

(1958) 08 OHC CK 0015

In the Orissa High Court

Case No : S.J.C. No. 24 of 1952 and O.J.C. No. 15 of 1953

Malcolm Angus Tulloch

APPELLANT

Vs

The Revenue Commissioner and Others

RESPONDENT

Date of Decision : 12-08-1958

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1958) 9 STC 799

Hon'ble Judges : R.L. Narasimham, C.J;S. Barman, J

Bench : Division Bench

Advocate : R.K. Mukherji, S R. Banerji, S. Acharya and A K. Tripathy, for the Appellant; A.G. and B. Mohapatra and G.K. Misra, for the Respondent

Final Decision : Dismissed

Judgement

Narasimham, C.J.—These two applications are directed against the order of the Member, Board of Revenue, dated the ,10th July, 1952, declining to revise the assessment of the petitioner to sales tax in respect of certain sales effected in 1949 in favour of an American firm named Messrs. Union Carbide and Carbon Corporation, New York. The petitioner asked the Member, Board of Revenue, to state a case for the decision of the High Court u/s 24(1) of the Orissa Sales Tax Act, but the member refused and S. J. C. No. 24 of 1952 was filed under Sub-section (2) of Section 24 of the Orissa Sales Tax Act. The petitioner, however, thought it advisable to file an independent application under Article 226 of the Constitution O.J.C. No. 15 of 1953 against the order of the Member, Board of Revenue, for quashing the assessment order on the aforesaid sale. The two applications were heard together and are disposed of in one judgment.

2. The facts which were admitted by the petitioner himself not only before the Sales Tax Authorities but also in his application before this Court under Article 226 of the Constitution and in his counter-affidavit filed before this Court on the 5th December, 1956, are as follows:

The petitioner owns chromite and manganese mines which lie in the State of Orissa and his main business consists in exporting chromite and manganese ores from those mines to foreign countries especially to the United States of America through Calcutta Port. The sales were effected through another company known as Messrs Chromite Corporation of India, Limited, who acted as the selling agents of the petitioner. The petitioner entered into two contracts with an American firm known as the Union Carbide and Carbon Corporation of New York on the 27th February, 1948, and the 21st December, 1948, for the sale of chromite ores and manganese ores respectively and one of the terms of the contract was that title should pass to the buyer when the ores were delivered by the seller on board the steamer at Calcutta--vide paragraph 5 of the petition in O.J.C. No. 15 of 1953. At the time of the aforesaid contracts of sale, the ores were in their natural state in the mines in Orissa. In pursuance of the said contract the petitioner delivered the goods to his selling agents, namely, the Chromite Corporation of India at Barbil in Orissa, and the said agents transported the same by rail to Calcutta, and put them on board the steamer. The cost of the ores at Barbil was shown as Rs. 87,380 whereas the price actually paid to the Chromite Corporation of India by the Union Carbide and Carbon Corporation, New York, was Rs. 1,45,070-5-0. The petitioner further admitted before the Collector of Commercial Taxes that in his account books the ores were shown as having been sold to the American firm and not to the Chromite Corporation, who, as already stated, were merely the agents of the petitioners.

3. For the quarter ending the 30th June, 1949 (which is the material quarter), the petitioner himself showed his gross turnover for the purpose of assessment of sales tax as Rs. 87,380-0-5 which, according to him, was the sale price when the ores were delivered at Barbil to the Chromite Corporation of India. The Sales Tax Officer, however, fixed the turnover at Rs. 1,45,070-5-0 holding that the price paid by the American firm to the Chromite Corporation of India was the real sale price inasmuch as the said Chromite Corporation marketed the ores for the petitioner. On appeal, this order was upheld with the following observation :

On a perusal of the records I am convinced that the appellants sold the goods to the American merchant in pursuance of an agreement entered into before the actual removal of the goods from Orissa and Messrs Chromite Corporation of India, Calcutta, acted only as the agent of the appellant to arrange to despatch the goods to America.

A revision petition which was filed before the Collector of Commercial Taxes was dismissed by him. That officer observed in his judgment dated the 29th April, 1952, that "it was admitted before him that in the account books of the petitioner the goods were being shown as having been sold to the American firm and not to the Chromite Corporation of India." The Member, Board of Revenue, before whom a revision petition was filed, also maintained the same order. But he observed in his judgment dated the 10th July, 1952, as follows :

The sale having been completed and the goods having left the possession of the

seller at Barbil we have to treat the sale as having been completed at Barbil.

