
(1969) 02 KL CK 0011
In the High Court Of Kerala
Case No : O.P. No. 96 of 1967

Dr. M. Narayanan

APPELLANT

Vs

Sales Tax Officer, Tellicherry and Others

RESPONDENT

Date of Decision : 06-02-1969

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 10, 2(d), 2(g), 2(viii), 2(xxi)
Sales of Goods Act, 1930 — Section 4

Citation : (1969) KLJ 311

Hon'ble Judges : V.P. Gopalan Nambiyar, J

Bench : Single Bench

Advocate : V. Rama Shenoi and R. Raya Shenoi, for the Appellant; K.V. Kuriakose and Government Pleader, for the Respondent

Judgement

V.P. Gopalan Nambiyar, J.—This writ petition canvasses the liability of a Medical Practitioner to be assessed to sales-tax under the Kerala General Sales-tax Act 1963. Alternatively, it challenges the validity of a notification - and in particular, of the explanation thereto - made by the Government, exempting medical practitioners from payment of sales - tax, to a limited extent. The petitioner is a Medical Practitioner in Tellicherry and was assessed to sales-tax for the years 1963-64, 1964-65 and 1965-66 by final orders of assessment (Exs. P5 to P7). He was also provisionally assessed by the last of these orders to sales-tax for the years 1966-67. Ex. P8 series are the demand notices in respect of the periods covered by these orders. Section 2(viii) of the Kerala General Sales-tax Act 1963 defines the term "dealer" as follows: (the material portion alone re-produced):

2. Definitions--In this Act, unless the context otherwise requires,--

(viii) "dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration and includes--

Explanation:--(1) A society (including a co-operative society), club or firm or an association which, whether or not in the course of business, buys, sells, supplies, or distributes goods from or to its members for cash or for deferred payment, or for commission, remuneration or other valuable consideration, shall be deemed to be a dealer for the purposes of this Act:

Section 2(xxi) defines "sale", the material portion of which is as follows:--

2 (xxi) "sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business for cash or for deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge.

It is not necessary to extract the definition of "goods", but it is enough to notice that the definition is comprehensive enough to include medicines of all kinds.

2. The contention of Counsel for the petitioner was that a Medicinal Practitioner is not a "dealer" within the meaning of the Act; nor could there be any "sale" of medicines by such a practitioner to his patient so as to attract liability for tax. A medical practitioner, it was contended, is engaged in the pursuit of a profession and, not a trade or business. From the nature of the profession no less than from the oath of Hippocrates by which he was bound, he was required to strive for the alleviation of human suffering, without any motive of profit or reward. Any transfer of property in medicines in the course of professional service, from a Medical Practitioner to a patient, was if at all, only incidental and ancillary to the service and can hardly form the basis of a consensus or agreement between the two to sell the medicine, as distinct from, or as an integral part of, the service rendered, so as to attract the definition of a "sale", under the Act. So ran the argument.

3. We are concerned only with the question whether the statutory provisions of the Sales-tax Act, are, or can be, attracted, and not with the objectives of the noble medical profession, nor with the functioning of the medical practitioner within the Edicts of professional etiquette, except to the extent to which these bear upon the statutory provisions. For that reason again, the recent pronouncement of the Supreme Court in *Dr. Devendra M Surti v. The State of Gujarat* (1968 K.L.J. 949) holding that a doctor's dispensary is not a "commercial establishment" within the meaning of the Bombay Shops and Establishments Act, whose provisions are materially different, is not conclusive of the matter. It was contended that the professional services rendered by a medical practitioner to a patient were governed by the same principle of law applicable to a contract for work and labour, as expounded by the Supreme Court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, The passages at pages 162 and 166 of Benjamin "on Sales", (8th Edn), were cited. The former of these is to the effect that not merely the result of the contract, but the intention of the parties must be considered, and the test would be; was the purpose and intention of the parties to transfer a chattel or to employ labour and

material to produce a result? The passage at page 166 reads:

The principles already discussed have shown that a contract of sale is not constituted merely by reason that the property in material is to be transferred to the employer. If they are simply accessory to work and labour, the contract is for work, labour and materials, such is the case of medicine supplied by a medical man to a patient, or by a farrier to a horse: of plans made by an architect, of drafts by a solicitor.

