

(1955) 09 OHC CK 0003
In the Orissa High Court
Case No : O.J.C. No. 92 of 1955

Chakko Bhai Ghelabhai

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 05-09-1955

Acts Referred:

Constitution of India, 1950 — Article 226
General Clauses Act, 1897 — Section 6
Orissa Sales Tax Act, 1947 — Section 11(1), 12(5), 12(7), 2, 29(2)

Citation : (1955) 21 CLT 531 : (1955) 21 CLT 521 : (1956) 7 STC 36

Hon'ble Judges : Panigrahi, C.J.; P.V.B. Rao, J

Bench : Division Bench

Advocate : M.S. Mohanty and Miss D. Mohanty, for the Appellant; A.G., G. Dhal and B. Mohapatra, for the Respondent

Judgement

Panigrahi, C.J.—The petitioner is a firm dealing in Biri leaves with its headquarters in Bagbahara in Madhya Pradesh. During the years 1048 to 1951 he was engaged in collecting Biri leaves from the forest areas of Borasambar Zamindari in Sambalpur district, and was carrying on the business of collecting and storing them in godowns situated at various centres within the State of Orissa. These leaves were stored and made up into bundles which were then despatched to various destinations outside the State of Orissa.

The petitioner has been assessed to sales tax and, In addition, a penalty has been imposed upon him for not getting himself registered under the provisions of the Orissa Sales Tax Act. He has, therefore, come up to this Court and prays for a writ directing the Sales Tax authorities to withdraw the demand for payment of taxes and to rescind the orders passed by them,

2. A number of contentions have been raised by learned counsel for the petitioner. It is urged, firstly that the petitioner is not a "dealer" as defined in the Orissa Sales Tax Act, that he had no "place of business" in Orissa that he was merely sending the goods from Orissa to places outside the State and

consequently the Orissa Sales Tax authorities had no jurisdiction to assess him to, sales tax.

Secondly, he complains that the opposite parties realised a sum of Rs. 1200/- as court-fees under Rule. 59 of the Orissa Sales Tax Rules and that the levy of Court-fees on his memorandum of appeal and revision petitions is ultra vires. Finally, he contends that the opposite parties had no jurisdiction to make" twelve separate assessments u/s 12(5) after service of a single notice in Form VI.

3. The Sales Tax Officer, Patna Circle, issued a notice on 21-7-1950 under Sections 11 (1), 12 (5) and 12 (7), Orissa Sales Tax Act in Form VI as follows:

Form VI.

Notice to a dealer, under Sections 11 (1), 12 (5) and 12. (7) Orissa Sales Tax Act, 1947.

(See Rules. 22, 23 and 28 (2)).

To

Chukabhai Golabhai,

Village/Post Lakhna.

Whereas it appears to me that your gross turnover immediately preceding the commence ment of the Orissa Sales Tax Act 1947 had ex ceeded Rs. 5000/- but that you have neverthelesswilfully failed to apply for registration u/s 9 of the Act,

Whereas I have reason to believe that your turnover for the quarters ending the 31st December 1947 to 30th June. 1950 on which sales tax payable under the Orissa Sales" Tax Act, has escaped assessment.

You are hereby required to submit within one month from the date of receipt of this notice a return in Form IV (separately enclosed) showing separately the particulars of your turnover for each of the quarters ending December 1947 to the 30th June 1950.

You are also hereby required to attend in person, or by agent, at my office at Bolangir on the 22nd August 1950 at 10-30 A. M. and there to produce or cause to be produced the accounts and documents specified on the reverse.

and also to show cause why, in addition to the amount of tax that may be assessed on you, a penalty not exceeding 1 1/2 times the amount should not be imposed on you under Sub-section (5) of Section 12 of the Act. In the event of your failure to comply with all the terms of this notice I shall proceed to assess you to the best of my judgment without reference to you.

Sd.

Place --Bolangir.

Assistant Sales Tax Officer, Patns Circle.

Date--21-7-50

Note:-- Unnecessary words should be scored out;.

....

It appears that the notices u/s 12 (5) were issued on. the petitioner from time to time, but. the firm did not put in appearance and sent replies to the effect that he was not a "dealer" within the meaning of the Orissa Sales Tax Act and that he was only storing kendu leaves in his depot at Lakhna and despatching the same therefrom to places outside the Orissa State. On 30-6-1951 one of the partners of the firm appeared before the Sales Tax Officer, but did not produce the necessary accounts.

The partner Shri Narbheram Popatbhai contended that his firm had been registered under the Madhya Pradesh Sales -Tax Act at Raipur, that the accounts were maintained at their Head office at Bagbahar and that there were no separate accounts in respect of the transactions carried on in Orissa. The statement made by him to the Sales Tax Officer shows that the business of the firm consisted in collecting kendu " leaves at centres put up at different places in the forest areas of Orissa, and that the leaves were processed and manufactured for . sale in the storage godowns maintained at Lakhna and were despatched to places outside the State, to the regular customers of the firm, by rail in all cases. He said that the Railway Receipts were sent to the consignees who paid the freight on delivery of the commodity.

The Sales Tax Officer therefore held that the transfer of the property in the goods was completed in, Orissa as soon-as the goods were delivered to the railway, namely, a common carrier. He also held that the firm had wilfully failed to apply for registration of its business in Orissa and therefore assessed the firm to the best of his Judgment.

