
(1968) 11 RAJ CK 0001

In the Rajasthan High Court

Case No : Sales Tax Ref. No's. 24 of 1965, 41 of 1967 and 5 of 1968

Mewar Sugar Mills Ltd. and Others

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision : 12-11-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101
Rajasthan Sales Tax Act, 1954 — Section 15, 2

Citation : AIR 1970 Raj 1

Hon'ble Judges : V.P. Tyagi, J; D.M. Bhandari, J

Bench : Division Bench

Advocate : M.D. Bhargava, in No. 41/67, Sagarmal Mehta, in No. 5/68 and M. Mridul, in No. 24/65, for the Appellant; M.L. Shrimal, Dy. Government Advocate, for the Respondent

Judgement

Bhandari, J.—All these three references u/s 15 of the Rajasthan Sales-Tax Act, 1954 (hereinafter called the Act) raise similar questions of law and are, therefore disposed of by one judgment.

2. We first of all take up Sales Tax Reference No. 41/67, Mewar Sugar Mills Ltd. v. State of Rajasthan :

3. Messrs. Mewar Sugar Mills Limited (hereinafter called the Sugar Mills) is a public limited company carrying on business of manufacturing and selling sugar. The accounting year of the Sugar Mills begins from 1st August and ends on 31st July. This reference relates to the assessment proceedings for the assessment years 1957-58, 1958-59 and 1959-60. For the first two years the Sugar Mills was assessed by the Sales Tax authorities of the State of Rajasthan both, under the provisions of the Act and also under the provisions of the Central Sales Tax Act. For the assessment year 1959-60, it was assessed only under the provisions of the Act. Thus there were five assessment proceedings undertaken with respect to the aforesaid three years.

4. It may be mentioned that sugar was a controlled commodity and under the Sugar and Gur Control Order, 1950 the notification No. SRO 57 dated 29th January 1951 was issued in which it was made obligatory for the mills to supply arid deliver sugar in specified packings, the net contents of each packing was to be 2mds. 30 srs. This notification was replaced by another similar notification which we need not mention. Price of sugar was fixed by the Government of Rajasthan from 29th August, 1959 in relation to the weight of the sugar. Prior to 14th December, 1957, the Sugar Mills made sales of sugar and charged price from the purchasers in accordance with the price fixed on the quantity of sugar sold. On or from 14th December, 1957 additional Central Excise duty was levied on sugar and sugar was exempted from State Sales-tax. On and from that date it sold sugar at the price fixed by the State of Rajasthan which was computed on the weight of sugar sold by it. Sugar was sold in the gunny bags but the case of the Sugar Mills is that no price was charged for the gunny bags.

5. The Assistant Commissioner Excise and Taxation, District Udaipur assessed the Sugar Mills for the accounting year 1957-58 and did not charge any sales-tax on the value of the gunny bags supplied by it to its different customers. Notice u/s 10 (2) of the Act was, however, issued to the Sugar Mills and the assessment was reopened on the ground that the assessee had escaped tax on the value of gunny bags in which sugar was delivered. The Sales-tax Officer held that it had paid tax on the sale price of the sugar upto 13th December, 1957 which also included value of gunny bags. But from 14th December, 1957 tax on the sale of sugar was exempted and only the containers remained taxable. On this basis the Sugar Mills was taxed on the value of the gunny bags which he determined at rupee one per bag and assessed tax on it at the rate provided for the Bardana under the Act. For the next two years, namely account-ing years 1958-59 and 1959-60 the Sugar Mills was similarly assessed on the value of the gunny bags supplied by it to its various customers. The Mills filed separate appeals for the three years in question to the Deputy Commissioner (Appeals) Excise and Taxation, Jodhpur and the appeals were dismissed. The Mills filed revision applications u/s 14 of the Act to the Board of Revenue, Rajasthan. The single Member of the Board who heard the applications referred all the cases to a Full Bench.

6. Various rulings have been discussed by the Full Bench of the Board of Revenue in its judgment, but there is no clear finding of fact on the question whether under the circumstances of the case, there was any sale of gunny bags by the Mills to its customers or not. After discussing the cases, the Full Bench observed as follows :

"In this case (of) Mewar Sugar Mills there is no doubt that a Sugar Control Order imposed all sorts of obligations for the sale of sugar in specified gunny bags and of certain weight, yet the main contract of the assessee for the sale of sugar consists in supplying of sugar with gunny bags the price or which goods was no doubt included in the turnover of the assessee. No person would supply free of

charge a commodity which has some value. There would be an implied agreement in this case that along with sugar, the gunny bags were sold for value to other persons by the assessee.

