

(1977) 12 AHC CK 0063
In the Allahabad High Court
Case No : C.M.W. No. 1030 of 1973

DURGA DAS JOGENDRA KUMAR and Another	APPELLANT
Vs	
UP ARANYAPAL and Another	RESPONDENT

Date of Decision : 14-12-1977

Acts Referred:

Easements Act, 1882 — Section 15, 4
Income Tax Act, 1961 — Section 2
Limitation Act, 1963 — Section 2

Citation : (1978) 7 CTR 45

Hon'ble Judges : Satish Chandra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Satish Chandra, J. - The question of law raised in this writ petition is whether sales tax is chargeable in respect of a contract for tapping the blazes cut in the chir trees of Government Forests to collect Resin.

2. The Tons Forest Area belonging to the State Government has been divided into coupes, ranges and blocks. In each block the Forest Department determines the chir trees which are fit for the tapping resin. The Government officials make cuts called blazes in each tree. The number of trees which have been blazed is counted. The Government then sells the annual use of the blazes, block wise, by an auction. The Conservator of Forests issued notice on January 12, 1971 fixing January 27, 1977 as the date of auction. The petitioner won the auction for coupe Nos. 8, 9 and 15 in Sangtur and Devate Ranges. After his bid had been accepted, a formal contract, on a printed form, was executed between the petitioner and the Forest Department. Annexure B to the writ petition is a copy of the contract in respect of the Sangtur Range, coupe No. 8. In this coupe, 66,509 blazes were sold to the petitioner at the rate of Rs. 402.00 per hundred blazes. The sale price was calculated at Rs. 2,67,366.18. The contract was for the calendar years 1971 as well as 1972. The petitioner had thus to pay a sum of Rs.

5,34,732.38 as royalty to the Forest Department for purchasing the contract for coupe No. 8. Similar contracts were entered into for coupe Nos. 9 and 15. Condition No. 8 of the auction notice stated that apart from security, the contractor shall have to deposit 3% or whatever be the current rate, as sales tax. The contract which was ultimately entered into provided that it was subject to the conditions contained in the sale notice and also the conditions of sales announced at the time of auction. The contract mentioned the various dates on which the specified amounts of installments of royalty were payable.

3. The petition states that for the year 1971, the Forest Department realised from the petitioner a sum of Rs. 17,638-19 as sales tax. By a letter dated May 8, 1972, the Deputy Conservator of Forests demanded, inter alia, sales tax to the tune of Rs. 18,801.06 from the petitioner for the year 1972 in respect of the three coupes purchased by the petitioner. The petition states that when the petitioner received the aforesaid letter of demand, they sought legal advice and were informed that no sales tax is payable under the U.P. Sales Tax Act for tapping of the resin from the blazes on the trees. Accordingly, on June 15, 1972 the petitioner replied to the respondents that no sales tax was leviable or payable in respect of the contract taken by the petitioner. The demand was illegal and that the sum of Rs. 17,638.19 realised under a mistake in the previous year may be refunded at the earliest. The respondents, however, did not accept this contention and continued to press for the recovery of the sales tax dues. Hence the present writ petition challenging the validity of the levy of sales tax.

4. The following questions require consideration :

- (a) Whether the transaction inter-parties did not involve sale of goods.
- (b) Was Resin horticultural produce not liable to sales tax.
- (c) Prior to December 1, 1973, no sales tax having been levied on resin, no tax was chargeable for 1971 and 1972.

5. On the first point, the petitioners case is that the transaction was in law an easement, i.e., licence coupled with a grant known as "profits a prendre" and not sale of goods. Sales tax was, hence, not leviable. The respondents contend that in substance the contract was of sale of resin, a minor forest produce. Resin was goods liable to sales tax.

6. The respondents state that the resin blaze means a cut which is made on a chir tree for extracting resin, by adopting the resin tapping system. The contractor was responsible for collection of the resin from the blazes, and he carried it away.