3A. The view taken by the Department is that there was sufficient territorial nexus between the goods sold and the State of Orissa and that delivery was completed when the leaves were despatched by rail under Railway Receipts endorsed to the consignees outside Orissa who were only to pay the freight and take delivery. In the affidavit filed by the Collector of Commercial Taxes in this Court it is stated that the petitioner did not prove that the delivery of the goods took place outside the State of Orissa for the purpose of consumption and that, therefore, when the assessment was made for the quarters subsequent to 26-1-1950 on which date the Constitution came into force the petitioner cannot claim protection under Article 286 of the Constitution.

It is further maintained that although a notice u/s 12 (5) of the Act was issued for the quarters 30-6-1948. to 31-3-1949 no fresh notice was necessary for the subsequent periods as the Act does not contemplate a separate notice for each quarter before a penalty can be levied. "The Collector also seeks to Justify the

levy of court fees under Rule 59, read with Rule 62 of the Sales Tax Rules, and contends that such levy is not in excess of the rule-making power vested In the Government u/s 29 (2) (s) of the Act.

4. "In this Court the petitioner has filed an affidavit" stating the nature of the transactions he is carrying on which shows that biri leaves are collected in the forest areas of Orissa and prepared into bundles at phandi's (Centres). Thereafter they are sent to Lakhna, Nawapara, Khariar Road, etc., where the petitioner maintains storing centres. At these centres the leaves are made into bigger bundles and filled into bags whereafter they are, despatched by rail to different destinations.

Owing to restrictions on railway booking the consignments were sometimes booked in the name of the petitioner and sometimes in the nams of the employees of the firm and sometimes even in fictitious names with a view to facilitate the procurement of wagons. The railway receipts were sent to the petitioner's head-quarter office at Bag-bahara where negotiations for the sales were carried on. and the contract of sale was made at the destination. It is asserted that there was no contract of sale entered into with any buyer when the goods were within the borders of Orissa. The affidavit states that:

"All contracts of sales commenced after the goods had actually "left the territory of Orisse. State and followed the procurement of railway receipts after despatch at railway heads. No such. contract of sale was ever entered into by the petitioners prior to the despatch of the goods."

It is further averred that the commercial practice obtaining in the biri leaves trade is that no particular consignment is ever despatched against any specific order. A schedule has been filed in order to show that many of these consignments were addressed to "self and were later sent to different customers outside Orissa.

5. The transactions in question may be divided into two groups, namely, those that took place before 26-1-1950, i. e., before the Constitution came into force, and those that took place afterthat date." In respect of the latter category it cannot now be seriously disputed that the sales are deemed to be completed only in the State where the delivery took place irrespective of the . presence of the goods or the other elements of sale being completed in Orissa.

In respect of the sales that took place before. the Constitution came into force, it is equally clear that the Orissa State could assess them to tax provided there was sufficient territorial nexus between the goods and the State. This test however would not avail the taxing auctorities if no attempt had been made to assess the petitioner before the Constitution came into force. It was pointed out by the learned Advocate-General -- and very rightly - that the recalcitrant attitudeadopted by the petitioner in refusing to produce his books of account rendered it impossible for " the taxing authorities to exclude the sales that took place outside Orissa during the pre-Constitution period.

The position, therefore, is that the statement, made by the petitioner can be neither accepted as true nor rejected as being entirely untrue. It is not possible to say, on the scanty material before us, that none of the transactions of the petitioner is affected by the Orissa Sales Tax and that all of them are liable to be exempted from taxation. We were invited to accept a statement made by the petitioner in his second affidavit (to which a schedule was also attached) and to hold that all the consignments delivered to the railway were addressed to "self" and that consequently no sales ever took place inside Orissa.

It is not the function of this Court to decide questions of fact and to determine the liability of a dealer for assessment on that basis. All that we can do is to determine whether, on the facts admitted or proved, the assessment has been correctly made. (6) Turning now to the questions raised at the Bar I would like to deal first with the competency of the Sales Tax authorities to levy court-fees on the petitions filed before them by way of appeals and revisions against an order of the taxing Officer. Undoubtedly, the State Legislature, has the power to enact laws relating to the levy of court-fees, as well as fees in respect of any matters in List II (State List) of Schedule 7 to the Constitution. Item 3 in that list is entitled:

"Administration of Justice; constitution and organization of all Courts, except the Supreme Court and the High Court; officers and servants of the High Court; procedure in rent, and revenue Courts; fees taken in all Courts except the Supreme Court",

Under this item the Legislature is competent, to enact laws imposing "fees taken in all Courts except the Supreme Court". Item 86 of the same list empowers the State Legislature to make laws regarding "fees in respect of any of the matters in this List, but not including fees taken in any Court". It would thus appear that there is a distinction between the law imposing "fees taken in Courts" and that imposing fees in respect of any of the other matters in the list.

The question therefore is whether the taxing authorities can, by any stretch of imagination, be regarded as "Courts" and whether the applications made to them by parties are liable to be stamped with court-fees.