A case may happen, where an article is sold in ordinary paper bags of practically little value, then it cannot be inferred that the sale of material between the parties was also contemplated. It usually happens when one buys goods in a shop, where they are delivered to customers in ordinary paper wrappers. In such cases it can be presumed that no sale of the packing material has taken place. But looking to the trend of the cases cited by the learned Government Advocate, it has been the consistent view of the various High Courts that in the case of goods delivered in gunny bags, the latter were considered as sold along with the commodity, and the assessee was held liable to the payment of sales tax. The contract of sale in those cases is therefore implied.

We are therefore, of the opinion that the reference made by the learned single Member be answered in the terms, that the delivery of sugar made by the assessee company is with gunny bags and the sale of latter commodity is implied in it, and remand this case back to the learned single member to decide it in accordance with the above answer."

7. After the receipt of the case, the single Member of the Board of Revenue dismissed the revision applications.

8. Five separate applications were preferred by the Mills u/s 15 of the Act, On these applications the Board of Revenue has referred the following question;

"Whether in the facts and circumstances of these two cases, where sugar is sold packed in bardana, an implied sale of bar-dana can be inferred".

We understand that by two cases, the Board of Revenue meant all the five cases of two categories--(1) those arising under the Rajas-than Sales Tax Act and (2) those arising under the Central Sales Tax Act.

9. In order to answer this question, we may refer to certain provisions of the Act. "Sale" has been defined u/s 2 of the Sales Tax Act as follows :

"Sale", with all its grammatical variations and cognate expressions means any transfer of property in goods for cash or for deferred payment or for any other valuable consideration, and includes a transfer of goods on the hire purchase or other system of payment by instalment, but does not include a mortgage or hypothecation of, or a charge or pledge on goods "and the word "purchase" or ouy" shall be construed accordingly.

"Sale price" means amount payable to a dealer as consideration for the sale of any goods, less any sum allowed as cash discount according to the practice normally prevailing in the trade, but inclusive of any sum charged for any thing done by the dealer in respect of the goods at the time or before the delivery thereof other than the cost of freight or delivery or the cost of installation in case

where such cost is separately charged and the expression "purchase price shall be construed accordingly-"

"Turnover" means the aggregate of the amount of sale prices received or receivable by a dealer in respect of the sale or supply of goods or in respect to the sale or supply of goods in the carrying out of any contract."

10. The charging section under the Act is Section 3 which makes a dealer liable to pay tax on his taxable turnover.

11. The definition of "sale" under the Act is much wider than its ordinary legal connotation. In the well-known case of *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, the Supreme Court while discussing the provisions of the Government of India Act, 1935 has taken the view that the expression "sale of goods" in Entry 48 in List II of Schedule VII is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement. The same view has been taken by the Supreme Court with respect to the provisions of the Constitution viz Entry No. 54 in List II of Schedule VII of the Constitution. The Supreme Court has again pointed out that sale of goods in the various Acts of the States regarding the sales-tax must have the same meaning which it had in the Act of 1930. It has also been pointed out in a number of cases that to constitute sale of goods, three essential elements must be fulfilled. On this point, it is sufficient if we quote the following passage from *Commissioner of Taxes Assam, Shillong Vs. Prabhat Marketing Co. Ltd., Gauhati*, :

"It is well established that in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, the agreement must be supported by money consideration, and that as a result of the transaction the property should actually pass in the goods. Unless all the ingredients are present in the transaction there could be no sale of goods and sales tax cannot be imposed."

While considering the question, what are the characteristics of sale under the Rajasthan Sales Tax Act, the Supreme Court has taken the same view in the *State of Rajasthan and Another Vs. Karam Chand Thappar and Brothers (Coal Sales) Ltd., Jaipur*, and observed as follows :

"This Court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, , held that to render turnover from sale of goods liable to tax under the Sales Tax Acts, there must be concurrence of four elements in the sale--(1). parties competent to contract; (2) mutual assent of the parties; (3) thing absolute or general, property in which is transferred from the seller to the buyer; and (4) price in money paid or promised."

12. In the present case, the title to the gunny bags which were the property of the Sugar Mills, no doubt, passed to the various customers. But this by itself has never been treated as constituting sale; the two other elements as referred to in

Commissioner of Taxes Assam, Shillong Vs. Prabhat Marketing Co. Ltd., Gauhati, , must be further present. This has been pointed out by their Lordships of the Supreme Court in the majority judgment in the Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd., , in which it was observed :

"One fundamental fact has to be borne in mind is that from the mere passing of title to goods either as integral part or independent of goods, it cannot be inferred that the goods were agreed to be sold and the price was liable to sales-tax."

13. It was also held by their Lordships of the Supreme Court that in the case of the containers as well as in the case of the works contract it is for the taxing department to show that a particular transaction amounted to sale.

14. In Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh^{1966 17 STC 624 (SC)} the Department sought to assess a manufacturing dealer of cigarettes on the turnover in respect of packing materials consisting of cardboard and deal wood, their Lordships of the Supreme Court pointed out whether there was an agreement to sell the packing materials was a pure question of fact and that question could not be decided on fictions or surmises. The burden lay on the Commercial Tax Officer to prove that the turnover was liable to tax and he could ask the assessee to produce relevant material. If the assessee did not produce the same, he could draw adverse inferences against the assessee; but he had to decide the crucial question whether the packing materials were the subject of the agreement of sale, express or implied.