The decision in *Robinson v. Graves* (1935 - 1 - K.B. 579) was cited. That was concerned with the question, whether a customer who wanted his portrait to be painted for a commission accepted by the painter, had entered into a contract for manufacture and sale of future goods within the meaning of section 4 of the Sale of Goods Act. It was held that he had not, as the substance of the matter was the exercise of skill, and it was only incidental that some material would have to pass from the artist to the gentleman who commissioned the portrait. Greer L.J. expressed himself thus:

I can imagine that nothing would be more surprising to a client going to a portrait painter to have his portrait painted and to the artist who was accepting the commission than to be told that they were making a bargain about the sale of goods. It is, of course, possible that a picture may be ordered in such circumstances as will make it an order for goods to be supplied in the future, but it does not follow that that is the inference to be drawn in every case between the client and the artist.

The above observations are apposite, and it seems to me that however jarring it might be to regard a medical practitioner as selling medicines to his patient it does not necessarily follow that in no conceivable case can he be so regarded. This must essentially depend on the question whether an express or an implied agreement for sale of medicine could be spelt out between the practitioner and his patient, and the other ingredients of the definition are satisfied. To take a simple illustration, if a patient goes to consult a medical practitioner having a dispensary of his own with the idea of purchasing and paying for the medicine prescribed from the practitioner's dispensary, there seems to be no reason why an express or implied agreement for sale of the medicine cannot result between the two. Even so, if a Practitioner injects some medicine into a patient and receives remuneration for the said professional service, it is difficult to regard the medicine injected as having been sold to the patient, notwithstanding the transfer of property in the medicine. The case of *Lee v. Griffin* (30 L.J.Q. B 252) noticed in *Robinson v. Graves* is an illustration of the substance of the contract between the dentist and his customer being regarded as a sale of denture rather than as a contract for work and labour. Whether the sale was in the course of trade or business, so as to constitute the practitioner a "dealer" within the statutory definition, is a different matter altogether. In *Sri Damma Peddu Yellappa v. State of Andhra Pradesh* (XI - STC. 691) a registered medicinal practitioner was regarded as a dealer within the meaning of the sales - tax Act.

4. The decision in the Government of Andhra Pradesh v. Guntoor Tobacco Ltd, (16 - S.T.C. 240) does not carry the petitioner very far. It was ruled by the Supreme Court that the packing of re-dried tobacco and its storage were an integral part of the re-drying process, and no sale of the packing material whether independently of the tobacco or an integral part thereof, could be spelt out from the nature of the transaction, and hence there was no liability to sales-tax in respect of the price of the packing materials. It is instructive to compare the decision in Commissioner of Taxes Assam, Shillong Vs. Prabhat Marketing Co. Ltd., Gauhati, , where the Supreme Court held that the value of containers of hydrogenated oil is assessable to sales-tax, if there is an express or implied agreement for the sale of such containers.

5. Nor does the basic decision of the Supreme Court in The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., which defined the concept of "sale" for purpose of taxation by a state legislature, advance the petitioner's case. While a consensus or agreement, is the basis of a sale, it cannot be postulated that the same cannot be present in any conceivable situations or circumstances as between a medical practitioner and patient. In Indian Steel and Wire products Ltd. v. State of Madras (1968 S.G. 478), and in Andhra Sugars Ltd. and Another etc. Vs. State of Andhra Pradesh and Others, , the Supreme Court found on analysis that it could not be postulated that there was no contract or agreement for sale at all, and that there was sufficient mutual assent in both these cases to form the foundation of a sale. In the first of these cases the sales were directed under certain orders issued by the Iron and Steel Controller, and in the second, by reason of certain provisions of the Andhra Sugar Control (Regulation of supplies and purchase) Act. On the principle of these decisions, it cannot be said that mutual assent to the sale of medicines as between a medical practitioner and patient can never be predicated.

