

(1971) 01 OHC CK 0015
In the Orissa High Court
Case No : O.J.C. No. 1520 of 1968

Maheswar Mahapatro

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 19-01-1971

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 2(g)

Citation : (1972) 29 STC 52

Hon'ble Judges : G.K. Misra, C.J.; A. Misra, J

Bench : Division Bench

Advocate : L. Rath, for the Appellant; Standing Counsel (Sales Tax) and Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

G.K. Misra, C.J.—The Assistant Sales Tax Officer, Jeypore, (opposite party No. 3) assessed the petitioner with sales tax by an order dated 22nd September, 1968, (annexure "D") for the year 1965-66 in respect of the quantity of rice and wheat (controlled goods) sold by him. As the petitioner was an unregistered dealer, he was also assessed with penalty. The writ application has been filed to quash the assessment on the ground that the petitioner is not a dealer. The petitioner's case is that he distributed rice and paddy under an agreement, a sample copy of which is annexure "A". Annexure "B" is the order issued by the District Magistrate, Koraput, on 6th August, 1965, to the petitioner appointing him as a retailer for sale of Government rice. A similar order was issued for sale of wheat. The petitioner's stand is that he was an agent of the Government in the matter of distribution, and supply of the controlled commodities, wheat and rice, which were in short supply. He takes the alternative plea that even assuming that he was not an agent and the title to the goods passed to him, yet the transfer of the goods by him to the consumers did not constitute a sale as there was no agreement between him and the consumers for sale of goods.

2. To appreciate the contentions raised in the case, it would be appropriate to

refer to the essential terms on which the petitioner was appointed as a retailer for sale of Government rice. By annexure "B" he was informed that he had been appointed as a retailer to sell Government rice at Jeypore town subject to the conditions given below.

The conditions were-

(i) He should furnish cash security of Rs. 100 in the shape of N.D.C. or Government loan bonds duly pledged to the Collector of Koraput.

(ii) Execute an agreement in support of his retailership. (iii) Pre-deposit the cost of rice at ex-godown rates into the State Bank of India, Jeypore, and take issue order for supply of rice from the Civil Supplies Officer, Jeypore, and lift the stock in his own gunnies. The price of various categories of rice (common, fine and superfine rice) per quintal was mentioned therein.

(iv) Maintain stock and sale registers in the pro forma given below in Oriya or English :

Stock Register

-----				Date	Opening
Receipt	Total	issues	Closing		balance
-----				Sale	Register
-----				Date	Name of the
Father's	Quantity	Cost of	Signature or	Consumer	name sold
thumb	im-	sold	pression	of	the consumer.
-----				(v)	Lift the

every week regularly so that the consumers may not face any difficulty with regard to non-supply of rice in the retail centre. If such a contingency arises, the deposit of the retailer will be forfeited in addition to other actions liable for.

(vi) Sell rice to the consumers at the rates per quintal and Kg. as mentioned therein.

A consumer should not be issued more than 4 Kgs. of rice in a single calendar day for the consumption of his family.

(vii) Deposit the cost of rice and lift the stock when the stock of rice comes to not less than 5 quintals of balance.

(viii) Open the shop at reasonable times, that is from 7 A.M. to 12 noon and from 3 P.M. to 7 P.M. In case he wants to close his shop for unavoidable circumstances, he should obtain prior permission from the Civil Supplies Officer, Jeypore.

(ix) He should deposit the cost of the stocks at the ex-godown rate in the treasury under the head of account 124 Capital Outlay etc." Collector's P. L. Account (New) Rice Credit through challans, duly passed by the Civil Supplies Officer, Jeypore.

The aforesaid terms and conditions were mentioned in the order of appointment and are in consonance with the agreement (annexure "A"). The preamble of the agreement runs thus:

WHEREAS it is the purpose and policy of the Government of Orissa (hereinafter called "the Government") to arrange distribution of food-grains at the deficit areas of "the State of Orissa at the prices fixed by the Government;

AND WHEREAS in pursuance of the above policy, the Government desire to appoint retailers for the purpose aforesaid ;

AND WHEREAS the retailer has agreed to become the retailer of and to serve the Governor on the terms and conditions hereinafter appearing;

Now THESE PRESENTS WITNESS and the parties hereto mutually agree as follows:

In the agreement there are eight clauses.

Clause 2 deals with the duration of the agreement.

Clause 3 speaks of the responsibilities of the retailer. He shall deposit in the treasury in advance the value of the stock to be taken delivery of. He is to deposit local tax like octroi duty, etc., wherever prevalent as per the directions of the Collector in addition to the value of stocks. He is to take custody, packing, transport to retail centres, wherever necessary, and make safe storage therein of the delivered stock. After depositing the value of the stocks into the treasury he, on production of the treasury challan, shall receive issue order from the Collector and take delivery of the stocks from the depot.

Clause 4 provides for inspection by the Collector or the Controller of Supplies, of the delivered stock.

Clause 5 fixes the remuneration for all services rendered by the retailer under the agreement. He shall be allowed commission at the rates as per Schedule I to the agreement which he will appropriate from out of the sale proceeds of stock sold by him.

By clause 6 he is to furnish a security deposit of Rs. 100 in cash or in Government securities for due performance of the terms and conditions of the agreement.

Clause 8 prescribes the continuance of the retailer's responsibility. He shall be responsible for the safe storage of foodgrains held by him on the date of the said determination of the agreement until the foodgrains are finally disposed of.

Similar terms were with regard to sale of wheat.

3. Mr. Rath, on behalf of the petitioner, initially raised two contentions:

(i) The petitioner was an agent of the Government and the sale, if any, was

between the Government and the consumers and as such he was not liable to pay sales tax.