7. It may be noticed that the Act itself fixes various type of fees in respect of certain matters stated in the body of the Act. Section 9 for instance, dealing with registration of dealers says that a dealer required to be registered shall make an application accompanied by such annual fee not exceeding Rs. 10/- to such authority as may be prescribed, u/s 9-A a dealer may apply in the prescribed manner, accompanied by a fee of Rs. 2/- and get himself voluntarily registered although his turnover has not exceeded Rs. 10,000/- during the year. The annual registration fee is fixed at Re. 1/- under Sub-section (4) of that section. u/s 11 the Collector may direct that the dealer shall, by way of penalty, pay a sum not exceeding 10 per centum of the tax due or Rs. 5/- for every day. Section 24 deals with the statement of cases to the High Court and requires a deposit of Rs. 100/- to be made if the dealer requires the Revenue Commissioner to refer to

the High Court any question of law arising out of an order u/s 23. Section 29 vests the power to make rules for carrying out the purpose of the Act in the Provincial Government, and Section 29(2) (8) says that such rules may prescribe "the procedure for and other matters (including fees) incidental to the disposal of appeals and applications for revision and review u/s 23."

Chapter X of the rules deals with appeals, revisions and reviews and enumerates the authorities to whom appeals would lie against the orders of the Subordinate Sales Tax authorities. Rule 48 says that a memorandum of appeal against an assessment to tax with or without penalty u/s 12 shall be presented in Form XVI. It shall be signed by the dealer or his agent or may be presented in person at the office of the appellate authority or sent by registered post.

Form XVI prescribes the form of appeal against the assessment and is worded as a petition. A reference to the body of the prescribed form would show that it is a petition against the order of a subordinate Sales Tax officer. Rule 49 provides for a summary rejection of an appeal if the memorandum of appeal is not in the specified form. Rule 50 deals with hearing of appeals and says that the appellate authority may, before disposing of any appeal, make such further enquiry as he thinks fit.

Rule 51 provides that any person other than the assessee shall be given a reasonable opportunity" of being heard if the order passed on an appeal is likely to affect such a person. Rule 52 enables a dealer to apply to the Collector for revision of an order passed by the Sales Tax Officer or Assistant Collector. Chapter 21 deals with "fees" and prescribes a graded scale of fees for different kinds of applications. A fee of Rs. 2/- is prescribed for the issue of a duplicate copy of the Certificate of Registration.

On a memorandum of appeal against an order of assessment or penalty or an application for revision or review of such order the assessee is required to pay 5 per cent of the amount in dispute subject to a minimum of Re. 1/- and a maximum of Rs. 100/-. Similar is the fee prescribed for application for review. Rule 61 requires that an application for certified copy of an order passed by any Sales Tax authority should bear a court-fees stamp of four annas for an ordinary and eight annas for an urgent copy. Sub-rule (3) of that Rule prescribes the scale of court-fee payable for the grant of copies and says that

"for every 150 words or less of typewritten documents 4 annas or 8 annas shall be chargeable according as the copy is an ordinary or urgent copy."

Rule 62 says that the fees payable under the Rules are to be paid- in court-fee stamps. It would appear from these provisions that the Government have failed to make any distinction between the functions of the taxing authorities and those of a Court constituted by the Legislature, in exercise of the power vested in it by item 3 of the State List.

8. It is not every tribunal that can be characterised as a Court. The word "Court"

is not defined anywhere, but the right to establish a Court flows from sovereign power of the State whose duty it is to exercise judicial power to decide disputes between its subjects, or between it and its subjects whether it related to life; liberty or property. This judicial power is vested in the Courts under the Constitution which is the repository of the sovereign power of the State.

The term "Court" has acquired the meaning of "a place where justice is administered" and also applies to persons who exercise judicial functions under authority derived either Immediately or mediately from the sovereign power. All tribunals, however, are not courts in the sense in which the term is understood. Thus arbitrators, committees of clubs and the like though they may be tribunals exercising judicial functions are not "Courts" in this sense of the term.

In determining whether or not a tribunal is a judicial body the facts that (1) it has been appointed by a non-judicial authority, (2) it has no power to administer oath and (3) the chairman has a casting vote are immaterial. The elements to be considered are enumerated in Halsbury, Vol. 8, page 525 as follows: (1) requirement for a public hearing subject to a power to exclude the public in a proper case; (2) a provision that a member of the tribunal shall not take part in any decision in which he is personally interested, nor unless he has been present throughout the proceedings.

It should be remembered, however, that there are tribunals with many of the trappings of a Court which nevertheless are not Courts in the sense that they exercise judicial power. A tribunal is not necessarily a Court in the strict sense of exercising judicial power merely because (1) it gives a final decision, (2) hears witnesses on oath, (3) two or more contending parties appear before it between whom it has to decide. (4) it gives decisions which affect the rights of subjects, (5) there is an appeal to a Court or (6) It is a body to which a matter is referred by another body.

Many bodies are not Courts although they have to decide questions and in so doing have to act judicially in the sense that the proceedings must be taken with fairness and impartiality, such as assessment committees, guardian committees, etc. The test is whether the tribunal exercises sovereign judicial power of the State and whether it is a place where Justice is "judicially administered."