7. Condition No. 8 of contract provided that the tapping season will be from February 15 to November 30 each year. The purchaser shall start setting up of the crop and carry out resin tapping from February 15 of each year to October 31. He will thereafter be allowed to collect resin from the containers and complete scraping etc. of resin upto November 15 each year. After November 15

only carriage operations shall be allowed and the forests shall be cleared of all resin stocks latest by December 31 each year. Condition No. 13 of the contract provides that the resin blazes will remain at the purchasers risk from the date of acceptance of his bid and no rebate or refund of price will be given to him for any loss sustained by him through fire or any other cause whatsoever or for his failure to tap any of the blazes purchased by him.

8. Condition No. 14, inter alia, provided that all blazes enumerated will have to be paid for whether tapped or not, Condition No. 15 gives detailed instructions with regard to the tapping of the blazes.

9. Condition No. 17 provides that the resin stored by the contractor in forest depots, roadside depots and transit deposits shall remain at the purchasers risk and the sellers (i.e. the Forest Department) will not be responsible for any loss whatsoever.

10. From the conditions incorporated in the contract, it is apparent that the petitioner was not granted any title or ownership in the chir trees or in that portion of the chir trees where the blazes were cut. The entire standing tree including its wood or leaves continued to vest in the Government. The petitioner was given the right to use the trees for two years for tapping the blazes in the manner specified in the resin tapping rules, to extract resin. The Petitioner became the owner of the resin extracted by him. He was entitled to take it away from the forest within the stipulated time.

11. The petitioner was under the contract liable to pay large sums of money as royalty. For what ? What did he get in return ? The only thing he obtained was resin. It is evident that the core of the transaction was the acquisition of resin extracted and collected by the petitioner for value paid in cash. The method of determining the value of resin was somewhat novel. The petitioner was not to pay for the resin at a fixed rate by volume or weight. He agreed to pay at the rate of Rs. 402.00 for 100 blazes. This was by mutual agreement. Even though the system of calculation was per 100 blazes, yet not the blazes, but the resin was the true subject-matter of the contract.

12. S. 2(h) of the U.P. Sales Tax Act, 1968 defines sale to mean any transfer of property in goods for cash or deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge.

13. Under the contract in question, property in resin was transferred to the petitioner for cash consideration. The transaction was not a mortgage, hypothecation, charge or pledge. It was clearly a case of sale of goods, namely, resin.

14. For the petitioner it was stressed that in its true nature and character the transaction was a licence, coupled with a grant, known in England as "profits a prendre". Gals on Easements (14th Edn.) says at page 4 :

"As easement relates only to user of land whereas a profits a prendre in solo

alien confers a right to take from the servient tenement some part of the soil of that tenement or minerals under it or some of its natural produce existing upon it."

15. The petitioners case is that resin was the natural produce of the Forest and by the contract he was granted the right to take it away. At best this line of reasoning will bring the transaction within the ambit of "profits a prendre" as known in Enland. Since title was conferred in the thing taken away, the transaction is not an easement as known in Enland. There easements are confined to user of land and do not extend to taking away anything in or from land. But in India, the law is different. S. 2 Limitation Act, 1908, defined the term "easement" as :

"Easement includes a right, not arising from contract, by which one person is entitled to remove or appropriate to his own profit any part of the soil belonging to another, or anything growing in or attached to or subsisting upon the land of another".

16. S. 2(f) Limitation Act, 1963, retains the same definition.

17. Resin was growing in trees in forests. The right to take it away could legally be an easement. But not when the right arises from contract. The definition excludes such contractual rights. The transaction in question here cannot hence be an easement popularly called licence coupled with a grant or profits a prendre.

18. Under S. 4 of the Indian Easements Act, an easement is a right appurtenant to ownership of land. S. 15 provides for acquisition of easement. Explanation I to S. 15 reads.

"Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement or, if granted as an easement, that it has been granted for a limited period or subject to a condition on the fulfillment of which it is to cease."

19. An enjoyment had under an agreement for a limited period is expressly excluded. It cannot hence be accepted that the petitioner, in the eye of law, acquired an easement known as licence coupled with a grant.

