(1966) 12 P&H CK 0009

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ No. 534 of 1965

Jaswant Singh	APPELLANT
Vs	
The Excise and Taxation Officer (Assessing Authority) and Another	RESPONDENT

Date of Decision : 05-12-1966

Acts Referred:
Constitution of India, 1950 — Article 226
Punjab General Sales Tax Act, 1948 — Section 2
Sales of Goods Act, 1930 — Section 4

Citation : (1967) 19 STC 297

Hon'ble Judges : A.N. Grover, J

Bench : Single Bench

Advocate : S.C. Goyal, for the Appellant; D.S. Tewatia, for the Respondent

Final Decision : Allowed

Judgement

A.N. Grover, J.—These two petitions (Civil Writs Nos. 534 of 1965 and 672 of 1965) under Article 226 of the Constitution are directed against the orders of assessment of sales tax relating to the years 1963-64 and 1964-65.

Before the Assessing Authority, two points were pressed on behalf of the petitioner-firm, The first was that since the firm had been dissolved, it could not be subjected to tax under the Punjab General Sales Tax Act, 1948. This point, however, had no force because of the amendment made by Act II of 1964. The amendment was not retrospective, but it is admitted by Mr. Shri Chand Goyal, counsel for the petitioner-firm, that the dissolution in the present case took place on the 30th July, 1964. The date of dissolution being subsequent to the amendment of the statute, there can be no manner of doubt that the point which has been raised cannot possibly be sustained. Mr. Goyal has not been able satisfactorily to meet the effect of the amendment of the law.

2. The second point, however, which was raised before the Assessing Authority has a good deal of force and must be sustained. It is common ground that the

sales tax which has been assessed related to supply of bricks which had been made by the petitioner-firm to various consumers who obtained permits for supply of such bricks under the Punjab Control of Bricks Supplies Order, 1956, which had been issued u/s 3 of the East Punjab Control of Bricks Supplies Act, 1949. Under this Order, no manufacturer or dealer can manufacture or sell or offer to store for sale bricks except under and in accordance with the conditions of a licence granted under the Order. Under Clause 9, no person shall purchase or sell or offer to sell or supply any bricks save against a permit issued by the Director or the District Magistrate and subject to all the conditions laid in such permit. Clause 10 lays down that no person shall purchase or sell bricks at a price higher than that which may be fixed by the Director or the District Magistrate. Clause 11 prohibits every manufacturer or dealer from acting in contravention of any directions issued by the Director or the District Magistrate. Any application for grant of permit for purchase of bricks has to be made to the District Magistrate in Form ''C'' appended to the Order as provided by Clause 12. Clause 14 prohibits a consumer from varying or altering the contents of the permit issued under the Order. Clauses 15 onwards make provisions for ensuring that a manufacturer or dealer of bricks complies with the provisions contained in the Order.

3. The contention which has been raised by Mr. Shri Chand Goyal is that since the bricks could be sold only in accordance with the permits issued by the authorities concerned and to the persons who held the permits, the transactions could not be regarded to be sales within the meaning of Clause (h) of Section 2 of the Punjab General Sales Tax. Act, 1948. "Sale" is denned to mean any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of a contract, but does not include a mortgage, hypothecation, charge or pledge.

4. In New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar, the question was whether a sale by the assessee of sugar despatched by them to the Provincial Government of Madras in compliance with the directions issued by the Controller in exercise of authority under the Sugar and Sugar Products Control Order, promulgated in 1946, by the Central Government under powers conferred by Sub-rule (2) of Rule 81 of the Defence of India Rules, was a "sale" within the meaning of the Bihar Sales Tax Act, 1947. According to the definition clause in that Act, "sale" meant, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but did not include a mortgage, hypothecation, charge or pledge. The material clauses of the Order concerning sugar, inter alia, were that the producers of sugar were prohibited from disposing of or agreeing to dispose of or making delivery of any sugar except to or through a recognised dealer authorised in that behalf by the Controller to acquire sugar on behalf of the Central Government. Clause 5 enjoined upon every producer or dealer a duty to comply with such directions regarding production, sales, stocks or distribution

of sugar as may from time to time be issued by the Controller. By Clause 6, the Controller was authorised to fix the price at which sugar may be sold or delivered and upon fixation of the price, all persons were prohibited from selling or purchasing or agreeing to sell or purchase sugar at a, price higher than the fixed price. By Sub-clause (1) of Clause 7, the Controller was authorised, inter alia, to allot quotas of sugar for any specified Province or area or market and to issue directions to any producer or dealer to supply sugar to such Provinces, areas or markets, to such persons or organisations, in such quantities, of such types or grades, at such times, at such prices and in such manner as may be specified by the Controller, and Sub-clause (2) provided that every producer shall, notwithstanding any existing agreement with any other person, give priority to, and comply with the directions issued to him under Sub-clause (1), Clause 11 provided for the penalties for contravention of the provisions of the Order.