15. It is the case of neither party in these cases that there was any express agreement to sell the bags by the Mills to its customers. We have to see whether there were circumstances present in this case showing such an implied agreement. Under what circumstances, an implied agreement is to be inferred is essentially a question of fact which it is for the Taxing authorities to determine on the facts and circumstances of each case. This question cannot be resolved by stating any abstract proposition of law. As pointed out by their Lordships of the Supreme Court a simple question of fact cannot be sidetracked by copious citation -- an error in which we regret to point out, the Full Bench of the Revenue Board has fallen.

16. When the circumstances show that particular goods were to be supplied by a dealer packed and the price fixed is inclusive of the packing material, an inference may be readily drawn that packing material was impliedly sold.

17. In M.S. Chidambara Nadar Sons and Co. Vs. State of Madras, where there was an agreement to purchase cotton to be delivered by the seller to the buyer, it was implicit in the contract that the goods should be delivered as packed. In such a case a contract to pay for and purchase the packing materials was held to be implied. This case was expressly approved by Subba Rao J., in his dissenting judgment in Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd., .

18. Learned counsel for the Sugar Mills has however argued that in the circumstances of the case, there could be no other conclusion from the material on record except that the gunny bags were never intended to be sold by the Sugar Mills to its various customers. He primarily relied on the fact that in the accounting year 1957-58 when there was no exemption of sugar from sales-tax and even earlier than that the Sugar Mills had been selling sugar and always the taxing authority was taxing it on the price which the sugar brought and not on the value of the gunny bags in which sugar was delivered by the Sugar Mills to its customers. According to the learned counsel, this shows that consistently the Sugar Mills were making a present of a gunny bag to a customer who purchased one bag of sugar. The Sugar Mills never intended to sell the bags and the Department never treated the transfer of a gunny bag from the sugar mills to the customer as a transaction of sale. He has pointed out that the price of sugar was settled not on the basis of one gunny bag of sugar but on the basis of per maund of sugar and that in the bills the Sugar Mills never charged the price of the gunny bags. He has further pointed out that it was only after the notification for exempting sugar from sales-tax was issued that the taxing authorities took into their head to tax the value of the gunny bags, but this should not have been done as the exemption did not alter the character of transactions of sale. He has further contended that unless a price is charged for the transfer of a particular commodity, there can be no sale because the second condition as envisaged in the case of Prabhat Marketing Company is that the agreement must be supported by money consideration. In this connection, he has also relied on the following observation of the Supreme Court in *Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd.*, .

"The contract may be for work to be done for remuneration and for supply of materials used in the execution of the works for a price; it may be contract for work in which the use of the materials is accessory or incidental to the execution of the work; or it may be a contract for work and use or supply of materials, though not accessory to the execution of the contract, is voluntary or gratuitous. In the last class there is no sale because though property passes it does not pass for a price."

19. These observations, it is contended, apply with greater emphasis to a case where the contract is simply a contract for supply of goods.

20. Learned counsel on behalf of the Department, however, relied on: *Mohanlal Jogani Rice and Atta Mills v. State of Assam*, AIR 1953 Gua 42; *Indian Leaf Tobacco Development Co., Ltd. v. State of Madras (now Andhra)* 1954 5 STC 354 (Mad); *Nimar Cotton Press, Khandwa v. Sales Tax Officer Khandwa* AIR 1956 Nag 27; *A. S. Krishna and Co., Ltd., Guntur v. State of Andhra*, (1956) 7 STC 26 = AIR 1957 AP 706.

21. It is further contended that the Sugar Mills while calculating the price of sugar included in it the cost of the gunny bags in which it intended to supply sugar to its customers and, therefore, it cannot be said that the price of gunny

bags was altogether not intended to be charged by the Mills.

22. These various facts and other ancillary facts may give rise to one inference or other on the question whether the Sugar Mills intended to sell the gunny bags to its customers and the customers intended to purchase them and the Sugar Mills intended to charge any price for the same. But this is essentially a question of fact which the Board of Revenue should have determined in the revision applications filed by the Sugar Mills before it. While referring the case to this Court, the learned Members of the Board have observed that,--

"the learned Government Advocate urged that the determination of the question whether the packing material in comparison with its contents would be significant or insignificant in a particular case would be a question of fact. That did not appear to them to carry conviction, as it would be a matter of inference from facts whether in a particular case packing material would be significant or insignificant in comparison with the value of its contents and thus a question of law had arisen in the case."