20. Last but not least, even if it be taken that the transaction was licence coupled with a grant, yet it will be covered by the term "sale" as defined in the U.P. Sales Tax Act. The contract did involve transfer of title in resin for cash consideration. Further the definition of sale, excludes only "mortgage, hypothecation, charge or pledge." No other kind of label of a transaction involving transfer of property in goods for consideration, has been excluded. A licence coupled with a grant will be within the ambit of "sale" if its other ingredients are satisfied, as they are in the present case. Resin is a minor Forest Produce. It is a consumer commodity. It is goods liable to sales tax.

21. In respect of the second point, it may be noticed that it was not taken in the writ petition. Since it was a question of law, I gave an opportunity to the parties counsel to be heard on it.

22. The position is that under the U.P. Sales Tax Act every dealer is liable to pay tax on his turnover. Clause (c) of S. 2 of the U.P. Sales Tax Act defines a dealer to include a department of the State Government. The Forest Department is hence a dealer liable to pay sales tax on its turnover of sales. In its turn it can charge sales tax from the purchasers.

23. Clause (1) of S. 2 of the Act defines turnover as follows :

(1) Turnover means the aggregate amount for which goods are supplied or distributed by way of sale or are sold by the dealer either directly or through another, on his account or on account of others, whether for cash or deferred payment or other valuable consideration :

Provided that the proceeds of the sale by a person of agricultural or horticultural produce, grown by himself or grown on any land in which he has an interest whether as owner, usufructuary mortgages, tenant or otherwise, or poultry or dairy products from fowls or animals kept by him shall be excluded from his turnover."

24. Under the proviso, proceeds of the sale of agricultural or horticultural produce grown by himself or grown on any land is to be excluded from the turnover of the dealer. According to the petitioner, resin is a horticultural produce. It is found on trees growing on land belonging to the Forest Department. Its turnover cannot be taxed. On the other hand, the Forest Department contends, in the first place, that resin is not horticultural produce, and, in the next place, it is not grown within meaning of the proviso.

25. Two aspects require consideration : (i) What is horticultural produce and (ii) Whether, resin can be said to be grown by himself or grown on any land".

26. According to the Oxford Dictionary, resin is an adhesive substance secreted by most plants and exuding naturally or upon incision especially from fur and pine trees (The Concise Oxford Dictionary of Current English, Fourth Edition, page 1039). The Webster Dictionary says that resin is a solid or semisolid organic substance, exuded from various plants and trees, (Websters New International Dictionary, Volume 3, page 2120). According to the Encyclopaedia Britannica, the term resin signified certain sticky substance which exuded in the form of yellow or brown deposits from certain trees particularly from pine trees and the fur. Resin is a substance obtained from trees, particularly pine or fur. These kinds of trees naturally produce resin without any human effort.

27. Horticulture is, according to Chambers Dictionary, art of gardening and according to Oxford Dictionary, it is art of garden cultivation. Websters Dictionary says that horticulture is cultivation of garden or orchard, the science and act of growing fruits, vegetables or flower or ornamental plants. It is a branch of plant

production which is one of the main divisions of agriculture. Encyclopaedia Britannica (Vol. 8, 15th Edn. page 1105) says that the term is derived from the Latin word hortus (a garden) and cholera (to cultivate). Horticulture means the cultivation of garden in contract to agriculture, which is cultivation of fields.

28. Horticulture hence implies active cultivation and maintenance of a garden or orchard.

29. S. 2(1)(a) of the Indian Income Tax Act defines agricultural income as meaning any rent or revenue derived from land which is used for agricultural purposes The question was whether derived from land which is used for agricultural purposes included income from trees of spontaneous growth in a forest. In *B. R. Bannerji vs. Commissioner of Income Tax, C.P.*, a Bench of this Court held that the income from trees of spontaneous growth, to the production of which the assessee has made no contribution, is not income from land used for agricultural purpose.

30. In *Province of Bihar vs. Maharaja Pratap Udai Nath Sahi Deo, Harries*, C.J. observed that these trees have grown naturally in the jungle without the intervention of human agency, and the growth of these trees cannot be said to result from cultivation of the soil. In fact, it was the absence of cultivation that permitted the area to develop into a jungle.