5. The admitted course of dealings between the parties in the case was that the Governments of various consuming States used to intimate to the Sugar Controller of India their requirements of sugar, and similarly the factory owners used to send to the Sugar Controller of India statements of stock of sugar held by them. On a consideration of the requisitions received from the various State Governments and the statements of stocks received from the various factories, the Sugar Controller used to make allotments. The allotment order was addressed to the factory owner, directing him to supply sugar to the State Government in question in accordance with the despatch instructions received from the competent officer of the State Government.

6. After considering the definition of the word "sale", it was observed in the majority judgment in New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar, :

According to Section 4 of the Sale of Goods Act to constitute a sale of goods, property in goods must be transferred from the seller to the buyer under a contract of sale. A contract of sale between the parties is therefore a pre-requisite to a sale. The transactions of despatches of sugar by the assessees pursuant to the directions of the Controller were not the result of any such contract of sale.

A little further their Lordships said :

A contract of sale postulates exercise of volition on the part of the contracting parties and there was in complying with the orders passed by the Controller no such exercise of volition by the assessees.

Earlier at page 1211, a quotation had been extracted from Benjamin in the 8th Edition of his work on "Sale" :

To constitute a valid sale there must be a concurrence of the following elements, viz., (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer;

and (4) a price in money paid or promised.

It was consequently held that the transactions of despatches of sugar by the assessees pursuant to the directions of the Controller were not the result of any contract of sale and the manufacturers acting under the Control Order were left with no volition. The manufacturer could not decline to carry out the Order; if he did so he was liable to be punished for breach of the Order. The Government of the Province and the manufacturer had no opportunity to negotiate and sugar was despatched pursuant to the directions of the Controller and not in acceptance of any offer by the Government.

Hidayatullah, J., who delivered the minority judgment, examined all aspects and even considered the argument whether bargaining was not possible. He was of the view that bargaining in the sense of offer and acceptance may be express or implied. In his opinion, "so long as the parties trade under controls at fixed price and accept these as any other law of the realm because they must, the contract is at the fixed price both sides having or deemed to have agreed to such a price, and that consent under the law of contract need not be express, it could be implied." If the view of Hidayatullah, J., had prevailed there would have been no difficulty in holding that even in the present cases the transactions in question could be regarded as those of sale. But it is the view expressed in the majority judgment which is to be followed and since it proceeds on the various elements which constitute a contract, in particular the element of mutuality and freedom of negotiation, it is difficult to see how there can be any escape from the conclusion that even in the present cases the transactions were not sales. The provisions of the Punjab Control of Bricks Supplies Order, which have been adverted to, show that the manufacturer or dealer has no freedom of contract and he can exercise no volition in the matter of supply of the quantity or of the period when it is to be supplied. The price is also controlled; but that may not be of material consequence. What is really important is that as soon as a permit is produced before the manufacturer he is bound to supply the bricks in accordance with the permit and he can neither refuse to supply the quantity which is contained in the permit nor vary the same. The element of volition is, therefore, lacking in the same way it was lacking in the case decided by the Supreme Court.

7. A faint line of distinction has been suggested, so far as the present case is concerned, from the facts in the case decided by their Lordships. That distinction is that there it was the Sugar Controller who had to place an order directly with the manufacturers to supply a particular quantity or quota of sugar to a particular State, etc. In the present case, the consumer who wishes to purchase the bricks has to obtain a permit and then he has to approach the manufacturer for the supply of those bricks. It can, therefore, be said that there is complete freedom of contract except that the consumer has to obtain a permit from the appropriate authorities and that it is not these authorities which send direct orders or directions to the manufacturer. The distinction is, however, specious and feeble and I am clearly of the view that the principle which has been laid

down in the majority judgment of the Supreme Court in New India Sugar Mitts'' case is directly applicable. As I have already observed before, under the Punjab Control of Bricks Supplies Order, the manufacturer or dealer is bound to make supply of bricks according to the quantity prescribed in the permit. The element of compulsion is common to the supply which is to be made in the present case and the supply which was made in the New India Sugar Mills'' case.

8. Mr. Tewatia has commended another line of argument. He says that in the present case every manufacturer or dealer of bricks has to take a licence under the Punjab Control of Bricks Supplies Order and one of the conditions of the licence is that he must supply the bricks according to the permit issued by the appropriate authorities. He says, therefore, that having submitted to that condition or arrangement with the authorities, the manufacturer or dealer cannot later on say that his volition is in any way being fettered or hampered by the terms of the licence. Such an argument, however, cannot be of much assistance in deciding whether the law which has been laid down by the Supreme Court in New India Sugar Mills'' case would be applicable to the matters before me or not. As I am of the opinion that the present cases are governed by the majority decision in New India Sugar Mills'' case, I would allow these petitions and quash the assessment orders to the extent they relate to sales tax on such transactions as were entered into with permit holders of bricks. In the circumstances, there will be no order as to costs.