It has been repeatedly pointed out that what inferences are to be drawn from facts is always a question of fact to be determined by the taxing authority. It cannot be called a question of law. The Full Bench of the Board of Revenue as well as the single Bench which disposed of the revision applications however fell into error in not determining this question of fact on the material on record but disposed all those cases in the light of certain observations in certain cases which they have cited. This was not the proper approach. Our answer to the question formulated in this reference therefore is :

23. Whether there was a sale of "bardana" to be determined by the Board of Revenue on the facts and circumstances of the case keeping in view the meaning of the expression "sale" as clarified by us and after satisfying that all the three elements which constitute sale are present.

24. Now we take up sales tax Reference No. 5/68, Messrs. Jaipur Spinning and Weaving Mills Limited, Jaipur v. The State of Rajasthan. Messrs. Jaipur Spinning and Weaving Mills Limited, Jaipur (hereinafter called the Spinning and Weaving Mills) is a public limited company carrying on business of manufacturing of yarn and selling it. This mill was assessed to tax under the Rajasthan Sales Tax Act for the assessment year 1958-59, Its accounting year is the calendar year. Assessment proceedings were taken against it under the Rajasthan Sales Tax Act for the year 1958-59 and under the Rajasthan and the Central Sales Tax Act for the assessment year 1960-61. The relevant facts are these :

25. The company sold yarn to its customers fixing the price of yarn per bundle at the rate of per bundle of 10 Ibs. The yarn was, however, sold packed in bales containing 40 bundles. It had not charged any sales-tax on the value of the packing material of the bales for the year 1958-59, but it was reassessed under the provisions of Section 12 of the Act and it was taxed on the packing material of the bales which it delivered to its customers. For the year 1960-61, it was

assessed for the value of the packing material of the bales supplied to its customers in that year. The assessment orders were passed by the Sales Tax Officer Jaipur which were challenged in appeals preferred by the said mills to the Deputy Commissioner Excise and Sales Tax, Jaipur and the appeals were accepted on the ground that there was no price charged for packing material and, therefore, there was no sale. The Department filed revision applications before the Board of Revenue. The Board of Revenue accepted the revision applications.

26. Mr. B. C. Mukherji, Member of the Board of Revenue observed that the issue of the case before them resolved itself into two questions :

(1) Whether there is an express or implied sale of packing material?

(2) Whether value of the packing material is insignificant?

27. So far as point No. 1 was concerned, he held that the price of the packing material was included in the consolidated charges realised from the customers and so far as point No. 2 was concerned, it was observed that the value of the packing material was about 1% of the total turnover and these figures were by no means insignificant

28. The other member of the Board Mr. Kacker after relying on the Full Bench ruling in *Mewar Sugar Mills v. State* (already referred to by us) and referring to certain other cases observed that the rule laid down by their Lordships of the Supreme Court was that it cannot always be said that the sale of packing material is implied in the sale of the contents. It will depend upon whether the packing material is of insignificant value in comparison with the value of the contents. If the value is significant even if there is no express agreement for the sale of the packing material, such a sale will be implied and the packing material will be chargeable to sales-tax. Then he further observed that value of the packing material in this case could not be said to be insignificant and also held that the packing material could be easily sold for valuable consideration. Taking this view, he agreed with the judgment of Mr. Mukherji and the revision applications were allowed by the Board, and the order of the Deputy Commissioner regarding the packing material as not being subject to sales-tax was set aside.

29. Applications were filed by the Spinning and Weaving Mills for making reference to this Court and the following question was referred by the Board of Revenue to this Court :

"Whether on the facts and circumstances of these cases the sale of packing material would be considered as implied sale and be liable to tax where yarn is sold in bundles of cloth?"

30. This question as it is framed, presupposes a sale of the packing material as it mentions "whether the sale of packing material would be considered as implied sale." This is an obvious error in the framing of the question. Instead of remitting

the case back to the Board of Revenue to frame a proper question, we have thought it fit to reframe it so as to bring out what was really meant by the Board of Revenue while referring it to this Court. We therefore frame the question in the following form :

Whether on the facts and circumstances of this case, the transfer of packing material when yarn is sold in packed bales should be considered as implied sale and will be liable to tax?

31. It may also be mentioned that cotton yarn is an exempted article under notification dated 14th April, 1955 issued by the Government of Rajasthan u/s 4 (2) of the Act.

32. The line of argument that has been taken up by learned counsel on behalf of the Spinning and Weaving Mills is that two essential elements of sale viz. (1) the agreement between the Spinning and Weaving Mills and its customers for transferring the title to the packing materials and (2) that such agreement must be supported by money consideration were missing in this case and that the burden lay on the department to show that these essential elements were present in the transaction of the sale of yarn by the Spinning and Weaving Mills to its customers. It has been further urged that the price that has been fixed by the Spinning and Weaving Mills has no reference to the packing material and has been fixed at per bundle of 10 Ibs of yarn and that no charge is made for the packing material. It has been further argued that the Spinning and Weaving Mills could sell yarn in bundles without packing them and yet would charge the same price as it would charge when selling it packed in bales. The contention is that the packing material was given free to those customers who purchased in large quantity, that is, purchased as many as 40 bundles. All these arguments run on the same lines as in the case of Sugar Mills. No doubt, in this case, the Members of the Board of Revenue have picked up one or two circumstances to show that there was implied sale of packing material, but they failed to give a categorical finding of fact whether in the facts and circumstances of the case all the elements of sale were satisfied.