31. In *Durga Narain Singh vs. The Commissioner of Income Tax, U.P., C.P. and Berar*, a Bench of this Court affirmed these views and held that income from fisheries and from sale of toddy grass, moonj and patawar, forest trees, etc., was not agricultural income because the assessee made no contribution by way of cultivation of land.

32. S. 2(viii) of the Kerala General Sales Tax Act, 1963 defined a dealer to include a person who sells goods produced by him by manufacture, agriculture, horticulture or otherwise. The question was whether a person who owned a private forest was liable to sales tax on the sale of trees of spontaneous growth in that forest. The Supreme Court held in *Deputy Commissioner of Agricultural Income Tax vs. Palampadam Plantations Ltd.* that trees which have grown spontaneously and without any plantation by a person cannot possibly be regarded as having been produced by him by agriculture or horticulture. The word otherwise also cannot cover trees of spontaneous growth since the element of production must be present. The context in which the word produced appeared in the definition can only mean to bring forth, bring into being or existence, to bring a thing into existence from its raw materials or elements". (See the meaning of the word produce in the Shorter Oxford English Dictionary). According to Websters International English Dictionary, the word produce means to bring forward beet, etc. The intention in employing the word produced obviously was to introduce an element of volition and effort involving the employment of some process for bringing into existence the goods. The respondent in that case was not found to have done any thing towards the

production of the trees and even the cutting was done by the contractor. It was held that he was not a person who produced the goods by horticulture or otherwise.

33. The phrase "agricultural" or horticultural produce" occurring in the definition of turnover in the U.P. Sales Tax Act seems to imply that the commodity in question should be brought into existence by volition and effort in the shape of cultivation. Trees of spontaneous growth situated in a forest or any other substance springing from these trees could not be said to be agricultural produce.

34. The provisions of the Madras General Sales Tax Act are more in point. S. 2(1) of the Madras Act defines "turnover". The proviso thereto stated :

"Provide that the proceeds of the sale by a person of agricultural or horticultural produce grown on any land in which he has an interest whether as owner, usufructuary mortgages, or tenant or otherwise, shall be excluded from his turnover."

The proviso is in terms identical to the proviso to the definition of turnover under the U.P. Sales Tax Act.

35. In *Mangalapalli Ramakrishniah vs. The State of Andhra* the question was whether the sale of bamboos of spontaneous growth in a government forest could be said to be "agricultural or horticultural produce grown on land." Vishwanath Shastri, J. speaking for the Bench of the Andhra High Court observed :

"The bambos in question are of wild or spontaneous growth in a cluster are cut and a clearance is effected, the remaining trees throw up new shoots which grow into trees and the cluster is re-formed. It does not appear that any human effort was expended in connection with the rearing of the bamboo trees in the forest. The etymological meaning of agriculture is the ploughing or tilling of a field. The decisions, however, have given a much wider interpretation to the expressions agriculture and agricultural income occurring in S. 2 of the Income Tax Act. See *Commissioner of Income Tax vs. Sundara Mudaliar* (1950) 18 ITR 250. Even for the purposes of the Income Tax Act, income from forests derived by sale of wood or trees or other produce has been held not to be agricultural income, *Mustafa Ali Khan vs. Commissioner of Income Tax* (1948) 16 ITR 320 P.C., and a person who takes contract in natural forests for the purposes of cutting down and selling timber has been held not to be earning agricultural income : *Commissioner of Income Tax, Madras vs. Manvegan* ILR (1930) Mad 21."

Sastry, J. went on to hold :

"The juxtaposition of the words "agricultural" and "horticultural" and the reference to the "produce grown" in the proviso to S. 2(i) of the Act indicate that what is exempted from the turnover by the proviso is the produce of land result in from the application of human effort to the land in the shape of manuring, tilling, ploughing, planting sowing, watering, weeding, pruning, harvesting, etc.

Forest trees of spontaneous growth cannot be regarded as agricultural or horticultural produce grown on land "within the meaning of the proviso."

