(1970) 04 J&K CK 0005

In the Jammu And Kashmir High Court

Case No : Writ Petition No. 75 of 1969

East India Hotels Ltd. APPELLANT

Vs

Assessing Authority Sales Tax Circle & others RESPONDENT

Date of Decision : 24-04-1970

Acts Referred:

General Sales Tax Act, 1962 — Section 2(1)

Citation : (1977) JKLR 510 : (1970) KashLJ 207

Hon'ble Judges : S.M.F.Ali, C.J and J.N.Bhat, J

Bench : Division Bench

Advocate : T.R.Bhasin, H.R.Gokhle, Advocates appearing for the Parties

Judgement

S.M.F. Ali, CJ.

(1) This is an application by the petitioner (a branch of the East India Hotels Ltd. running in the name of M/s Oberai Palace Hotel, Srinagar)

impugning the orders of the Assessing Authority as upheld by the Sales Tax Commissioner, respondent 2, levying tax under the Jammu and

Kashmir General Sales Tax Act, 1952 (hereinafter to be referred to as the Act) on the sale of food by the hotel to its guests during the year

196263, 6364 6465 and 6566 The facts giving rise to the present petition maybe summarized as follows,

(2) The petitioner is conducting hotel business at Srinagar and the petitioner provides various types of amenities to the guests who stay in the hotel

and the supply of food is not the only but one of the amenities for which no separate charge is levied. In other words the petitioner contends that

the guests of the hotel are charged a consolidated amount for enjoying all the amenities without defining the charges for each amenity separately.

The petitioner filed its turnover on demand notice being issued by the Salestax authorities for the years 196266. In the turnover submitted by the

petitioner it showed the amount of sales of food made to the guests during this period, but it claimed that such sales could not be taxed because

they were not chargeable sales within the meaning of the provisions of the Act. It was further contended that S. 4 which is the charging section

contemplated only a sale as contemplated by the definition given in the Sale of Goods Act and did not include within its ambit an indivisible or a

consolidated sale. The same was said of S. 2 (1) which defined sale.

(3) It was further contended that the supply of food to the guests was only one of the amenities which may or may not be enjoyed by the guests

and if it is not consumed by the guests they were not entitled to any remission on this account. Thus the necessary indicia or attributes of a legal sale

were wholly wanting in the present transaction which was therefore not taxable.

(4) The petition has been resisted by the respondents firstly on the ground that the definition given in S. 2(1) is wide enough to include an indivisible

sale, because our State legislature by virtue of its residuary power under S. 5 of the State Constitution had ample jurisdiction to legislate so as to

give an extended meaning to the word 'sale' in S. 2 (I). In the other States in India this residuary power was not there and therefore they were not

competent to legislate so as to give an extended meaning to the word sale as held by the Supreme Court, but so far as our Constitution was

concerned it did not suffer from this infirmity. Secondly it was pointed out that the question whether the sale of food by the petitioner to its guests

was an indivisible or a severable sale was essentially a question of fact and since the petitioner did not produce the necessary materials before the

Sales tax authorities, the question could not be agitated in the writ petition. Finally reliance was placed by the respondents on some notifications

which had empowered the Sales Tax authorities to levy tax on sale of food in hotels.

(5) In order to understand the contentions raised by the counsel for the parties, it may be necessary to deal with the admitted facts of the case.

It is not disputed that the petitioner is carrying on hotel business and in the course of its business it provides amenities including food to its guests. It

was also not disputed before us in the arguments that in the turnover filed by the petitioner as also in the course of arguments before the Sales tax

authorities the petitioner had admitted that it had realized sale tax on the rates levied by the respondents from its customers. This aspect of the

matter was explained by the petitioner on the ground that it was an internal matter and if the petitioner wrongly realized sale tax from it's customers

it was liable to refund the same to the customers and the State had not jurisdiction to take advantage of the conduct of the petitioner and realize the

same. That if any guest in the hotel does not take his food, normally he is not granted any remission on that account, nor is he allowed to substitute

somebody else in his place to consume the food which is meant for the guest. Thus while it is established from the record that the petitioner does

supply food to the guests for consumption it has not been proved by the respondents that any remission on this account is given by the petitioner if

food is not consumed by the guests. Mr. Gokhle appearing for the petitioner submitted that the transaction does not contain any attribute of a sale

as contemplated by S. 2 (1) of the Act. This Section runs thus :

Sale means 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.