In --"Shell Company of Australia Ltd. v. Federal Commissioner of Taxation" 1931 AC 275 (A) the question was whether the powers and functions of the Board of Review created by Section 41, Income Tax Assessment Act (1922-25) in making assessments were in exercise of the judicial powers or whether they were merely administrative functions. Lord Sankey while defining judicial power enumerated some of its negative aspects of it thus:

"A tribunal is not necessarily a "Court" in the strict sense because (1) it gives a final decision, nor (2) because it hears witnesses on oath, nor (3) because two or more contending parties appear before it between whom it has to decide nor (4) because it gives a decision which affects the rights of subjects, nor (5) because

there is an appeal to a Court, nor (6) because it is a body to which a matter is referred by another body. An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court."

In the case of taxing authorities, there are many functions which are inconsistent with strict judicial action and consistent with executive action. The appellate authority is specifically empowered to make such further enquiry as it thinks fit, into the case" of an assessee under Rule 50, and all the officers engaged in the assessment proceedings up to the Board of Revenue are designated as "Sales Tax authorities" under Rule. 3.

The appellate authorities are administrative tribunals who review the decisions of the Sales Tax officer who admittedly is not a judicial, but an executive officer.

9. It cannot, therefore, be argued with any semblance of reason that the Assistant Collector or the Revenue Commissioner is a judicial tribunal functioning as a Court. It has been held that an Income Tax Appellate Tribunal is not a Court and that the Legislature has the power to require the deposit of a sum as a condition for preferring an appeal to that Tribunal u/s 33, Indian Income Tax Act see -- "R. M. Seshadri v. Second Additional Income Tax Officer. Salaries Circle, Madras" AIR 1954 Mad 806 (B).

10. Another contention was also raised in this connection, and that is whether the levy of court-fees strictly falls within the rule-making power of the Government u/s 29(2) (s), in other words, whether the levy of court-fees on appeals and revision or review petitions has any relation to

"the procedure for and other matters incidental to the disposal of appeals, applications for revision and review u/s 23."

Section 23(2) says

"subject to such rules of procedure as may be prescribed the appellate authority in disposing of any appeal under Sub-section (1) may affirm, reduce, enhance or annul the assessment, set aside an assessment or penalty, or direct a further enquiry."

Government can prescribe rules of procedure for the disposal of such appeal u/s 29(2)(s). But the requirement of levying court-fees on a memorandum of appeal or revision application when such an application is instituted is not a matter relating to the disposal of an appeal. The rule contemplates the levy of fees which are "incidental to the disposal" like for instance, fees for summoning witnesses, or obtaining documents which may be required for such disposal.

The use of the expression "incidental to the disposal of appeals and applications" is a clear pointer that" appeal petitions themselves are not to be charged with any fee. It is referable to a charge of a casual nature which may occur in fortuitous or subordinate conjunction with the disposal. This may or may not happen in every case, but is likely to occur being an event of accessory

subordinate character. Court-fees levied for grant of copies are governed by the provisions of the Court-fees Act and no tribunal other than a Court can charge such a fee.

It may be open to the authorities to charge a fee for granting a copy as compensation for the services rendered, though the rules of natural justice would require that the assessee should be granted a copy of the assessment order free of charge. Apart from this, one has to keep in mind the distinction between a "tax" and a "fee" as has been pointed out by the Supreme Court in - *The Commissioner, Hindu Religious Endowments, Madras Vs. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt.*, .

Tax is a compulsory exaction of money by a public authority for public purposes enforceable by law and is not payment for services rendered. Fee is a charge for special services rendered to individuals by some Governmental agency and is based on the expenses incurred by Government in rendering the service. Ordinarily fees are uniform and no account is taken of the varying abilities of the different recipients to pay. It is therefore absolutely necessary that the levy of fees should, on the face of the legislative provision, bear some relation to the expense incurred by the Government in rendering the service.

There are ordinarily two classes of cases where Government imposes fees upon persons. In the first class of cases the Government grants permission or privilege to do something and extracts fees from that person in return for the privilege that is conferred. - In the second class of cases Government does some positive work for the benefit of persons and the money is taken as the return for the work done or the services rendered. If the money thus paid is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues for the benefit of the general public it can be counted as fees and not as tax.

Having regard to this distinction can it be said that the levy of fees prescribed by the rules is justified? Mr. Mohanty has taken considerable pains to satisfy us that the amounts collected by way of fees by the sales tax authorities are merged in the Consolidated Fund of the State and are not charged merely for the services rendered.

It would appear that these fees are collected as additional taxes and not as fees which are separately shown in the budget, but are included in the Consolidated Fund of the State. I am therefore satisfied that the levy of fees on a graded scale on appeals and applications for revision or review amounts, in the circumstances, to the imposition of a tax which is clearly unwarranted and is beyond the rule-making power of the State Government. The petitioner is consequently entitled to get back the amounts that he has paid by way of court-fee at the different stages of the assessment proceedings.

11. In order to appreciate the objection based on the constitutionality of the assessment it is necessary to trace briefly the history of the provisions under

which the assessment is sought to be justified. By Section 2(g), Orissa Sales Tax Act "sale" was defined as meaning.

"any transfer of property in goods for cash or deferred payment, or other valuable consideration including a transfer of property of goods involved in the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge."