This observation is somewhat inaccurate, because on the findings of the lower authorities there was no sale between the petitioner and the Chromite Corporation of India and the latter merely acted as his selling agents. They took delivery of the goods from the petitioner at Barbil on his behalf and delivered them to the American firm at the time of loading the ores in the ship at Calcutta port. The sale was completed only at Calcutta where, according to the petitioner himself, title to the goods passed when the ores were delivered on board the steamer. But the liability of the petitioner to sales tax does not depend upon the completed transaction of sale taking place in Orissa, in view of the expanded definition given to that expression "sale" in Section 2(g) of the Orissa Sales Tax Act, 1947 (Orissa Act XIV of 1947 hereinafter referred to as the Act). Hence, notwithstanding the somewhat inaccurate statement in the order of the Member, Board of Revenue, referred to above, the main question for consideration is whether on the facts as stated by the petitioner himself, he was liable to pay sales tax in respect of these transactions.

4. The transactions took place in 1948-49 long before the commencement of the Constitution. The mines are situated in the district of Keonjhar which, prior to the merger on the 1st of January, 1948, was a Native State under a Ruler. The Act came into force in the old Province of Orissa on the 14th May, 1947, and was subsequently applied to the merged States, including Keonjhar, by appropriate notifications. There were some doubts about the validity of the notification applying the said Act to the merged States of Orissa, but these have been set at rest by the recent decision of the Supreme Court in *Bharat Sabai Grass Co.'s case* [1958] 9 S.T.C. 289 and in *M/s. B.C. Patel & Co.'s case* [1958] 9 S.T.C. 467 (Civil Appeal No. 230 of 1956 decided by the Supreme Court on the 15th April, 1958). In view of the two aforesaid decisions of the Supreme Court the applicability of the said Act to the district of Keonjhar during the relevant period was rightly not challenged before me.

5. Before discussing the main questions raised on behalf of the petitioner, I may refer to the definition of the expression "sale" as given in Clause (g) of Section 2 of the Act:

2(g) "Sale" means 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 a contract but does not include a mortgage, hypothecation, charge or pledge :

Provided that a transfer of goods on hire-purchase or other instalment system of payment shall, notwithstanding the fact that the seller retains a title to any goods as security for payment of the price, be deemed to be a sale :

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in Orissa at the time when, in respect thereof, the contract of sale as defined in Section 4 of that

Act is made shall wherever the said contract of sale is made, be deemed for the purpose of this Act to have taken place in Orissa.

Doubtless, after the coming into force of the Constitution the second proviso to the aforesaid clause has been deleted. But we are here concerned with pre-Constitution sales. The second proviso makes it absolutely clear that if at the time of the contract of sale the goods are in Orissa, wherever the contract might have been made and if subsequently a completed sale ensues wherever might be the situs of the sale, that sale shall be deemed to be a sale in Orissa, for the purpose of assessment of sales tax. The contention of Mr. G. K. Misra appearing for the Sales Tax Department is based on a strict construction of the said proviso. He urged that on the petitioner's own admission when the contract of sale was entered into with the American firm the ores were inside the mines in Orissa. The completed sale subsequently took place when the ores were delivered on board the steamer at Calcutta to the American firm in pursuance of the said contract. By virtue of the second- proviso to the said definition, therefore, the sale must be deemed to have taken place in Orissa, notwithstanding the fact that both the contract of sale and the actual sale took place in Calcutta and also notwithstanding the fact that the goods were sold for the purpose of export to the United States of America. Mr. Misra also relied on the recent decision of the Supreme Court in Tata Iron & Steel Company's case [1958] 9 STC 267 where the constitutional validity of a similar deeming provision in the Bihar Sales Tax Act was upheld. The provisions of the Bihar Act and the Orissa Act are identical and the principles laid down by the Supreme Court would therefore apply with full force. Their Lordships of the Supreme Court held (by a majority) that the theory of nexus, which was applied to Income Tax cases in Raleigh Investment's case [1944] 12 ITR 265 and in (1948) 16 ITR 240 (Privy Council) would apply with equal force to sales tax cases also and that the place where the goods lay at the time of the contract of sale was a sufficient nexus for the Legislature of that place to assume jurisdiction to assess sales tax. I may quote the following relevant passage at page 283 :

In our view the presence of the goods at the date of the agreement for sale in the taxing State or the production or manufacture in that State of goods the property wherein eventually passed as a result of the sale wherever that might have taken place, constituted a sufficient nexus between the taxing State and the sale.

6. In view of the aforesaid pronouncement of the Supreme Court Mr. Banerji on behalf of the petitioner fairly conceded that he had an uphill task but he raised two ingenious contentions in order to distinguish the present case from the Tata Iron & Steel Company's case [1958] 9 S.T.C. 267, viz. :

(i) The second proviso to Section 2 (g) of the Act would apply only if the goods were present as goods at the time of the contract of sale. Here, however, when the contract of sale was entered into with the American firm the ores were inside the mines as immovable property and hence that proviso would not apply.

(ii) Even under the provisions of the Government of India Act, 1935, which was in force in 1948 and 1949 the said proviso would be invalid to the extent it affects "exports across the customs frontiers" of the Dominion of India which was an exclusively Central subject--vide item 19 of List I of the Seventh Schedule to the Government of India Act.

