
(1955) 07 OHC CK 0001
In the Orissa High Court
Case No : S.J.C. No. 10 of 1952

Krishna Chandra Acharya

APPELLANT

Vs

The Board of Revenue

RESPONDENT

Date of Decision : 14-07-1955

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 2, 24(3)

Citation : (1955) 21 CLT 401

Hon'ble Judges : Panigrahi, C.J.; Rao, J

Bench : Division Bench

Advocate : A. Das, for the Appellant; B. Mohapatra, S. Acharya and G. Dhal, for the Respondent

Judgement

Panigrahi, C.J.—This is a reference u/s 24(3) of the Orissa Sales Tax Act (XIV) 1947, made by the Member Board of Revenue Orissa.

2. The facts giving rise to this reference are that the Petitioner K.C. Acharya is a contractor executing contracts in the Puri and Kunti Sections of the Embankment Division. The work involved in the contract was to repair the embankment by putting new earth and turf, and he is paid by the Public Works Department for the supply of labour engaged in executing the contract.

3. It is admitted that the earth used in the process is supplied free by Government from their land, and the contract consists in merely removing the earth to the embankment. The Petitioner was called upon to register himself as a "dealer" under the Act, but he refused to apply for a certificate on the ground that he is not liable to pay tax, because his contract with the Public Works Department did not involve any sale or purchase of goods. The Sales-Tax Officer over-ruled his objection and assessed him to tax, after making a statutory deduction of so per cent of the gross turnover as representing the cost of labour. The Petitioner was also penalised and fined Rs. 50/- for his "wilful failure" to apply for registration of his business. The Assistant Collector of Sales-Tax who heard the appeal against the above order, examined the Petitioner as well as the

Section office, Pipli. The Section Officer deposed that the basis of payments made for earth work fell into five different categories, namely - (1) Mulia charges to dig earth, (2) female mulia charges the carry earth from the pits to the embankments, (3) Mulia charges for rough-dressing the new earth pit, (4) charges for supply of tools, plants, baskets, etc., at Re. 0-2-0 per thousand eft, and (5) 12 1/2 per cent profit to the contractor on labour. He further stated that according to the contract the earth supplied is not the property of the contractor and lie is not separately paid for it. On these facts, the Assistant Collector held that the contractor was a "dealer" within the meaning of the Act as there was a transfer of Property in goods, involved in the execution of the contract. He took the view that the labourers must have been paid for employing their own tools and implements in addition to their labour charges. The Collector of Commercial Taxes took a different view of the matter and held that as some consideration was received for carrying out the contract it became "sale-price" within the meaning of the Act and anybody who receives such sale-price is a "dealer" for the purpose of assessment. According to him even for earth work of the kind referred to here, the contractor has to supply earth (which has also to be paid for if taken from a private property though not by the contractor) and also materials for removing the earth. He must therefore be held to be "supplying goods". On appeal, the Revenue Commissioner took an entirely different view from those taken by the other Officers of the Department. In the opinion, "the contractor took possession of the earth and therefore may be said to be exercising ownership thereof secondly, as it is not easy to trace the same earth from the pit to the embankment since the earth may have got transformed from the manner in which it was on the ground to the manner in which it came on the embankment, there was a transfer of ownership." Dealing with the use of tools and plant by the muliahs the Revenue Commissioner held that as these were obviously more or less destroyed during the course of the work it must be held that there has been a supply of goods to the P.W.D.

4. I confess my inability to follow the reasoning of the Sales-Tax authorities in holding that the contractor is a "dealer" or that he supplied goods, or that the use of tools and implements constitutes supply of goods. In order to determine the liability of the Assessee to tax under the Orissa Sales Tax Act the Court has got to ascertain whether there has been a sale of goods in the first instance. The expression "sale of goods", as has been observed by Mukherjea, J., (as he then was) in *Popatlal Shah v. The State of Madras* 1953 S.C.J. 369, is a composite expression consisting of various ingredients or elements. These elements are (1) a bargain or contract of sale (2) payment or promise of payment of price (3) delivery of goods and (4) actual passing of title. Each one of these ingredients is essential to a transaction of sale, and the sale is not completed or concluded, unless the purchaser becomes the owner of the property. It is clear therefore that one of the essential requisites of a transaction of sale of goods is the passing of title from one party to the other for a price in money paid or promised. It is the duty of the taxing authorities to examine all the facts involved

