within 90 days from the date of the filing of the application. An order was passed that this matter would be taken up at the time of hearing. As this question would arise in many references, it should be resolved by us once for all.

4. Section 24(1) of the Orissa Sales Tax Act runs thus:

24(1) Within 60 days from the date of receipt of the copy of an order of the Tribunal or Additional Tribunal, as the case may be, under Sub-section (3) of Section 23 affecting any liability of any dealer to pay tax under this Act, such dealer or, as the case may be, the State Government may, by application in writing, accompanied, when the application is made by any person other than the State Government, with a fee of one hundred rupees, require the Tribunal or Additional Tribunal, as the case may be, to refer to the High Court any question of law arising out of such an order and except in cases covered under Sub-section (2), the Tribunal or the Additional Tribunal, as the case may be, may, within 90 days of the receipt of such application, draw up a statement of the case and refer it to the High Court.

It would thus appear that the Tribunal or the Additional Tribunal, as the case may be, may draw up a statement of the case and refer it to the High Court within 90 days of the receipt of the application. In the present case, the Tribunal admittedly did not make the reference within 90 days. The question is whether the reference judgment of the Tribunal would be void on the ground that it was passed beyond 90 days from the date of filing of the reference application.

5. The word used in the sub-section is "may". Doubtless in certain contexts the word "may" has the force of "shall" and becomes mandatory, but in the present context it is directory. The reasons are obvious. After the dealer has made his reference application he has no control over the proceedings of the Tribunal, and if, for no fault of his, the Tribunal delays delivering its order, such an order cannot be said to be void. If such a view is taken then every reference application can be frustrated by the Tribunal by resorting to dilatory tactics. The word "may" has been used in the sub-section to indicate that the injunction given to the Tribunal is directory and not mandatory. In other words, even if the Tribunal passes an order beyond 90 days from the date of filing of the application, its judgment would not be void and would have full effect and no question of limitation is involved. The injunction has been given to the Tribunal, with a view to keep it within bounds, so that reference applications may be disposed of quickly. Despite this construction the force of the injunction still subsists. Our view that the word "may" is directory does not entitle the Tribunal to resort to dilatory tactics. It must always keep in view that, as far as practicable, reference applications should be disposed of within 90 days as enjoined upon by the statute.

6. We may now proceed to answer the question referred. The matter has been

fully dealt with in *Kanhu Charan Das v. State of Orissa* and Ors. O.J.C. No. 371 of 1966 decided on March 4, 1970, reported at p. 571 supra. and *Natabar Mohanty v. State of Orissa* S.J.C. No. 71 of 1968 decided on March 27, 1970, reported at p. 572 supra, where identical agreements were under consideration. The crux of the matter has been missed by the Tribunals from time to time due to their failure to appreciate the principles laid down in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, We would therefore clarify the position in a simple manner. u/s 2(g) of the Orissa Sales Tax Act, the expression "sale" carries the same meaning as it has in the Sale of Goods Act. Sale involves the concept of transfer of title in movable goods for consideration, either paid in cash immediately or for deferred payment ; and the goods that are ultimately to pass are the goods in respect of which the agreement was entered into. If the agreement is in respect of immovable property, it can in no circumstance constitute a "sale" within the meaning of Section 2(g). There are many contracts which, though apparently appearing to involve sale or immovable property, also constitute sale of movable property. In other words, though the contract may be drawn up in the shape of one agreement, the contract might contain two divisible agreements--one for sale of movable property and the other for sale of immovable property. If, on a careful scrutiny of the terms of the agreement and the surrounding circumstances, it appears that there was an agreement for sale of movable goods, then there is a sale within the meaning of Section 2(g) of the Orissa Sales Tax Act, and sales tax is leviable on such movables. This would vary according to the facts and circumstances of each case.

7. In the impugned agreement in P.W.D. F-2 form there is no term for independent sale of movable goods. In cases of construction of roads, the contractor is bound to supply some movable goods. But from the mere fact that such movables are supplied, it does not follow that they were sold under the agreement. Unless there is an agreement to the contrary, they merely passed as accretions to the immovable property.

The agreement was for the construction of roads and not for sale and supply of movables. Title to the movables passed as a component and integral part of the construction. There being no agreement for sale of movables, as such, supply of movables cannot be taxed merely because they were movables. It was not open to the assessing authorities to split up the agreement and spell out a case of sale. This is the confusion into which the Tribunal fell.

We are satisfied, on a perusal of the terms of the agreement and the findings recorded by the Tribunal, that there was no sale of goods. The fact that the petitioner was being paid a major part of the consideration soon after the assembling of the movable goods does not also lead to the conclusion that there was a sale of those goods. Under the agreement such payments were made by way of advances.

8. We would accordingly answer the question by saying that there are no two contracts (one for labour and another for sale of goods) in the P.W.D. F-2

agreement. It follows that there was no supply of materials for money consideration and they are not liable to sales tax.

9. In the result the references are accepted, but without costs. The petitioner will be entitled to refund of reference fees.

S. Acharya, J.

I agree.