7. In my opinion, neither of these contentions is tenable.

8. It is true that at the time of contract of sale, the chromite and manganese ores were embedded in the mines of Orissa and had not been extracted therefrom. It is also true that in the contract there was a stipulation that the ores sold to the American firm should have chromium and manganese content of a certain minimum percentage and inferior grade ores were liable to be rejected. But it was never alleged before the Sales Tax Authorities nor in the petition before this Court, that the ores extracted from the mines were subjected to any subsequent processes outside Orissa so as to be in a deliverable state for the purpose of sale. This is a pure question of fact which the petitioner ought to have raised at the earliest stage. We must therefore assume that the ores were not subjected to any further processes outside Orissa but that when they were extracted from the mines in Orissa they may have been sorted out by mechanical processes so that only those high grade ores may be selected which contained the minimum percentage of chromium and manganese as required by the contract. The goods that were the subject-matter of the contract of sale should, therefore, be held to have existed in their natural state inside the mines at the time of the contract. It is true that at that time the ores had not been detached so as to constitute movable property, but only remained as part of the mines which may be immovable property. But Section 6 of the Sale of Goods Act does not say that at the time of the contract of sale, the goods must exist as "goods". There can be a contract of sale for future goods also. Hence, I am not inclined to accept Mr. Mukherji's argument that for the purpose of applying the second proviso to Clause (g) of Section 2 of the Act the goods must exist as goods at the time of the contract of sale. If a mine owner agrees to sell ores from his mines on the understanding that after the date of the agreement the ores will be extracted from them and delivered to the buyer, that contract must be held to be a contract for the "sale of goods" for the purpose of applying the second proviso.

9. The second contention raised by Mr. Banerji for the petitioner requires some elaboration. Under the Government of India Act, tax on sale of goods is a purely Provincial subject--see item 48 of List II of the Seventh Schedule. But import and export and duties on customs including export duties were purely Central subjects (vide items 19 and 44 of List I). Mr. Mukherji argued that if sales tax be levied on goods which are sold for the purpose of export from India to a foreign country, it must necessarily affect export and would indirectly amount to an export duty which a State Legislature has no jurisdiction to impose. He tried to distinguish the Tata Iron and Steel Company's case [1958] 9 S.T.C. 267 on the ground that there the goods were not sold for the purpose of export, but were

sold to persons in other States of India.

10. This argument, though ingenious, is unsustainable. It is well-settled that in considering whether a particular statute comes within the legislative power either of a State or of the Centre, the "pith and substance" of the legislation must be considered, and incidental overlapping amongst the various entries in the three Lists to the Seventh Schedule should be ignored. If in pith and substance the subject-matter of the impugned legislation is relatable to one of the entries in the three Lists the mere fact that it incidentally encroaches another entry will not alter its true character. In pith and substance the Act is relatable to a purely Provincial subject, namely item 48 of List II. Doubtless where the sale takes place in the course of exports there may be an incidental encroachment on the Centre's legislative power under items 19 and 44 of List I. But so long as the legislation is in respect of "tax on sales" and there is sufficient nexus (as held by the Supreme Court in the Tata Iron and Steel Company's case [1958] 9 S.T.C. 267 for the State to tax the sale, the Act cannot be successfully impugned merely because of its incidental encroachment on a Central subject.

11. In the aforesaid Supreme Court decision also there are some observations in support of this view. There also the second proviso to Section 2 (g) of the Bihar Act was attacked on the ground that in reality it was not a tax on sale of goods but was in substance a duty of excise which was an exclusively Central subject--vide item 45 of List I. Their Lordships repelled this argument by saying that "in essence it was a tax on sale and not a duty on goods manufactured or produced." The same reasoning would apply here, the only difference being that in Tata's case [1958] 9 S.T.C. 267, item 45 of List I was considered whereas here we are concerned with item 19 of the list. The whole question ultimately depends on what is the pith and substance of the impugned legislation. . I think there can be no doubt that it is a tax on sale of goods which is an exclusively Provincial subject.

12. As regards the quantum of the turnover for the purpose of assessment, the sum paid by the American firm namely Rs. 1,45,000 and odd should be taken to be the sale price. Messrs Chromite Corporation of India were only the selling agents and they accepted the price from the American firm on behalf of the petitioner. The lower price shown in the accounts as representing the value of the goods at the time of delivery to Messrs Chromite Corporation of India at Barbil in Keonjhar district, cannot be taken as the sale price because there could possibly be no sale between the petitioner and his selling agents.

13. For the aforesaid reasons I am satisfied that the petitioner was rightly assessed to sales tax.

14. Both the applications are dismissed with costs. There will be a consolidated hearing fee of Rs. 200 (Rupees two hundred only).

Barman, J.

15. I agree.