(ii) Even assuming that there was relationship of seller and buyer between the petitioner and the Government, there was no sale by the petitioner to the consumers as there was no mutual agreement between the parties for sale of the controlled commodities.

4. In the course of argument Mr. Rath did not press the first contention. He thus accepted the position that there was relationship of seller and buyer between the Government and the petitioner. This concession is well founded. Under the terms of the agreement the petitioner was to pay the entire price before delivery of the controlled articles to him. Thus, title to the goods passed to the petitioner on payment of the price in cash. There was an agreement between the Government and the petitioner whereby he agreed to purchase the controlled articles from the Government on conditions and terms as mentioned in the agreement and the order of his appointment as a retailer. Thus in the transaction between the Government and the petitioner, the latter became the owner of the controlled goods. After purchase, if the goods were destroyed, the petitioner would bear the loss.

5. The second question for consideration is whether there was relationship of seller and buyer between the petitioner and the consumers who purchased the controlled articles from him. Mr. Rath places strong reliance on *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*, and *Chhitter Mal Narain Das Vs. Commissioner of Sales Tax, ,* in support of the contention that the petitioner was to sell goods to the consumers under the terms and conditions mentioned in annexures "A" and "B" and there being absence of a voluntary agreement between the contracting parties there is no sale. The learned standing counsel, on the other hand, places reliance on *Indian Steel and Wire Products Ltd. Vs. State of Madras, , Andhra Sugars Ltd. and Another etc. Vs. State of Andhra Pradesh and Others*, and *State of Rajasthan and Another Vs. Karam Chand Thappar and Brothers (Coal Sales) Ltd., Jaipur*, the agreement in question, exercise of volition in some matters was available to the contracting parties and, as such, the transaction was a sale. The rival contentions require careful examination.

6. "Sale" as defined in Section 2(g) of the Orissa Sales Tax Act, 1947 (hereinafter to be referred to as the Act) runs thus:

"Sale" means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable considerations, but does not include a mortgage, hypothecation, charge or pledge and the words "buy" and "purchase" shall be construed accordingly.

7. Law is now well-settled that to constitute a valid sale there must be concurrence of the following elements : (i) parties competent to contract; (ii) mutual assent; (iii) the property in the goods transferred from the seller to the

buyer; and (iv) a price in money paid or promised. The aforesaid Supreme Court decisions conclude this question.

8. In this case, there is no dispute that the 1st, 3rd and 4th elements are satisfied. The petitioner and the consumers who are parties to the transaction are competent to contract. The property in the controlled goods passed to the consumers and they acquired title to the goods on payment of price in cash. The controversy thus centres round the second element as to whether there was mutuality or mutual assent between the petitioner and the consumers while effecting the transaction.

9. In this matter no hard and fast rule can be laid down. The ultimate conclusion would depend on the facts of each case. The ratio of all the aforesaid Supreme Court decisions is to the effect that where the transactions were completely regulated and controlled by the Controller leaving no room for mutual assent, the transaction would not be a sale. The area of bargaining between the prospective buyer and intending seller might be greatly reduced, but if there is scope for negotiation in respect of some matters, then the agreement is voluntary as in certain matters parties were left with the freedom to exercise their volition. Due to change in political outlook and as a result of economic compulsions the freedom to contract is being confined gradually to narrower limits. So long as mutual assent has not been completely excluded in any dealing, it is a contract in law and the transaction amounts to a sale.

Applying these tests to the particular facts and circumstances of the case the transactions in *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*, and *Chhitter Mal Narain Das Vs. Commissioner of Sales Tax*, , were held to be not sales as in no field the contracting parties had any independent volition. The entire matter was wholly controlled under the statutory control orders. On the other hand, applying the identical tests it was held in *Indian Steel and Wire Products Ltd. Vs. State of Madras*, , *Andhra Sugars Ltd. and Another etc. Vs. State of Andhra Pradesh and Others*, and *State of Rajasthan and Another Vs. Karam Chand Thappar and Brothers (Coal Sales) Ltd., Jaipur*, , that the transactions constituted sales. The present case is analogous to *Andhra Sugars Ltd. v. State of Andhra Pradesh*⁴ and *State of Rajasthan v. Karam Chand Thappar and Brothers (Coal Sales) Ltd., Jaipur*⁵.

10. We would proceed now to examine the various features in this case evidencing the scope for exercise of volition between the contracting parties in the transactions. Those features are :

(i) The consumers were not compellable to buy the controlled commodities from the petitioner, though cards were issued in their favour entitling them to purchase the commodities up to a certain quantity.

(ii) The seller can refuse to sell if no price is paid by the consumer.

(iii) The seller has also the option to sell for deferred payment or at a rate less

than the prescribed price.

(iv) Though in the card of the consumer the maximum quantity of goods to be sold has been fixed, the seller can supply less quantity if the stock in hand is less.

(v) The seller has also the option of distributing a specific quantity of goods amongst; different purchasers as a result of which some of the consumers may be deprived altogether.

11. Thus, though the freedom of contract was seriously restricted by the Collector within the sphere of trade or business allowed by the control order, the ordinary law relating to contract for sale of goods did not stand wholly abrogated. In the facts and circumstances of this case, there is no escape from the conclusion that in a very wide sphere the contracting parties were left with the volition to determine their jural relationship. The transaction therefore constituted a sale and sales tax was rightly imposed. Similar views have been taken in *Bangaru Rama Rao & Bros. v. Tadavarthi Punnayya and Bros.*¹ and *Commissioner of Sales Tax, U.P. v. Jiwan Das*², which were decided prior to the Supreme Court decisions.

12. In the result, the writ application fails and is dismissed, but in the circumstances, without costs.

A. Misra, J.

13. I agree.