The main point taken by the Board of Revenue was that the cost of the packing material which was as much as 1% of the total turnover could not be taken as insignificant and, therefore, it could not have been given free by the Spinning and Weaving Mills to its customers. It is, however, contended by the learned counsel on behalf of the Mills "that the price of yarn was fixed by the Textile Controller without taking into consideration the cost of the packing material and therefore the question whether the value of packing material was significant or not cannot be made the sole basis for finding that there has been an implied sale of that material. It was contended that to a customer who purchased the products of the Mills in large quantities, a particular mill may supply packing material free of cost because it may think that by supplying packing material free of cost it may attract more customers.

According to learned counsel, there may be cases where there is cut-throat competition between several mills and some mills may therefore supply packing material even of significant value as free. These contentions cannot be said to be totally devoid of force. The duty of the Board of Revenue was to find out from the facts and circumstances of the case whether all the three elements constituting sale were fulfilled or not in the transaction of transfer of packing material by the Spinning and Weaving Mills to its customers. Our answer to this question will also be as in the Sugar Mills case.

33. We have, however, to consider yet another argument addressed in this case by Mr. Mehta. His argument is that in exercise of the powers conferred under Sub-section (2) of Section 4 of the Act the Government of Rajasthan issued notification dated 11th August, 1959 exempting from tax the sale of "bardana" old, new or being received as containers except on the first point at the hands of an importer in the series of sales in the State and that the effect of this notification was that only "bardana" which was imported in the State was liable - to sales-tax, but the "bardana" manufactured or produced in the State would not be so liable and by this process, the State Government had discriminated "bardana" which was to be imported in the State and that this discrimination was not legal in view of Article 301 of the Constitution. He has relied on the decision of this Court in D. B. Civil Writ Petn. No. 92 of 1965, Ghasiram Mangilal of Sambhar v. State of Rajasthan, decided on 18-7-1968 (Raj). Learned Deputy Government Advocate has argued that u/s 15 of the Act, this question has not been referred to this Court. In reply to this argument, Mr. Mehta has pointed out that the second part of the question, that is, whether the sale of packing material is liable to tax is comprehensive enough to cover this point. We may, however, point out that u/s 15 of the Act any question of law arising out of the order of the Board of Revenue can be referred to us and not any question, which does not arise out of such order. We have, therefore, to examine whether this question arises out of the order of the Board of Revenue passed on the revision application filed by the Department.

This question was not at all raised by the Spinning and Weaving Mills before the Board of Revenue. There is no discussion in the order of the Board of Revenue on this question. As pointed out by their Lordships of the Supreme Court in Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., when a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.

Mr. Mehta has, however, pointed out that before the Tribunal the said Mills had sought to exonerate themselves from payment of any tax on the ground that there had not been any sale express or implied. In this Court they should be permitted to show that on account of certain notifications, the article for which tax was being levied could not be taxed as this was only another aspect of the same matter. In the widest sense, every tax payer who is party to any appeal or

revision is only attempting to exonerate himself from the payment of tax, but it does not mean that he has not to address specific points for such exoneration. In this case, the specific argument that was addressed before the Board of Revenue was only whether there has been an implicit sale of "bardana" or not. No other argument was addressed before the Board. All aspects on this point can be argued before this Court, but not any new point which was not argued before the Board of Revenue. It cannot be said that what is being argued before us in exonerating the Spinning and Weaving Mills from its liability for payment of tax is not a new point which does not arise out of the judgment of the Board of Revenue. In our opinion, this point cannot be urged to be taken before us because it has not been referred by the Board of Revenue.

34. As a result of the aforesaid discussion, we answer the question as framed by us in the following manner:

Whether there was an implied sale of "bardana" is to be determined by the Board of Revenue on the facts and circumstances of the case, keeping in view the meaning of the expression "sale" as clarified by us and after satisfying that all the elements which constitute sale are present.