There were two provisos to this definition, with the first of which we are not concerned. The second proviso was as follows :

"provided further that notwithstanding any thing to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in Orissa at the time when, in respect thereof, the contract of sale as defined in Section 4 of that Act, is made, shall, wherever the said contract of sale is made, be deemed for the purpose of this Act to have taken place in Orissa."

There were similar enactments in all the different State Acts by which the State Government was empowered to tax goods which form the subject of the sale irrespective of where the sale took place within the meaning of the Indian Sale of Goods Act. A sale is composed of several elements, such as an agreement to sell, payment of price, transfer of property in the goods, and delivery of the goods. But the State Legislature sought to tax the sale of goods at one or more of these points and, accordingly enacted by this proviso that irrespective of the situs of the agreement to sell, or of the sale itself, the goods were liable to tax if at the time of the contract they were found within the State of Orissa.

In other words it was not necessary that the sale should actually take place within the territorial limits of the State in the sense that all the ingredients of a sale should have territorial connection with the State. As has been explained by the Supreme Court in -- *The State of Bombay and Another Vs. The United Motors (India) Ltd. and Others*, ,

"Broadly speaking, local activities of buying or selling carried on in the State in relation to local goods was a sufficient basis to sustain the taxing power of the State provided of course such activities ultimately resulted in a concluded sale or purchase to be taxed. Such claims to taxing power on behalf of the State led to multiple taxation of the same transaction by different provinces. The Constitution makers found it necessary, therefore, to restrict the taxing power on sales involving inter-State elements, and enacted Arts. 286, 301 and 304.

These Articles provided for the freedom of inter-State trade and commerce while imposing restrictions on the power of the State to tax sales involving inter-State elements. The difficulty in determining what is an outside sale was solved by introducing an Explanation to Article 286(1) which creates a legal fiction that the State in which, the goods are" actually sold or actually delivered for consumption therein is the State in which the sale is to be deemed to have taken place, notwithstanding the fact that the property In such goods may pass in another

State".

The test of territorial nexus was thus replaced by a simpler and more easily workable test. The position, therefore, is that after the coming into force of the Constitution only that State in which delivery of goods takes place as the result of a concluded sale is empowered to levy a tax on the sale.

12. The learned Advocate-General, however, sought justification from the proviso to Section 2(g) of the Act and contended that the assessment in respect of the pre-Constitution period, based on territorial nexus, should be upheld. Plausible as it may seem this argument cannot be accepted in view of the amendment made by the President by the Adaptation of Laws Order, 1950, is sued under the Constitution of India. The section and proviso to Clause (g) of Section 2 was omitted by the Adaptation Order on 26-1-1950 and it had the effect of repealing that proviso.

Nevertheless it was contended that the liability of the dealer to taxation still continued in spite of the omission of the proviso by the Adaptation Order. Strong reliance was placed on Section 6(c), General Clauses Act. That Section reads as follows:

"6. "Effect of repeal": Where this Act or any Central Act or Regulation made after the commencement of this Act repeals any enactment hitherto made, or hereafter to be made, then, unless a different intention appears the repeal shall not (a) (b) (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; (d) (e) and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

The Argument is that the liability had been incurred under the proviso before it was repealed by the Adaptation of Laws Order, and that the assessment proceedings could be instituted after the Constitution came into force. The effect of the repeal of an enactment is to obliterate it as completely from the records as if it had never been passed, and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law -- per Tyndall C. J. in "Kay v. Goodwin (1830) 130 ER 1403 (E).

In England the practice was to insert in most of the repealing statutes a clause saving anything duly done or suffered under the repealed statutes and any pending legal proceedings or investigations. This procedure was found to be cumbersome and ultimately Section 38 (2) was inserted in the Interpretation Act of 1889 which provided that a repeal, unless a contrary intention appears does not affect the previous operation of the repealed enactment, or anything duly done or suffered under it, and any investigations legal proceedings or remedies may be instituted, continued or enforced in respect of rights liabilities and penalties under the repealed Act as if the repealing Act had not been passed.

Section 6, General Clauses Act is a verbatim reproduction of Section 38(-2) of the English Act. The ordinary rule is that Section 6, General Clauses Act will apply if there is no saving clause in the repealing enactment, or "unless a different intention appears." If, however, the repealing enactment makes a special provision regarding pending or past transactions it is the latter provision that will determine whether" the liability arising under the repealed enactment survives or is extinguished.

13. Strong reliance was placed by the learned Advocate-General on a decision of the Supreme Court reported in -- Keshavan Madhava Menon Vs. The State of Bombay, . In that case the question was whether the proceedings already instituted u/s 18 (1) Indian Press Emergency Powers Act of 1931 before the commencement of the Constitution became void by reason of Article 13(1) of the Constitution.

It was held by the majority that proceedings commenced under the Press Emergency Powers Act before the Constitution were not affected by the Constitution, and could be continued as, in their Lordships' view Article 13(1) was not retrospective in its operation and did not render void any law which was inconsistent with the Constitution which for the first time laid down the Fundamental Rights of citizens. Our attention was drawn to a passage in the judgment of Mahajan J. as he then was, in which his Lordship observed that the President could have repealed the Press Emergency Powers Act "and brought the law 19 accordance with the provisions of Part in of the Constitution," and if he had used the powers of repeal given to him by thisArticle the provisions of the General Clauses Act would have been immediately attracted to the situation and the pending prosecution of the appellant would have to be continued in view of these provisions.