6. Stress was laid on the fact that the petitioner - or any medical practitioner for the matter of that - cannot be said to be carrying on the "business" of selling medicines, and that he did not, and could not have any profit motive in pursuing his profession. Whether the frequency, regularity, and volume of the sale of medicine are sufficient to justify the inference that the petitioner was carrying on a "Business" and hence a "dealer" within the definition, is a matter to be investigated and found. As for profit motive, it is enough to draw attention to two recent decisions of the Supreme Court. In State of Gujarat Vs. Raipur Manufacturing Company Ltd., , it was observed:

The expression "Business" though extensively used in taxing statutes, is a word of indefinite import. In taxing statutes, it is used in the sense of an occupation, or profession which occupies the time, attention and labour of person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure. Whether a person carries on business in a particular commodity must depend upon the volume, frequency,

continuity and regularity of transactions of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit motive. But the use of the expression "profit motive" it is not intended that profit must in fact be earned. Nor does the expression cover a mere desire to make some monetary gain out of a transaction or even a series of transactions. It predicates a motive which pervades the whole series of transactions effected by the person in the course of his activity. In actual practice, the profit motive may be easily discernible in some transactions; in others it would have to be inferred from a review of the circumstances attendant upon the transaction.

In *Deputy Deputy Commercial Tax Officer, Saidapet and Another Vs. Enfield India Ltd., Co-operative Canteen Ltd.*, the question arose whether a Co-operative Society which ran the canteen to provide food for the employees of the parent company was liable to be assessed to sales-tax, under the provisions of the Madras General Sales tax Act 1959. The definition of "dealer" in the said Act was more or less similar to the one occurring in our Act. It was observed:

Such a co-operative society which carries on the business of supplying goods to its members for cash or deferred payment falls within the definition of "dealer" in section 2(g). We are unable to hold that by the Explanation to section 2(g) it was intended to overstep the limits of legislative power. By the Explanation the State Legislature has merely clarified that a taxable entity will be regarded as a dealer within the meaning of the Act even though it buys, sells, supplies or distributes goods from or to its members, whether in the course of business or not; it is not intended by the Explanation to declare all transactions of the taxable entity with its members to be transactions of sale or purchase. The explanation is a part of the definition of "dealer" and not of "sale". For the purpose of levying sales-tax it was open to the Legislature to devise a definition of the word "dealer" and further to provide that certain bodies shall be deemed to be dealers within the meaning of the Act. We are unable, therefore, to agree with the High Court that the Explanation to section 2(g) is ultra vires and State Legislature.

(6) For turnover from a transaction to be taxable under the Act the transaction must have constituent elements, viz., (1) parties competent to contract; (2) mutual assent; (3) thing, the absolute or general property in which is transferred from the seller to the buyer; and (4) price in money paid or promised. When a Co-operative Society supplies to its members for a price refreshments in the canteen maintained by it the four constituent elements of sale are normally present the parties are competent to contract; there is mutual assent; refreshments which belonged absolutely to the Society stand transferred to the buyer and price is either paid or promised.

(7) There is nothing on the record of the case which shows that the Society is acting merely as an agent of its members in providing facilities for making food available to the members-From the mere fact that the Society supplies refreshments to its members only and claims to make no profit, it cannot be inferred that in preparing refreshments, and making them available to its

members it is acting as agent, of the members. Nor can it be said that the Society is holding its property including refreshments prepared by it for supply to the members as a trustee for its members. A registered Society is a body corporate with power to hold property and is capable of entering into contracts. It cannot be assumed that property which it holds is property of which its members are owners.