35. The third case Civil Sales Tax Reference No. 24/65 Sales Tax Officer, Bhilwara v. Mahalaxmi Cotton Ginning and Pressing Factory, Asind arises under the following circumstances :

36. Mahalaxmi Cotton Ginning and Pressing Factory (hereinafter called the Factory) carried on the business of pressing the raw cotton brought to it by its constituents for the period 1-6-1955 to 31st May, 1956. The Assistant Commissioner, Excise and Taxation, Bhilwara, assessed the factory and held it liable to pay sales-tax on a turnover of Rs. 30,005 which, according to the estimate of that officer, was the value of the gunny bags and iron hoops used by the assessee in the conduct of its business. The factory had disputed its liability to pay sales-tax on the ground that the factory did not make sale of the packing material to its constituents. This argument was negatived by the taxing officer. The factory preferred appeal before the Deputy Commissioner, Sales Tax, (Appeals) Jodhpur, which was rejected, but the estimated turnover was reduced to Rupees 24,849. An application for revision against the order of the Deputy Commissioner was filed by the Factory to the Board of Revenue. The Division Bench of the Board quashed the order of assessment by its order dated 17th February, 1964 taking the view that the gunny bags and iron hoops were delivered as a part of the consolidated contract for pressing and baling of cotton. The assessing authority filed an application u/s 15 of the Rajasthan Sales Tax Act (hereinafter called the Act) before the Board of Revenue for referring the following question :

"Whether the iron hoops and hessian cloth used for wrapping the pressed cotton bales by the assessee, the Cotton Ginning and Pressing Factory, is a sale to the Customer and divisible part of the contract and its turnover is taxable under the

Rajasthan Sales Tax Act."

37. The Board of Revenue has taken the view that it was the job of the factory to press the cotton into bales and then redeliver the same after pressing it. For this contract, the consolidated charge of Rs. 11 per bale was being charged and it was also clear from the order of the Assistant Commissioner, Bhilwara that he estimated the price of the packing material at Rs. 5 per bale. The Board of Revenue held that it was the essence of the operation of pressing and baling that the hessian cloth and iron hoops were to be necessarily used, otherwise in the absence of such use, the pressed cotton would not remain in that shape and that the petitioner charged a consolidated price for the entire operation and thus two agreements -- one for pressing the cotton and another for sale of the packing material -- cannot be inferred from the transaction. Taking this view, the Board held that there was no sale of hessian cloth and iron hoops to the persons who brought their cotton for being pressed.

38. It is contended by learned Deputy Government Advocate on behalf of the Department that pressing and packing were two distinct processes. While the former is only a contract for work, the second is mainly a contract for the sale of material and, therefore, the sales-tax could be levied under the Act on the packing material. We have to examine how far this argument is correct.

39. We have already pointed out that in order to constitute sale there must be:

- (1) Agreement between the parties for the purpose of transferring title to the goods,
- (2) That the agreement must be supported by money consideration, and
- (3) As a result of the transaction, the property should actually pass in the goods.

40. A contract for work is not a contract for sale because there is no agreement between the parties for the purpose of transferring title to the goods. A contract of work may be supported by money consideration and as a result of contract, some material belonging to the person undertaking the job may actually pass from him to the other persons with whom he has entered into agreement to undertake the job. But these two circumstances which are present in this case also would not make the transaction an agreement to sell the material unless there is either express or implied agreement between the parties that the person who had undertaken the job also intended to transfer title to goods to the other party. In the case before us there is no such express agreement. The question is whether we should infer any implied agreement for the sale of packing material. This will depend as to what was the dominant intention of the parties at the time when the job of pressing was undertaken by the Factory. If in doing this job, it was intended that some material will be supplied by the person undertaking the job to the other party for a price, then it may be inferred that there was an implied contract for sale of the material. As has been pointed out by their Lordships of the Supreme Court in *The State of Madras Vs. Gannon Dunkerley*

and Co., (Madras) Ltd., in these words :

"It is possible that the parties to the contract may enter into distinct and separate contracts, one for the transfer of materials for money consideration and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment."

41. In several cases decided by the High Courts, the view taken is that in the contract for pressing cotton bales, the process of packing cotton may be separated from that of pressing it and the contract of packing may be considered to be mainly a contract for supply of packing material and some labour. The Madhya Pradesh High Court has consistently taken this view.

42. In *Jaikishan Gopikishan Vs. Commissioner, Sales-tax*, the definitions of "dealer", "goods" and "sale" as given in the Madhya Bharat Sales Tax Act, 1950 were examined and the view was taken that the combined effect of those definitions was that every person who carried on the business of transferring property in any kind of movable property including articles and commodities used in fitting out, improvement or repairs of movable or immovable property to another for cash or deferred payment or other valuable consideration is liable to pay sales tax on the turnover. It was held that the hessian cloth and hoops supplied by a ginning and pressing factory to its customers in the form of bales covered with hessian cloth and secured by iron hoops was a sale. This case was decided on the definition of Sale in the Madhya Bharat Act. Another case of a cotton pressing factory which arose in Madhya Pradesh High Court was referred to the Full Bench *The Nimar Cotton Press Vs. Sales Tax Officer and Another*, and that case is 1954 STC 428 = (AIR 1956 Nag 27).