(6) It was contended that S 2 (1) clearly contemplated a transfer of property in goods for cash or deferred payment or other valuable

consideration. In the instant case the fact that the guests to whom the food was served for consumption did not have an absolute right over the

property sold namely, the food, therefore the food given to the guests could not amount to a transfer of property. Reliance was placed on a

decision of the Punjab High Court in AIR 1966 Punjab 449. Associated Hotels of India V. Excise and Taxation Officer where Narula J held that

supply of food in the circumstances mentioned above did not amount to a sale and that such a transaction was an indivisible contract of multiple

service and was not contemplated by the charging section This decision was affirmed in a Letters patent appeal by a Division Bench of the same

Court. While dealing with this question, Narula J. observed as follows :

After a careful consideration of the entire law referred to above and the facts and circumstances of this case I hold on the first question formulated

by me as below

(i) Whenever the taxing authorities contend that the transfer of certain movables in the course of discharge of mutual obligations in a contract

amounts to a sale the burden in such a case would lie heavily upon the taxing authorities to show that there has in fact been a taxable sale. Such

burden is not discharged by merely showing that some movables have passed from the alleged seller to the alleged buyer in the course of the

supposed sale in performing an overall service or execution of a contract.

(ii) A transaction between a hotelier and its residents client is an indivisible contract of multiple service and does not involve any sale of food in as

much as it does not involve any lease of the room made available for the residence of the client.

(iii) It is not open to the taxing authorities under the Punjab Act after its amendment by Act 18 of I960 to split up the composite contract so as to

make out an agreement of sale where in fact none exists. The transaction as a whole has to be seen to find out if it is a sale or not. Seen in that

prospective the service of food in the admitted circumstances of this case does not amount to sale.

(iv) Food given by a first class hotel to its client who makes one consolidated payment per day or periodically for residence in that hotel is not

'sold' by the hotel but merely 'served' to the resident. This does not constitute (sale of the food within the meaning of the Sale of Goods Act nor

falls within S. 2 (h) of the Punjab Act..............

(7) We respectfully agree with the propositions of law adumberated by Narula J. on the first three points and hold that an indivisible contract of

sale coupled with multiple service for which no separate charges for food are realized does not fall within the purview of the Act. We also agree

that it is not open to the Sales Tax Authorities to spell. Out a transaction of sale by truncating a contract into two parts where the contract is

essentially a consolidated one but for reasons to be given hereinafter we respectfully express our dissent from the view taken by Narula j. that the

supply of food to a guest by a. hotelier does not amount to a sale within the meaning of the provisions of the Act. In our opinion the main test is to

see whether the hotelier has charged separately for the food supplied to its guests and once this is proved then the contract ceases to be an

indivisible one and becomes easily severable.

(8) A similar view appears to have been taken by an unreported case of the Delhi High Court in Municipal Corporation of Delhi V. Laxmi Narain

Tandon and others. Cr. appeal No. 11 of 68 wherein it was observed as follows :

It was not disputed that there is no separate agreement regarding the supply of food, which is supplied only as part of the service for which a

consolidated charge is made. The property in the food supplied a part of service also does not pass to the guest except in that which is actually

consumed by him...............

(9) The view taken by Narula J. in the cases of Messrs Associated Hotels of India Ltd. Simla appears to be correct.*'

(10) In this case the Delhi High Court was actually considering the definition of the word 'Sale' in the Food Adulteration Act.

(11) Before, however, we enter into a discussion of the cases cited before us, it may be necessary to decide the question of fact over which there

appears to be some controversy between the parties. The respondents contended that the petitioner never raised the question of fact that the sale

of food was an indivisible contract of multiple service nor did it produce any material to prove the same. The petitioner has repelled this contention

and has submitted on the basis of a number of circumstances to be discussed hereinafter that the point was specifically taken and the Sales Tax

Authorities proceeded on the footing that the point was raised before them, A perusal however, of the order of the Sales Tax Authorities would

show that the point was no doubt raised before them. Mr. Shonthu, the Sales tax Assessing Authority has clearly indicated the contention raised by

the petitioner in his judgment (Annexure I) thus;

''In this connection it was alleged that such payments are joint lumpsum rate on contractual basis both in respect of services rendered and the

supply of food and meals. Any boarder is not entitled to any reduced rate even though he may not utilize the meals of the hotel. Accordingly the

arrangement of the hotel with regard to the boarders has been termed as indivisible contract of multiple service and does not involve any sale. In

support of this contention he adverted attention to the finding made by Narula J. of the Punjab High Court...............

(12) It would thus appear that the point regarding the contract being an indivisible one coupled with multiple service was not only raised before the

Sales tax Authority, but even the authority of the Punjab High Court (Supra) was cited before him.