7. In the light of the above principles, I cannot accept the broad and general proposition that in no case can a medical practitioner, be regarded as a "dealer" within the meaning of the Sales-tax Act, carrying on the business of selling medicines to his patient. The same must essentially depend upon the facts and circumstances. These have not been adverted to and found in the impugned orders. There is no consideration of the question as to whether the frequency, regularity and the volume of the sales, if any by the petitioner to his patients would justify his being regarded as a "dealer". There is no consideration again as to whether in respect of the transactions assessed there could be said to be an express or implied agreement between the petitioner and his patients for sale of the medicines; nor is there any consideration as to whether the transactions were in substance contracts for work and labour, and not for sale; and whether a profit motive is necessary and present. For these reasons, the impugned orders and notices of demand are liable to be quashed.

8. I would now turn to the petitioner's argument based on the exemption notification of the Government. Section 10 of the Act empowers the Government if they considered it necessary in public interest, by notification in the Gazette to make an exemption in respect of any tax payable under the Act. In exercise of these powers, the Government issued G.O. MS. 388/65/Rev. dated 22nd April 1965, which reads as follows.

G.O. MS. 388/65/Rev.

Dated Trivandrum 22nd April 1965.

S.R.O. No. 173/65--In exercise of the powers conferred by sub-section (1) of section 10 of the Kerala General Sales - tax Act, 1963 (Act 13 of 1963) the Government of Kerala having considered it necessary in the public interest so to do, hereby make an exemption in respect of the tax payable under the said Act on the sale of medicines, dispensed by a medical practitioner owning a dispensary and dispensing medicines to his patients from his own dispensary.

Explanation:--This exemption shall not apply to patent medicines sold by medical practitioners to their patients.

This notification shall be deemed to have come into force with effect from 1-4-1963." The impugned notification has been challenged on the ground that the explanation to the same which excludes patent medicines is arbitrary and unreasonable. For the one thing, no definition is provided nor guidelines afforded, as to what is a patent medicine, and the danger of leaving these to be

evolved by the authorities administering the Act is sufficiently illustrated by the counter-affidavits filed in this case. In the first counter-affidavit, dated 26th August 1968 by the Assistant Secretary (Law) Board of Revenue, it is stated:

The mixtures and other kinds of medicines other than patent medicines have to be administered for diseases after medical check up by qualified Doctors. In the case of patent medicines no such check up or diagnosis is ordinarily necessary.

In the counter-affidavit dated 27-11-1968 (filed after the case had been argued in part), it is stated:--

There is no vagueness in the term patent medicines used in the notification, its meaning being what that term signifies as ordinarily understood, namely, medicines protected by patents or patent medicines easily distinguishable by their patent marks. The medicines other than patent medicines will be largely mixtures and other preparations made or manufactured by the medical practitioner himself for the purpose of treating a particular condition of ailment seen in a particular patient or class of patients. In respect of sales of such medicines the notification grants complete exemption from tax. However in respect of patent medicines which are manufactured patented under the law of patents and put in the market the exemption is not granted the obvious reason being that they are commercial products produced or manufactured on a large scale and intended to be sold to the public at large as any other goods. Their sales-are subject to tax and no exemption is given. The classification thus made of medicines sold by medical practitioners to their patients into patent and non-patent medicines and the exemption granted on that basis is a reasonable one based on an intelligible differentia having a rational nexus to the object sought to be achieved, namely to lessen the burden on the medical profession and thereby on the public

At the stage of argument the position taken up was that a patent medicine is one protected by a patent issued under the Patents and Designs Act. The question whether the explanation to notification is discriminatory or not, does not appropriately arise and cannot be satisfactorily decided at this stage. If any of the petitioner's, transactions constitute a sale of patent medicines then the question has to be investigated and found as to what are patent medicines, and as to how far the exclusion of patent medicines from the scope of the exemption is justified. At this stage, on bare abstract averments in the affidavits, a decision as to the vires of the explanation to the notification is hardly appropriate.