In that case it was held that the decision in *Jaikishan Gopikishan Vs. Commissioner, Sales-tax*, was in no way contrary to the principles laid down by the Supreme Court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, and *Banarsi Das v. State of Madhya Pradesh* 1958 STC 388. Their Lordships of the Madhya Pradesh High Court examined the case before them in the light of the Supreme Court decision and came to the following conclusion :

"The "pressing part" of the contract was one of execution of work on the cotton. The hessian cloth and iron hoops which were used for packing were not in any way materials "worked into" the cotton, and there was no question of iron hoops and hessian cloth vesting by accession in the owner of the cotton, The packing material remained extraneous. It must be remembered that in the process of pressing cotton, the packing material is not necessary as an incident of pressing. It is not an accessory to the work of pressing..... The compressing is not done by the hessian cloth or the iron hoops, but by a machine worked by mechanical or hydraulic power which exerts great and steady pressure on the ginned cotton in

a cast and thus compresses it into bales. The packing material is for convenience of transport and to prevent the bales from being "unloosened" during the course of handling. The necessity of packing compressed cotton varies with the factor of transport and the time within which the pressed cotton is to be spun and used for manufacture in the textile mills. If the pressed cotton is to be taken immediately to an adjoining textile mill and used for manufacture, it may be wholly unnecessary to use any packing material. The necessity would be great if the pressed bates are to be transported over long distances or to overseas. Therefore a contract for pressing cotton and delivery of the compressed cotton in a certain kind of packing is really divisible into two distinct contracts; (i) one of labour and work, namely, the pressing of the cotton, and (ii) the other of packing the compressed cotton which is partly of material and of labour. In the "packing part" of the contract, the substance of the agreement is not the skill and labour but it is the material.

It is thus clear that even in the absence of an express agreement for the sale of packing material as such there would be a sale of the material for in a contract of pressing cotton and delivery of compressed cotton in bales covered with hessian cloth and iron hoops for a consolidated charge of pressing, and packing, it is implicit that there would be a sale of the packing material and the parties are impliedly ad idem on the passing of the property in the material qua material and the addition of its price to the pressing charges. If the property in the extraneous packing material vests in the owner of the cotton on payment of a consolidated price and the vesting is not accession, then it can only be under an implied contract of sale of the material.

43. The Madhya Pradesh High Court again considered this matter in the *The Nimar Cotton Press Factory Vs. Commissioner of Sales Tax*, . This time the contention raised before the High Court was that in view of the decision of the Supreme Court in *Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd.*, , the decision in *The Nimar Cotton Press Vs. Sales Tax Officer and Another*, was no longer of any binding force. Their Lordships considered *Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd.*, and observed as follows :--

"From the facts of the said case it would appear that the ratio of the case is that in a works contract, where packing material is used and where there is no specific agreement to transfer the packing material, the test to determine whether there was a sale of the packing material or not is to find out from the circumstances of each case whether the packing material was an integral part, of" the works contract or it was extraneous to it; if it was an integral part, no agreement for sale could be inferred; if it was not so, then an implied contract of sale could be inferred from the facts and circumstances of the case."

44. There is yet another case of the Madhya Pradesh High Court in *Vimalchand Prakashchand Vs. Commissioner of Sales Tax*, in which a similar question was involved. The view taken was that for supply of packing material, there was an implied contract for the sale of packing material and that the mere fact that the

price of packing material was not fixed makes no difference to the assessment of sales-tax. While referring to other, cases, reliance was placed on M.S. Chidambara Nadar Sons and Co. Vs. State of Madras, which according to the Madhya Pradesh High Court was approved by the Supreme Court in Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd., .

45. The Andhra Pradesh High Court in B. V. Hanumantha Rao v. State of Andhra^{1956 7 STC 486 (AP)} took the view that the packing materials in the shape of gunny cloth and iron hoops used by the assessee carrying on the business of baling and pressing palmyra fibre could be assessed to sales-tax. Subba Rao C. J. (as he then was) took the view that packing materials were goods within the definition of that expression under the Madras General Sales Tax Act. He observed as follows :--

"In the present case, as in that case, the packing materials were "goods" within the definition of the Act, The assessee certainly had property in the goods and it is not disputed that he transferred them to his constituents. But what is said is that he did not sell the goods for consideration. It is said that he did not charge a separate price for the packing material. But, the order of the Andhra Sales Tax Appellate Tribunal clearly shows that he entered into three kinds of transactions, (i) where he charged an inclusive rate of both the gunny coverings and also the pressing process, (ii) where the gunny cloth and the hoops were supplied by the customers and rebate was granted by the assessee, and (iii) where the price of the goods and the cost of labour involved were separately shown.

It is obvious that whatever method was adopted, the assessee charged for the gunny cloth and the hoops and it is impossible to conceive that a businessman like the assessee would not have included in the charges the large amounts he spent for purchasing the gunny cloth and iron hoops. We, therefore, following the judgment in AIR 1957 AP 706 hold that the transactions in question were "sales" within the meaning of the Act and, therefore, were liable to sales tax."