(13) It is true that the Assessing Authority has said that no regular material had been produced before him to prove the fact, but the Sales tax

Officer does not say whether he had called for the original vouchers and bills from the petitioner to indicate that the hotel charged a consolidated

amount for all the amenities including food without levy any separate charge for food supplied to its guests. On the other hand in a later part of the

judgment the Assessing Authority has negatived the contention raised by the petitioner in the following words :

In this connection it was pointed out to the dealer that the ruling in this case does not hold good when the procedure of determining the turnover in

relation to a contract has been well defined in the General Sales Tax Act and whereby it has been laid down that goods sold in the course of a

contract be assessed after deducting the cost of labour. In the light of this the dealer cannot claim deduction with regard to the boarding sales more

so when the due tax on these sales have been already charged and realized. The realization has been effected on 50% of the total amount billed for

which according to the dealer's own showing represented sale of meals and remaining 50% being charges of lodging.'*

(14) In other words the Assessing Authority was of the view that since the petitioner had realized 50% of the entire charges from its guests

towards food and realized sales tax on this amount, the petitioner could not be heard to plead that the transaction amounted to an indivisible

contract of sale. The Sales Tax Commissioner who was the Revisional Authority briefly summarised the contentions raised before him by the

petitioner thus :

.........The points on which the orders have been challenged on briefly stated as under:

(1) The J&K Genera] Sales Tax Act, 1962 does not empower the Asessing Authority to split up the consolidated charges made by the board and

lodging.

(2) The consolidated charge made from the resident customers in an indivisible contract and does not involve any sale of food. The guests and not

the hotelier can fix the price of meals separately.

(3) No property in meals does pass to the guest at all and the guest does not at any rime acquire ownership in meals and therefore there is no

transfer of property.

(15) But he went on to hold that since S. 2 (1) had given an extended meaning to the words sale of goods and the State Legislature was competent

under S 5 of the Constitution to legislate in such a matter, even if the contract of sale was an indivisible one, coupled with the multiple service, it fell

within the mischief of S, 4 of the Act. In other words the Sales Tax Commissioner nowhere complained that the necessary materials to prove as to

whether or not the sale was an indivisible one were not produced before the Assessing Authority. If the S T. Commissioner had any doubt, he

could have called for the necessary documents from the petitioner which he did not.

(16) We cannot, however, help feeling that if the petitioner had produced counterfoils of the bills which he had charged from his guests, the matter

would have been put beyond any dispute. The petitioner, however did not produce the bills before the sales tax Authority nor has he done so

before us Since, however the Sales Tax Authorities proceeded on the footing that the sale was taxable even if it was an indivisible one, we are at

the moment called upon to examine the correctness of the legal view taken by the Sales Tax Authorities.

(17) We might not dispose off the other contentions raised by the respondents at this stage It was contended that since the petitioner realized sales

tax from the guests and had shown the price of food at the rate of 50% of the total charges, the contract of sale must be deemed to be a separate

one and not an indivisible one. We are not at all impressed with the argument that the conduct of the appellant in realizing sales tax from its guests

would make the transaction a sale, even if it does not fall within the four corners of the taxing statute. But this may be a circumstance which has to

be taken into consideration in conjunction with other factors in determining whether the plea of the petitioner that there was an indivisible contract

of sale is correct or not.

(18) Coming now to the judgment of the Punjab High Court, (Supra). We fully agree with the view taken therein that the Punjab Sales Tax Act did

not contemplate an indivisible contract of sale coupled with multiple service. Ss 2

(1) and 4 were recently interpreted by a Division Bench of this

Court in the Hindustan Construction Co. V. The Assessing Authority where one of us (the C J.) pointed out as under :

''In the Act passed by our State, however, there is nothing to show that the legislature intended to give any extended meaning to the word 'sale'. In

fact the word 'sale' has been defined in S. 2 (1) of the Act thus :

Sale means 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.

(19) A perusal of this definition manifestly shows that the Section postulates a pure and simple sale where goods pass from the seller to the buyer

on payment of the consideration without the intervention of an intermediary. In the instant case on the allegations made by the petitioners in their

petition which have not been disputed before us by the Advocate General the transaction of sale involves a composite and a complicated process

under which the petitioners buy materials required for construction of the bridges through contractors and labourers and invest the same in the

construction of bridges. Thus the sale and construction of bridge becomes a compositeand indivisible transaction so that it is difficult to divorce the

transaction of sale from the lumpsum contract itself.

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(20) Similarly in S. 2 (g) the word dealer has been defined thus :

Dealer means any person including a Department of Government who carries on the business of selling goods in the State.

