
(1961) 11 OHC CK 0005
In the Orissa High Court
Case No : S.J.C. No. 82 of 1960

Commissioner of Sales Tax

APPELLANT

Vs

K.C. Mohapatra

RESPONDENT

Date of Decision : 14-11-1961

Acts Referred:

Contract Act, 1872 — Section 182
Sales of Goods Act, 1930 — Section 2, 27

Citation : (1962) 13 STC 412

Hon'ble Judges : R.L. Narasimham, C.J; R.K. Das, J

Bench : Division Bench

Advocate : G.K. Misra, for the Appellant; N.N. Bhattacharjya and L. Rath, for the Respondent

Judgement

R.L. Narasimham, C.J.—The following question has been referred to this Court u/s 24(3) of the Orissa Sales Tax Act, by the Member, Sales Tax Tribunal, Orissa, in pursuance of a direction given by this Court u/s 24(2) of that Act:-

Whether in the facts and circumstances of this case, the Tribunal is right in holding that the appellant was not liable to pay tax on sales of goods supplied by the Textile Marketing Organization.

2. The Government Handloom Textile Marketing Organization is a concern run on a commercial basis by the Government of Orissa, with its headquarters at Cuttack. Its business is to sell handloom products produced at various centres in Orissa. The opposite party K.C. Mohapatra (hereinafter referred to as the assessee) is the proprietor of a shop known as Lakshmi House near Lion's Gate in Puri town. He carried on his own independent business of selling various kinds of textile goods and he was registered as a "dealer" and used to pay sales tax in respect of those sales.

3. In addition to this business, the opposite party was also selling the goods of the Textile Marketing Organization and the question arose as to whether he was

liable to pay sales tax in respect of those sales. By his order dated the 11th February, 1960, the Additional Member, Sales Tax Tribunal, held that there was no "sale" as between the Textile Marketing Organization, on the one hand, and the assessee on the other, in respect of those goods and that he was also not a commission agent of the Textile Marketing Organization. Hence he held that he was not liable to pay sales tax. Though the finding is not very clear it appears that the learned Tribunal was of the view that the assessee was merely an ordinary agent carrying on the business of the Textile Marketing Organization of selling its goods in Puri town and that in respect of those transactions he had no independent status. He relied on a decision of the Nagpur High Court in *Kalyanji v. Tika Ram* AIR 1938 Nag. 254 which has been followed in a Madras decision in *Radlmkrishnct Rao v. Province of Madras* [1952] 3 S.T.C. 121(Mad).

4. The material facts found by the Tribunal are as follows :-

The Textile Marketing Organization used to supply the goods in question to the assessee from time to time. That Organization maintained a separate personal ledger account in the name of the assessee in which the goods supplied to him and the moneys received by him, were debited and credited. The cash memos of the Textile Marketing Organization were also supplied to the assessee who used to issue " them to the various purchasers of the goods from his shop known as Lakshmi House. But the labels of the Textile Marketing Organization, pasted on the goods, were taken out by him and he affixed his own labels, describing himself as "Lakshmi House, agent of the Textile Marketing Organization". The sale prices actually received by the assessee from the various purchasers were remitted by him at regular intervals to the Textile Marketing Organization who used to send a supervisor periodically to verify the stock of goods in the assessee's possession and report about the same. After annual audit the assessee was given 5 per cent, commission on the total sales effected by him, on behalf of the Textile Marketing Organization. In the affidavit filed by the assessee before this Court on the 10th October, 1961, it is admitted that this commission covered not only his remuneration as an agent but also actual expenses incurred by him towards payment of house rent, lighting charges, etc., for that portion of the assessee's shop where the goods of the Textile Marketing Organization were stocked and sold. It further appears from the order of the Assistant Collector of Sales Tax that a copy of the written agreement between the parties was kept in the assessment record, but that was not taken into consideration by him. Before the Additional Member, Sales Tax Tribunal, also, neither party relied on: the terms of the agreement with a view to ascertain the precise nature of the relationship between the assessee and the Textile Marketing Organization.

5. On the aforesaid facts the question for decision is whether the assessee is a "dealer" as defined in Section 2(c) of the Orissa Sales Tax Act which runs thus :-

2(c) "Dealer" means any person who executes a contract or carries on the business of selling or supplying goods in Orissa, whether for commission, remuneration or otherwise, and includes any firm, or Hindu joint family and any

society, club, or association which sells or supplies goods to its members.