It should be observed that no reference was made to the Adaptation of Laws Order 1950 issued by the President, and if I may say, so with the utmost respect the General Clauses Act would certainly be applicable in the absence of the Adaptation Order. Where there is an adaptation, the provisions of the Adapataion Order and not of the General Clauses Act. should apply. The Adaptation Order "itself makes a provision similar to Section 6, General Clauses Act with only a slight difference. Paragraph 20 of the Adaptation Order says;

"Nothing in this Order shall affect the previous operation of anything duly done or suffered under any existing law, or any right, privilege, obligation or liability already acquired, accrued or incurred under any such law, and any penalty, forfeiture, or punishment incurred in respect of any offence already committed against, any such law",

It will be noticed that there is no provision in this Order similar to that contained in Section 6 empowering the institution of legal proceedings after the repeal in respect of liabilities incurred before the repeal. On the other hand Clause 20 of the Adaptation Order indicates the contrary intention by the use of the word

"already" before the words, "acquired, accrued or incurred".

I am inclined to the view that the provisions of the General Clauses Act are not applicable to a case like the present where the repeal has been brought about by an Adaptation Order, and the key to the solution of the difficulty is provided by the Order itself. Section 6 of the General Clauses Act would apply only where the Adaptation Order is silent. It appears to me that Cl. 20 of the Adaptation of Laws Order is intended to give effect to the ordinary rule of Interpretation, which I have quoted earlier from the judgment of Tyndall C. J. and to obliterate all obligations and liabilities which had not been closed before the commencement of the Constitution.

This is also in consonance with good sense as it would be anomalous to permit the existence of two inconsistent sets of laws after the coming into force of the Constitution. The very purpose of empowering the President to adapt the existing law in order to bring them into accord with the Constitution would be defeated if laws in-consistent with the Constitution were permitted to survive,

14. If I am right so far in the view I have taken of the effect of the Adaptation of Laws Order, the questions that would next fall to be considered is whether the liability had been "already incurred" before the Adaptation Order operated. It was contended by the learned Advocate General that the liability is Incurred u/s 4 Orrisa Sales Tax Act the moment the turnover of a dealer exceeds the figure mentioned in the Act.

This argument proceeds on a wrong assumption that, chargeability to pay is the same thing as liability to pay. Liability means no more than "to be under an obligation" and does not necessarily connote an existing liability. Thus a person is liable to maintain his wife and children but no liability to pay is actually incurred until the amount of maintenance is ascertained. The unsuccessful party in a suit is liable to pay, the costs of his opponent, but the liability is not incurred until the costs are actually "assessed".

The Sales Tax Act itself makes a distinction between "liability to be assessed" and liability to pay". Section 4 is declaratory and says:

"Every dealer shall be liable to pay tax under the Act on sales effected after the date so notified".

The language of this section clearly implies that the liability is prospective and contingent and comes into existence only after the date notified under the Act and when the gross turnover exceeds a stated figure. The liability of a dealer to whom Sub-section (1) of Section 4 does not apply commences from the year immediately following that during which his gross turnover exceeded Rs. 5,000/- as the Act stood before its enactment Sub-section (3) says that this liability shall remain in force for three consecutive years although his gross turnover did not exceed Rs. 5000/- or such further period as may be prescribed.

It further says that "on the expiry of this latter period the liability to pay tax shall

cease". The liability again revives under Sub-section (4) when the gross turnover exceeds Rs, 5,000/-, It is clear, therefore, that the expression "liability" occurring in Section 4 refers to a contingent liability which may continue or cease upon the happening of a certain event and this liability is expressly stated to be "subject to the provisions of Sections 5, 6, 7 and 8".

Section 5 says that the tax payable by a dealer shall be levied at particular rate which again is ,a fluctuating factor. It may also be compounded by paying the tax in such manner as may be prescribed. Section 5 (2) defines what "taxable, turnover" means under the Act, and provides for certain deductions to be made before ascertaining the tax payable. Section 6 empowers the Government to declare certain goods tax-free.

By Section 8 the Provincial Government is empowered to prescribe the points in the series of sales at which any goods may be taxed. These provisions indicate that the liability to pay does not arise until an assessment has been made according to the directions laid down in the Act. The procedure for assessing and determining the amount of tax payable is laid down in Sections 11 and 12. The dealer is required to furnish a return, and if the Collector is satisfied that the return furnished is correct and complete, he shall assess the amount of tax due from the dealer on the basis of such returns.

Until the tax has been determined and it cannot be determined unless the Collector is satisfied with the return furnished by the dealer - the tax does not become payable nor is the liability to pay "incurred" under the Act. When Clause 20 of the Adaptation of Laws Order speaks of a liability already incurred" It can only mean that the assessment has already been made. To read into the language of Section 4 a past and defined liability would be an undue stretch of the language not justified by the context or the scheme of the taxing provisions.

In my opinion the effect of Section 4 is that it merely declares that a dealer whose turnover for a particular year exceeds Rs. 5,000/- incurs in *gremio* the liability for tax in respect of the year which is to commence after the passing of the Act..