(21) It would be pertinent to note that neither in the word 'dealer' note in the word 'sale' has the legislature expressly or by necessary intendment

indicated any intention to include a contract of an indivisible sale. In the definition of the word 'sale' (Supra) only such transactions have been

indicated which amount to a simple transfers of property for goods for cash or deferred payment and does not include at all contract or an

indivisible sale where the transaction of sale is so coupled with the cost of labour that it is difficult to divorce one from the other.

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(22) Thus the charging section also has reference only to the word 'turnover' as

may be determined by the Government and the tax to be charged

on the sale of goods which as we have already mentioned is defined in S. 2(1). In these circumstances therefore we agree with the learned counsel

for the petitioners that the Act does not contain any effective intention to tax indivisible sales.

(23) This judgment being a Division Bench judgment is binding on us and /we fully agree with the proposition of law adumbrated in that case.

(24) We, therefore, hold that reading S. 2 (I) and the other definitions of turnover and dealer appearing in the otherprovisions of the Act, the

legislature never intended to give an extended meaning to the word 'sale' so as to include an indivisible contract of sale. We agree with the Sales

Tax Commissioner that the State legislature had the undoubted power under S, 5 of the Constitution to legislate over this subject, but it had not

exercised this power having regard to the language employed by S. 2(1). So long as the legislature does not intend to include within the ambit of S.

2 (1) an indivisible sale, the position in our State and that in the rest of India would be the same. In these circumstances the inescapable conclusion

is that where a sale or transfer of an article amounts to an indivisible contract of multiple service, it is not taxable under the Act. Since the statute

itself has not applied within its ambit an indivisible sale, a mere notification by the executive Government making such a sale to be taxable would be

of no legal effect and would not take the place of the statute. A notification cannot do a thing or permit to do a thing which the statute does not

intend to do or has not intended to do. In these circumstances the two notifications on which reliance has been placed by the respondents appear

to be of no assistance to them on the subject in issue.

(25) The next serious question that has to be determined is as to whether or not the petitioner has proved that the transaction of sale was an

indivisible one. The Solicitor General appearing for the respondents submitted that even accepting the proposition of law laid down by the Punjab

and Delhi High Courts (Supra) this case is distinguishable. While in the cases before the Delhi and the Punjab High Courts the fact that the contract

of sale was an indivisible one was admitted, in the present case it is not admitted but is seriously disputed It was also pointed out before us by the

Solicitor General that the necessary materials to prove the plea of the petitioner that it charged a consolidated amount from the guests had not been

proved to our satisfaction. There appears to be some force in this contention. We have already observed that the best evidence to prove the

manner in which the petitioner realized charges from the guests would have been to produce the counterfoils of the bills of the guests or such other

documents as would show that even on such dates when no food was taken no remission was granted to the guest?. At any rate, these facts have

been clearly pleaded by the petitioner and sworn to in the affidavits and have not been emphatically denied by the respondents. Nevertheless we

think that in view of the failure of the petitioner to produce the counterfoils of the bills, it can still be given an opportunity to do so before the Sales

Tax. Authority.

(26) We now come to the last point, which is as to whether the supply of food to the guests amounts to a transfer of property. In this connection

the following circumstances have been relied upon by the petitioner to show that such a transaction would not amount to a sale.

(1) The tariff charge is inclusive of all meals..

(2) The guest is not entitled to pass on food to anyone, be he a relative or a friend, but can consume itself only.

(3) The guest is not entitled to claim any rebate if he does not want to take food even on a single day.

(4) The guest cannot take the food meant to be served to him in the hotel in a packed condition outside the hotel.

(5) The guest is not entitled to take with him in his room the food which is left over.

(27) From the facts mentioned above, an inference is sought to be drawn by the petitioner that the transaction does not amount to a sale and it

does not pass a complete title to the purchaser to dispose of the purchased property in any manner he likes which is an essential ingredient of a

sale.

(28) This argument has found favour with the Punjab and the Delhi High Courts. The Delhi High Court has even gene to the extent of holding that

food stored for sale also does not fall within the ambit of a sale and therefore any adulteration of such food does not fall within the mischief of the

provisions of the Food Adulteration Act, In this connection Jagjit Singh, J.

speaking for the Full Bench observed as follows :

It seems to us that the jutaposition in which the expression or 'store' occurs in Ss. 7 and 16 of the Act and the scheme of the Act do not leave any

doubt that the intention of storing being for 'sale' was implicit in the word 'store' as used in these sections.