in a transaction and ascertain whether, as a fact, there has been a sale whether the sale relates to goods as defined in the Act and whether the party to the sale satisfies the definition of that word "dealer". Unless all these elements are satisfied it cannot be said that the liability to tax has been incurred. It is only when all these elements are found to be present, that the Legislature authorises the levy of a tax, but transaction, which do not, in law, amount to sales of goods are not taxable and the Courts will be astute in examining the effect of each transaction before upholding the levy. In *Ladore v. Bennett* L.R. 1939 A.C. 468 it was observed by Lord. Atkin as follows

It is unnecessary to repeat what has been said many times by Courts in Canada and by the Board, that the Courts will be careful to detect and invalidate any actual violation of a constitutional restriction under, pretence of keeping within the statutory field.

"Sale" has been defined in Section 2(g) of the Orissa Sales Tax Act as any transfer of property in goods for cash or deferred payment for valuable consideration, including a transfer of property in goods involved in execution of a contract. The question is whether in removing earth from one place to another there has been a transfer of property right in the earth so removed. Admittedly, in this case, the earth belonged to Government. It was Government property both before and after the execution of the contract. The contractor never claimed, nor obtained title or right to the property in the earth, in executing the contract. The agreement executed by the contractor was not before the authorities but it could have been easily obtained from the Public Works Department which supplied the information necessary to ascertain the gross turnover. The evidence of the Section Officer, however, makes it clear that the price of the earth was not separately contracted for or paid. The only contract between the parties was to supply labour for the removal of Government property from one place to another. It is well established that in a contract like one, before us the materials are not contracted for separately. Employment of labour use of tools and plants for removing earth are merely parts of a larger corpus which is the subject-matter of the contract. The agreement was for repair of the embankment by putting earth. This can only be done by the employment of labour and labour includes not only the use of human agency but also the employment of tools and appliances. Another principle which is equally well established is that the materials provided by a contractor and used in the execution of a contract cannot be regarded as being appropriated to the contract or as sold unless they have been affixed to or in a reasonable sense made a part of the corpus, See, *Heath v. Moore*. The crucial test therefore is whether the materials that are affixed to the corpus, namely, the embankment, and have passed to the Government consist of only the earth which was already the property of Government or something more. It is of course open to the parties to have stipulated separately for the earth used, but in the absence of any such stipulation, it must be held that the contract was merely for the supply of labour. There was no contract for the purchase of earth separately and there is no sale

of goods by the contractor to the Government. Instances of similar contracts occur in every day life. For example, when a piece of cloth is given to a tailor for making a coat, the value of the thread and buttons used is not separately assessed so that it can be said that the work involved sale of thread and buttons. The contract is essentially for the work done and there is no separate stipulation for payment of the value of the thread or buttons. Undoubtedly several appliances re-used, like the sewing machine, needles, thimble, etc., but it cannot be said that there is a transfer of the property in these articles to the owner.

The Petitioner can by no means be described as a "dealer" unless there is a sale of goods involved in the contract. Nor is there a supply of any goods from one party to the other. The amount received by the contractor does not represent the sale price as defined in the Act. It is the value of labour supplied and not of goods.

5. I have therefore no hesitation in holding that the transaction is exempt from liability to sales tax and the Petitioner is entitled to a declaration accordingly. The order of assessment and the order levying penalty are therefore set aside, and any tax collected from the Petitioner shall be refunded to him. The proceedings before the Certificate Officer, Puri, are quashed. The Petitioner shall be entitled to the cost of this application which we assess at Rs. 250/- (Rupees Two hundred and fifty only). The Petitioner shall also have a refund of the Court fees collected from him by the Tax-authorities.

Rao, J.

6. I agree.