Explanation.-The manager or agent of a dealer who resides outside Orissa and who carries on the business of selling or supplying goods in Orissa shall, in respect of such business, be deemed to be a "dealer" for the purpose of this Act.

The said definition underwent a change, as a result of the passing of the amending Act of 1958 (Orissa Act 28 of 1958). In consequence of that amendment, the new definition ran as follows :-

2(c) "Dealer" means any person who executes any contract or carries on the business of purchasing or selling or supplying goods in Orissa, whether for commission, remuneration or otherwise, and includes a Department of the Government which carries on such business and any firm or Hindu joint family, and any society, club, or association which purchases goods from or sells or supplies to, its members ;

Explanation.-The manager or agent of a dealer who resides outside Orissa and who carries on the business of purchasing or selling or supplying goods in Orissa shall, in respect of such business, be deemed to be a dealer for the purposes of this Act.

Thus, after the amendment, even a Department of Government run on commercial basis, may have to be registered as a dealer and may be liable to pay sales tax. But here we are concerned with the assessments for the quarters, commencing with the quarter ending on 31st March, 1951, and ending with the quarter ending on 31st March, 1956. This period is prior to the date of the aforesaid amendment. Mr. G. K. Misra for the Department frankly conceded that for the aforesaid period the Textile Marketing Organization was not liable to pay sales tax in respect of transactions of sale with third parties. This is also made clear in letter No. 2086/(13). F dated the 18th March, 1948, from the Under Secretary to the Government of Orissa, Finance Department, to the Director of Industries, Orissa, (copy of which was communicated by the latter officer to the Business Manager, Textile Marketing Organization and other industrial concerns of Government) in which Government stated as follows :-

Government are advised that the Orissa Sales Tax Act does not bind Government either expressly or by necessary implication, to pay the tax and therefore a Department of Government cannot be treated as a dealer within the meaning of the Act, merely because it carried on the business of selling or supplying goods, in Orissa.

6. The finding of the learned Tribunal that there was no sale between the Textile Marketing Organization, on the one hand, and the assessee on the other, is clearly unassailable and was rightly not challenged before us. But it was contended, on behalf of the Department, by Mr. G. K. Misra, that the assessee was not an agent as ordinarily understood but was somewhat in the position of a "mercantile agent" as defined in Section 2(a) of the Sale of Goods Act, who had

full authority to transfer title in the goods to third parties, as authorised by the proviso to Section 27 of that Act, and that such a mercantile agent who was remunerated by his principal on a commission basis was also a "dealer" within the meaning of the Orissa Sales Tax Act.

7. The main question for consideration, therefore, is : whether in respect of the impugned transactions the assessee carried on the business of the Textile Marketing Organization, or else whether he carried on his own business of selling goods to third parties. The definition of the expression "dealer" is somewhat wide, and if the clause is construed without the Explanation it may include all classes of agents who for commission or otherwise carry on the business of the principal. The expression "agent" as defined in Section 182 of the Indian Contract Act is very wide. It will include all classes of agents such as factors, brokers, commission agents etc., and may also include mere employees who, for commission or other kinds of remuneration, carry on the business of their masters. The distinction between the various classes of agents has been pointed out in Bowstead on Agency (Twelfth Edition) pages 1 to 4, and it is unnecessary to repeat it here. There are also certain classes of commission agents between whom and the principal the relationship is merely that of debtor and creditor, as pointed out in *Kirkham v. Peel* (1881) 44 L T 195 (cited at page 103 of Bowstead on Agency), In Indian law also the definition of the expression "mercantile agent" as given in Section 2(9) of the Sale of Goods Act and his right to pass title in the goods to third parties as provided in Section 27 of that Act, shows that the main principles of English law of agency have been incorporated in Indian law.