AIR 1966 SC 128 was also cited at the bar, in which their Lordships of the Supreme Court held that a sale for analysis by a Food Inspector must

be regarded as sale within the meaning of the Act. In that case, however, their Lordships of the Supreme Court were not considering the scope of

the word 'store' as used in Ss. 7 and 16 of the Act.

(29) We, therefore, answer the question referred to the Full Bench as follows:

(a) There is no sale of food.

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(30) We are, however, unable to go to the extreme extent to which the Delhi High Court has gone because the words stored for sale in the Food

Adulteration Act are wide enough not only to include a sale which has taken place but also a sale which has not taken place but which might take

place. The statute is intended to protect the guests of a hotel from being served stale or contaminated food and if the interpretation of the Delhi

High Court is correct, then the hoteliers who do not charge separately for food supplied to their guests would go Scot free and would get a free

licence to supply all sorts of stale and contaminated food to their guests without facing the consequences of a criminal prosecution. Furthermore,

the Delhi High Court was dealing with the interpretation of a General Act which had full legislative competence to give an extended meaning to the

word 'sale' so as to include also an indivisible transaction. The language employed in S. 7 (quoted in extense in the judgment of the Delhi High

Court) appears to be much wider than that of S. 2 (1) of the Act or of the Sales Tax Act which was being construed by the Punjab High Court in

the case (Supra). The Food Adulteration Act is a beneficial statute and in our opinion the interpretation put by the Delhi High Court on this point

does not appear to be correct and with due respect we do not agree with the same.

(31) As regards the question whether the supply of food to the guests amount to a transfer of property, it is true that a transfer of property

indicates that the purchaser gets a complete title over the acquired property by sale or transfer of an article and the nature of the title accruing

would depend on the character of the article sold. So far, as food is concerned, it is a special type of an article and cannot be equated with other

goods. Food can be easily contaminated, it is perishable, it can become rotten if it is left uneated for some length of time. In these circumstances

the transfer of sale of food would naturally indicate sale in such a manner as the property is capable of being sold.

(32) In the instant case the sale of food to a guest would only mean that the food is made available to a guest for consumption and he is charged

for the same Even according to the facts mentioned by the petitioner as detailed above, it is not disputed that food is made available for

consumption to the guests at the appointed time and there is no restriction on their eating the food in any way they like. Whenever a guest stays in a

hotel he has to observe certain formalities, a certain code of ethics and the rule requiring that the food cannot be transferred to anybody else is a

part of this ethics, to which the guest his to inform there not because there is no sale of food to him but because he has to maintain certain

standards while staying in a hotel. In these circumstances therefore we are not able to agree that the supply of food to a guest by a hotelier would

amount to a sale.

(1) The food is made available to the guest for consumption during the appointed time fixed by the hotel which the guest has to observe under the

rules which he accepts for staying in the hotel,

(2) Where the guest is allowed to consume his food in any manner he likes by taking the entire food offered to him, or a portion of it or half of it.

(3) Price is charged for the food supplied to the guest.

(33) In the present case it is not disputed that some price is charged from the guest for the food supplied to him which forms a part of the amenities

enjoyed by the guest staying in the hotel, but the contention is that there is one indivisible contract of multiple service and no separate charge for

food is levied. It is also clear from a perusal of the orders of the Sales Tax Authorities that they proceeded on the footing that the contract of sale

of food to the guests by the petitioner was an indivisible contract coupled with multiple service, but they erroneously held that such a contract would be taxable under the provisions of the Act. If it is held that such a contract was an indivisible one and no separate charges for food were

levied, then such a sale is not taxable under the provisions of the Act As, however, we feel that the petitioner did not produce the best evidence in

support of his plea that the contract was an indivisible one we would interfere only to this extent that the petitioner should be given an opportunity

of proving this plea before the Sales Tax Authorities. If the Sales Tax Authorities are satisfied that the petitioner has charged separately for the

food, then the tax will be leviable, but if the petitioner proves that the contract of sale is an indivisible one and no separate charge for food was

realised but is included in the multiple service charge, then the transaction would not be taxable. We might mention here that there is no dispute

before us regarding the sale of food to the guests from the restaurant maintained by the petitioner which is undoubtedly a sale and is taxable.

(34) We would therefore allow this petition in part and quash that part of the order of the Sales Tax Authorities which relates to the sale of food by

the petitioner to its guests in the hotel and not in the restaurant. The Sales Tax Authorities are directed to give a fresh opportunity to the petitioner

to prove its case that the transaction of sale is an indivisible one and pass orders in accordance with law and in the light of the observations made

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