36. This decision is directly in point and I find myself in agreement with the views expressed in it. In order to constitute "horticultural produce grown" human effort in the shape of doing acts of cultivation is necessary. Trees of spontaneous growth in a forest or the substance yielded by such trees, cannot be treated as horticultural produce grown by someone, unless it is established that the someone made an effort to produce such trees or the thing by doing cultivation, namely, manuring, tilling, ploughing, planting, sowing, watering, weeding, pruning, harvesting etc. In the writ petition, there is no allegation at all that the Forest Department cultivated the forest in the sense mentioned above. It is common knowledge that these big forests owned by the Forest Department consist of trees of spontaneous growth of various species, including pines and chir.

37. Learned counsel for the petitioner invited my attention to a decision of the Madras High Court in the State of Madras vs. R. Sarevana Pillai. The question considered in that case was whether "horticultural produce" ceased to be horticultural produce when it was processed to make it marketable. It was held that where any horticultural or agricultural produce has to be subjected to a minimum processing before that produce could be marketed at all it will still retain its character as agricultural produce or horticultural produce, despite that minimum processing. In that case, it was found that the assessee grew and marketed arecanuts in Coimbatore district in accordance with the practice that prevailed in that market. It was not disputed that there was no market for arecanuts as gathered from the trees. The practice in South Canara district was to gather the nuts after they were ripe while the practice in Coimbatore was to gather them while they were still raw. After gathering the produce, the arecanut were peeled, and the kernels were then sliced, boiled and dried.

It was only after they were dried that they were fit to be marketed. On these facts, the Court ruled that the processing to which the arecanuts were subjected did not really change the character of the produce. There was no process of manufacture. The process of curing the arecanuts was only to preserve the commodity. Despite such process, the goods retained their character as horticultural produce.

38. It will be seen that there was no dispute that these arecanuts were not agricultural or horticultural produce. It was agreed that the nut was such a produce. The only question was whether it retained its character after undergoing to processing. This authority is hence not helpful in the present case.

39. The case of Deputy Commissioner of Agricultural Income Tax and Sales Tax, Kerala State vs. A. P. Raman is similar. There also, the question was whether a commodity which was horticultural produce loses its character if it is subjected to a minimum processing in order to preserve its value and prevent its deterioration.

The case is distinguishable on the same ground as the decision in *State of Madras vs. R. Saravana Pillai*.

40. In *G. P. V. A. Subrahmanyam vs. The State of Andhra Pradesh*, the Andhra Pradesh High Court held that coconuts are horticultural produce for the purposes of R. 5(2)(f) of the Hyderabad General Sales Tax Rules. It was found that coconuts were raised in gardens. Gardens required some amount of tilling and watering. It was held that horticulture means the art of gardening and that coconuts were raised in gardens. The argument that merely because tilling and watering was done in coconut cultivation, coconut will not be horticultural produce, was rejected. This case does not help the petitioner. On the contrary, it goes to show that horticultural produce must be the result of gardening which involved human contribution. This decision does not support the contention that the produce of trees of spontaneous growth in a forest area will be horticulture produce.

41. Since on facts it has not been established that any cultivation was involved in the development of the trees in the forest used by the petitioner, it cannot be said that resin, the product of such trees, is horticultural produce within meaning of the proviso to the definition of "turnover". The petitioner cannot escape the levy of sales tax on this ground.

42. The third point is devoid of any merit. It appears that by notification No. ST-II-6629/X-1012-1972, dated December 1, 1973 resin was specifically mentioned and made taxable at the rate of 7%. Prior to it there was no specific entry relating to resin, and it was taxable as an unclassified item at the rate of three and a half per cent till November 14, 1971, and at the rate of 4% after November 15, 1971. Simply because resin was specifically mentioned for taxation at a higher rate by the notification of December 1, 1973, it does not mean that it was not taxable prior to December 1, 1973. It was taxable under the head "unclassified item".

43. The various points urged in support of the writ petition fail. The petition is accordingly dismissed with costs.