8. But if the expression "dealer" occurring in the main part of Section 2(c) of the Orissa Sales Tax Act is so construed as to include any agent of the principal, the Explanation to that clause will become somewhat redundant. That Explanation clearly says that a manager or agent of a dealer who resides outside Orissa and who carries on the business of selling goods in Orissa shall be deemed to be a "dealer". The necessity for this Explanation arose because the Legislature thought that the main part of the definition may not include a manager or ordinary agent of a dealer whether the dealer resides in Orissa or outside Orissa. But the Legislature was anxious that if a dealer resides outside Orissa and carries on the business of selling goods in Orissa through a manager or agent, he should be liable to pay sales tax. Hence, the Explanation was inserted in the definition clause. Thus, by giving full meaning to the Explanation it must be held, as a matter of construction, that the expression "dealer" will not include a manager or an ordinary agent of a dealer if the dealer himself resides in Orissa. Thus, those classes of agents whose duties are akin to those of mere employees of the principal who carry on the business of the principal, of selling goods, will not come within the definition of the expression "dealer". In a recent decision of the Bombay High Court in *Kishenchand Tolaram v. Ghanekar* [1961] 12 S.T.C. 562 the definition of the expression "dealer" occurring in Section 2(7) of the Bombay Sales Tax Act (the language of which is almost identical with that used in the Orissa Sales Tax Act) came up for construction. The learned Judges held that the

definition would apply only if the person concerned is carrying on his own business of selling goods, even though he may be selling somebody else's goods. Thus, commission agents or mercantile agents may well come within the definition clause because though they may be selling goods of other persons, nevertheless, the business of selling is their own and they have full authority to transfer title to third parties without disclosing the name of the principal.

9. As the terms of the written agreement between the parties are not on record, the main question as to whether the business of selling the goods was assessee's own business or the business of the Textile Marketing Organization has to be answered on the basis of the facts found which have been summed up in paragraph 4 above. This case is thus distinguishable from the case decided by their Lordships of the Supreme Court in *Mahadaya v. Commercial Tax Officer* [1958] 9 S.T.C. 428, where, in view of the express terms of the agreement between the principal (who was in Kanpur) and the agent (who carried on the business on behalf of the principal, in Calcutta), it was held that the agent had no authority, in the customary course of business, to sell the goods belonging to the principal and was therefore not a "dealer" within the meaning of the Bengal Finance (Sales Tax) Act. It is true that the assessee here has described himself as a "commission agent", in his statement before the lower Sales Tax Authority dated the 8th December, 1958. In his affidavit filed before this Court also he described himself as a "selling agent". But too much importance should not be attached to this description because the main question here is one of legal inferences to be drawn from proved facts. I am inclined to take the view that in selling the goods of the Textile Marketing Organization the assessee was not carrying on his own business, but the business of that Organization. His position was somewhat akin to that of an ordinary agent or employee who was remunerated on a commission basis. He had absolutely no discretion in the matter. The goods of the Textile Marketing Organization, with the prices marked thereon, were sent to him by that Organization. He sold them for the same price to his customers using the cash memos supplied by the Textile Marketing Organization. It is true that he removed the original labels and put new labels containing the words "Lakshmi House, agent of the Textile Marketing Organization". This, however, will not show that the business of selling was his own business. It was simply a method of advertising himself. The name of the principal was fully disclosed to all the customers. The sale price was also remitted to the Textile Marketing Organization at intervals, and the goods, though stocked in the shop of the assessee, were periodically inspected by an official of that Organization. The assessee charged house rent and lighting charges for that portion of his shop in which the goods of the Textile Marketing Organization were stocked and sold. The commission paid to the assessee included the above charges also. Having regard to these facts the assessee's position is hardly distinguishable from that of a mere employee remunerated on a commission basis. Hence, following the Bombay decision in *Kishenchand Tolaram v. Ghanekar* [1961] 12 S.T.C. 562, I would hold that the assessee was

not a dealer within the meaning of the Orissa Sales Tax Act.

10. My attention was also drawn by the learned Counsel for the assessee, to letter No. 1795 dated the 26th August, 1950, in which the Business Manager of the Textile Marketing Organization informed the assessee though somewhat guardedly that he was not liable to pay sales tax. The liability to pay sales tax has to be decided on a construction of the provisions of the relevant statute and the facts found, and any opinion expressed by the Business Manager, one way or the other, has no value.

11. For the aforesaid reasons I am satisfied that the learned Tribunal was right in holding that the opposite party was not liable to pay sales tax for the quarters in question. The question is therefore answered in the affirmative. The assessee will get the costs of this reference. Hearing fee is fixed at Rs. 100. (One hundred only).

R.K. Das, J.

I agree.