9. By the impugned orders of assessment, the 1st Respondent calculated the total turnover and deducted therefrom the price of sales of mixtures supplied to patents. From the balance, one third was deducted as charges for surgical treatments, dressing charges, laboratory investigation charges etc. and the resulting balance was treated as the taxable turnover. This is hardly a satisfactory method of assessment.

10. Before I close this matter, I think it necessary to draw the attention of the

Government to the need for revising or at least clarifying, the notification evidenced by G.O. MS 388/65. Under the General Sales-tax Act 1125, the Travancore-Cochin Government issued an order dated 27-12-1950 which ran as follows:-- Order No. S.R. 1-8445/50/RD dated 27-12-1950 Government sanction medicines dispensed and sold by Registered Medical Practitioners to their own patients in their own dispensaries being exempted from the levy of sales-tax. The Board of Revenue will forward the draft of the necessary notification to be published in the Gazette u/s 6 of the sales-tax Act.

By a subsequent Government order dated 5-2-1951 it was ordered as follows:

Doctors by virtue of dispensing medicines to their own patients from their dispensaries cannot be said to be carrying on the "business" of selling or supplying goods. Consequently, they are not dealers within the meaning of section 2(d) of the Travancore-Cochin Sales-tax Act and the transactions under reference are not liable to sales tax. The orders issued in Government proceedings No. 11-3445/50/ED dated 27-12-1950 are revised accordingly.

While the earlier one assumes liability and grants an exemption to medical practitioners, the later one proceeds on the basis that Doctors dispensing medicines are not "dealers" within the Act. G.O. MS. 388/65 dated 22-4-1965 proceeds on the same basis as the first. None of these are authoritative expositions of the law, but represent merely policy decisions of the Government. But it is necessary that the Government itself should be clear in their mind and should lay down clear guidelines to those administering the law. In *Sri Dama Pedda Yellappa Mandyal v. The State of Andhra Pradesh* (11 - S.T.C. 691) G.O. MS 815 dated 7th April 1948 of the Government of Madras, granting exemption to the doctors under the Sales Tax Act has been set out. It is extracted below.

The Government have examined the representations made by the Madura and the Indian Medical Association, Madras, in regard to the assessment of private Medical practitioners to sales-tax. There are three categories of medical practitioners, namely:

- (i) those having consulting rooms only;
- (ii) those owning dispensaries and dispensing
- (iii) those having large dispensaries and dispensing medicines not only to their patients but also the patients of other practitioners and also sell patent medicines to the public.

The Government pass the following orders in respect of each of the categories mentioned above;

Category (i) These are not liable to sales-tax as they give prescriptions only and do not dispense medicines.

Category (ii) Though these practitioners are legally liable to sales-tax, the Government direct that they may be exempted from the payment of the tax.

Category (iii) These should be treated as any other chemists and druggists and should be assessed to sales-tax.

2. The Board is requested to issue necessary instructions in the matter to the Commercial Tax Officers.

After the case was heard in part, I asked the Counsel appearing for the Respondent to clarify, after instructions, whether the modifications, in the stand of the Government, reflected in the three G.Os. brought to my notice were the result of any careful study or analysis. Neither the hearing after adjournment, nor the additional counter-affidavit filed after the same have thrown any light on the matter. It is for consideration by the Government whether any revised G.O. should be issued on the point or whether the present G.O. (G.O. MS. 388/65/Rev. dated 22-4-1965) should be suitably clarified so as to avoid anomalies and ambiguities in its practical operation. For the said purpose, a carbon copy of this judgment will be communicated forth with to the concerned Secretary to the Government.

I allow this O.P. and quash Exs. P5 to P7 orders of assessment and P8 series demand notices, making it clear that this will not preclude the 1st Respondent from proceeding in accordance with law and in the light of the observation"s contained in this judgment. There will be no order as to costs.