15. "incur" means "to become subject to or liable for by act or operation of law" Law Lexicon. Until the law operates the liability is not incurred. In *Collins v. Collins and Doce*" (1947) 1 All ER 793 (G) the phrase "liability to pay had to be interpreted, and Wallington J. observed:

"No party to a suit can become liable to pay or entitled to receive costs until an order to pay has been made. In other words no such liability to pay or title to receive costs arises merely because, or at the time when, the costs have been incurred".

In, *In re: "Duffy; Lakeman v. A. GV* (1949) 1 Ch 2 (H), the question was whether for the purpose of ascertaining the estate duty payable on the death of a shareholder a deduction of Income Tax payable on the profits made by the

Company during the financial year could be claimed and it was held that the liability of the Company referred to in Sub-section (1) of Section 50, Finance Act of 1940 meant the legal liability actually existing at law and not a prospective liability. Lord Greene, M.R. observed:

"Although it is absolutely certain that Income Tax would be imposed in the following year It did not become a legal liability unless it was perfectly ascertainable without any doubt whatsoever, namely, an existing legal liability actually existing in law at the relevant date. The words cannot be stretched so as to cover something which, in a business sense, is morally certain and for which a business man ought to make provision, but which in law does not become a liability until a subsequent date".

In -- "Hinckley Urban District Council v. West Midland Gas Board (1951) 1 Ch 577 (I) an undertaking for the supply of gas, belonging to the plaintiff, vested in the defendant, viz., The West Midland Gas Board, by the Hinckley Gas Act of 1922. After the vesting the plaintiff, namely Hinckley Urban District Council, had found that they had gained surplus profits during the previous year before it vested in the defendant.

These profits could be spent in a number of ways stated in the Hinckley Local Boards Gas Act of 1880 and empowered the Council either to carry to the district rate fund any surplus or balance remaining in any year, or apply the same in reduction, of the rates charged by them for the supply of gas. The Council, therefore claimed a refund of the surplus profits from the defendants, and it was contended that it was a liability or an obligation incurred by the plaintiffs before the vesting and this liability or obligation passed to the defendant Board u/s 18.

Clauses (b) and (c) of Section 38 (2), Interpretation Act of 1889 were relied on and it was contended that the liability had been incurred before the vesting date and had already operated to make the surplus applicable by carrying it to the general rate fund.

Overruling this contention it was held by the Court that though the surplus profits actually existed before the vesting date, they had not been ascertained and, therefore, had not become a legal liability or obligation of the District Council and could not, therefore, be refunded. I can not, therefore, accede to the contention that any liability can be said to be "already incurred" until that liability has been ascertained and, an assessment made under the provisions of the Act itself.

16. This contention is open to yet another objection. Even if the taxing authorities could invoke the second proviso to Section 2 (g), Orissa Sales Tax Act and contend that the Adaptation of Laws Order did not prevent them from assessing the petitioner to tax, it must be held, in view of the Supreme Court's decision, The Sales Tax Officer, Pilibhit Vs. Budh Prakash Jai Prakash, that the proviso is ultra vires the Legislature inasmuch as the recognised definition of the word "sale" is sought to be enlarged by the proviso by also including an

agreement to sell within its scope.

Our attention was drawn to a decision of the Madras High Court in--"Louis Dreyfus v. State of Madras" AIR 1954 Mad 932 (K) "where the contrary view appears to have been entertained, but the Supreme Court decision cited above was given two months later, and- the Madras decision must be taken to be no longer good law. This Court also has recently held in -- "Bharat Sabai Grass v. Collector of Commercial Taxes" 21 CLT 66 (L) that a mere agreement to sell does not attract the liability to tax under the Act.

17. One other point remains to be considered and that is whether the notice in Form VI issued by the opposite parties is in conformity with the provisions of the Act. Mohanty pointed out that a composite notice as prescribed in Form VI is so framed as to meet all forms of notice prescribed under the Act. The instruction given at the bottom of the form is that unnecessary words should be scored out. The tax authorities, however, do not always follow these instructions with the result that the notice actually issued calls upon a dealer to perform a number of acts simultaneously.

The scheme of the Act is that, in the first instance, the dealer is to be called upon by notice to furnish returns. He is permitted by Sub-section (2) of Section 11 to furnish a revised return if he discovers any omission or wrong statement made in the first one. If he fails to comply with the notice without any reasonable cause, he incurs the liability to be penalised. Then comes the stage when the Collector is to be satisfied whether the return furnished is correct and complete.

Section 12 (1) speaks of the satisfaction of the Collector with the return furnished before he can assess the amount of tax due. If the Collector is not satisfied with the return he has to serve on the dealer a notice requiring him either to attend in person or to produce any evidence upon which he may rely in support of the return.

This is the second stage in the proceedings. The law requires that the Collector should apply his mind to the return and if he is not satisfied with it he should issue a notice on the dealer to produce evidence in support of the return. After hearing such - evidence as the dealer may produce, and such other evidence as the Collector may require him to produce, he shall assess the amount of tax due from him. It is not open to him to refuse to hear such evidence as may be produced.

Then comes the third stage on the failure of the dealer to comply with the terms of the notice issued under Sub-section (2) of Section 12. It is only at that stage and not till then that the Collector shall proceed to make an assessment to the best of his judgment. If on the other hand the registered dealer does not furnish any return at all the Collector is bound to give him a reasonable opportunity of being heard and then assess to the best of his judgment under Sub-section (4). Then comes the penal provision contained in Sub-section (5).

Here again the Collector must be satisfied that the dealer has become liable to pay tax under the Act, but has nevertheless wilfully failed to apply for registration. On being so satisfied he has to give the dealer a reasonable opportunity of being heard before he can proceed to assess to the best of his judgment or impose a penalty. Section 20 of the Act vests the power in the Collector to determine whether a person or firm is a dealer, whether a transaction is a sale or a mere contract, whether the goods purchased by a registered dealer are covered by his certificate or other similar matters.

These, however, cannot be done arbitrarily or capriciously, but must be determined after giving the dealer an opportunity to be heard. The notice actually issued to the dealer assumes that his turnover had exceeded Rs. 5,000/- and that he had wilfully failed to apply for registration. It also further assumes that his turnover had escaped assessment, without giving him an opportunity to be heard before coming to such conclusion. The notice says:

"Whereas I have reason to believe that your turnover has escaped assessment, etc".

How could the Sales Tax Officer believe anything, or have any reason to believe, before calling upon the dealer to furnish a return, and before determining that his gross turnover had exceeded Rs. 5,000/-? The notice further requires the dealer to submit a return and simultaneously calls upon him to produce his accounts. This is contrary to the procedure contemplated in the Act. If the return is furnished it is open to the Collector to accept it if he is satisfied as to its correctness.

But why should the dealer be called upon to produce his accounts along with his return when the Act does not specifically say so?. It may be that a dealer furnishes a return on the balance sheet, but may not have put his accounts in proper order. The hardship that is likely to issue as a result of such composite notices can easily be visualised. An even graver objection is that the dealer is required to show cause why in addition to the tax a penalty should not be imposed on him u/s 12 (5).

As I have stated already, Section 12 (5) is explicit and imperative that the dealer must be given a reasonable opportunity to prove that he had not wilfully failed to get himself registered. If, as is the case here, the dealer disputes the very jurisdiction of the Taxing Officer to assess him how can it be said that he has wilfully failed to get himself registered? The penal provision of Section 12 (5) cannot, therefore, be resorted to before an enquiry has been made, and before the Collector is satisfied as a result of such enquiry that the dealer's refusal to apply for registration was wilful.

It appears to me that the Sales Tax Officer has short-circuited the procedure prescribed by the Act, and in the circumstances I must hold that the notice issued on dealer is not in accordance with law and could be ignored. -- See, for similar instances, cases arising under the Indian Income Tax Act in -- Rajmani

Devi Vs. Commissioner of Income Tax ; Special Manager, Court of Wards, SPECIAL MANAGER, COURT OF WARDS, NARAINDAS NARSINGHDAS Vs. COMMISSIONER OF Income Tax, U. P., .

18. This, however, does not dispose of the contention raised by the learned Advocate-General. He pointed out -- and very rightly -- that the dealer in this particular case cannot complain. that he has been prejudiced by the composite notice issued by the Sales Tax Officer as he was examined by him before the assessment was made. He did not choose to produce the accounts which he could easily have done and cannot, therefore, now complain that the assessment is not the result of his best Judgment.

I own that I was in doubt for some time whether in a case like this we should give the Taxing. Officer a further opportunity of applying the law to the facts of this case. While on the one hand a dealer should not be unjustly or improperly assessed, it is equally peremptory, on the other, that he should not be permitted to escape assessment or payment of the tax by adopting a recalcitrant attitude. It was open to the petitioner to produce his accounts and establish that all his sales were completed outside the Orissa State and that he was not otherwise liable to tax.

The statement that he made to the Taxing Officer is by no means unambiguous and I have reason to believe that some of the sales, at any rate, were concluded within the State of Orissa so as to attract the provisions of the Orissa Sales Tax Act. I have, therefore, arrived at the conclusion that the petitioner should be directed to produce his accounts before the Taxing Officer on a date fixed by him and thereafter assessment should be made on the transactions which fell within the definition of "sale" in Section 2 (g).

19. Incidentally I should like to point out that the procedure adopted so far by the taxing authorities in issuing combined notices in Form VI without complying with the instructions given in the form, is contrary to the scheme to the risk of being quashed.

20. The conclusions I have reached, therefore, are:

(1) That the petitioner is a dealer and is liable to be registered under the Orissa Sales Tax Act;

(2) That he is liable to be taxed for sales concluded in Orissa both before and after the coming into force of the Constitution.

(3) That he is not liable to be taxed in respect of transactions affected by the second proviso to Section 2 (g) of the Act, but that his liability in respect of transactions governed by the definition of "sale" is not affected by the Adaptation of Laws Order made by the President; and

(4) That the levy of court-fees by the Taxing officer at different stages of the assessment proceedings is ultra vires.

20. In the result the assessment order is set aside. The petitioner shall be directed to furnish a return of his transactions u/s 11, for the period for which he has been served with a notice u/s 11 (1). The assessment order already passed and the demand for recovery of the tax as well as of the penalty should be withdrawn. The court-fees paid by the petitioner at the different stages of the assessment proceedings should be refunded to the petitioner.

21. In the circumstances we make no order as to costs.

Rao, J.

22. I agree.