In 1956 7 STC 26 which was relied by the learned Chief Justice, the assessee Company redried in their plant raw tobacco given to them by their customers. After redrying the tobacco, the assessee packed it with the necessary packing materials purchased by them and then delivered it to the customers. The assessee collected from each customer a consolidated charge for redrying as well as packing. They were assessed to sales-tax After quoting certain English and Indian cases, Subba Rao C. J. took the view that in the case of tobacco given for drying purposes, the owner may supply the material or the assessee may supply the material himself and the material did not become the part of drying process and was clearly separable from the process. Reference was made to the definition of goods in the Madras General Sales Tax Act and it was observed as follows :--

"Unless we can hold that the materials, after being packed, have been transformed into some other commodity not covered by the definition of goods, it

is not possible to hold that there was no sale of that material. Though the learned counsel for the petitioner argued that packing material was an integral part of the drying process, he did not go to the extent of contending that the material lost its character as movable property."

46. The Bombay High Court in *Babulal Onkarmal and Co. Vs. The State of Bombay*, has also taken the view that in the transaction entered into by a company carrying on business of ginning and pressing cotton in the factory owned by them with their customers for the ginning and pressing of their cotton, there was involved as a severable part of the transaction, sale of hessian and iron hoops used in the execution of the contract and therefore the applicants were dealers under the Bombay Sales Tax Act.

47. These cases are direct authorities on the point that the contracts of pressing and packing are severable and packing does not form integral part of the contract of pressing.

48. In some cases, it is also said that the material does not become part of the thing packed, that is, cotton by the process or packing and for this reason, the packing material is liable to sales-tax for exemption.

49. In *Krishna and Co.* 1956 7 STC 26 , the view was expressed that unless the packing material had been transformed to some other commodity not covered by the definition of the goods, it was not possible to hold that there was no sale of that material.

50. These cases have been decided by eminent Judges and we must hesitate to take a different view, but with utmost respect, we may say that in taking the view that packing is not a part of pressing cotton, the learned Judges have been unduly stringent. If a particular job entrusted for performance to any person cannot be completed without the process of packing, then, in our opinion, the process of packing also becomes integral part of the performance of that job. In this connection, we may quote the following observations of Shah J. in *Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd.*, , (supra):

"The fact that in the execution of a contract for work some materials are used and property in the goods so used passes to the other party, the contractor undertaking to do the work will not necessarily be deemed on that account to sell the materials. A contract for work in the execution of which goods are used may take one of three forms. The contract may be for work to be done for remuneration and for supply of materials used in the execution of the works for a price; it may be a contract for work in which the use of materials is accessory or incidental to the execution of the work; or it may be a contract for work and use or supply of materials though not accessory to the execution of the contract is voluntary or gratuitous. In the last class there is no sale because though property passes it does not pass for a price. Whether a contract is of the first or the second class must depend upon the circumstances. If it is of the first, it is composite contract for work and sale of goods; where it is of the second

category, it is a contract for execution of work not involving sale of goods".

51. In the light of these observations, we have to examine therefore whether the use of packing materials in the circumstances of this case by the factory was not accessory or incidental to the execution of the work of pressing cotton. That packing is a necessary part can be gathered from the provisions of the Cotton Ginning and Pressing Factories Act, 1925 which regulates cotton ginning and cotton pressing factories. We will make reference to this Act as amended by the Cotton Ginning and Pressing Factories Act (Rajasthan Amendment Act, 10 of 1957). Without referring to the provisions of this Act in detail, we may point out that under this Act, cotton pressing factory has been defined as a factory in which cotton is pressed into bales and bale means according to Webster's Third International Dictionary, "a large closely pressed package of merchandise bound with cord, wire, or hoops and usually protected by a wrapping (as a burlap.)"

Now, in the very nature of things, there can be no bale of pressed cotton unless it is wrapped by some material and hessian being the cheapest of the materials available for such wrapping, it is often used in the process. It may be noted that the owner of every pressing factory is required under the said Act to maintain a register containing a daily record of the number of bales pressed in the factory u/s 3 (2). u/s 4, the owner of every cotton factory is required to cause every bale pressed in the factory marked in such manner as may be prescribed, before it is moved from the press premises with its serial and with the marks prescribed for the factory and if he fails to do so, he is on conviction liable to be punished with fine which may extend to Rs. 50. u/s 12, power has been given to the Central Government to make rules prescribing a special mark to be used by each pressing factory for the purpose of making bales in the manner in which bales shall be marked.

These provisions show that in the performance or the work of pressing, a pressing factory is bound to make bales of the cotton pressed by it and mark it in a prescribed manner otherwise it is likely to incur criminal liability. Can it be said under these circumstances that the work of wrapping the pressed cotton is not an integral part of pressing undertaken by the factory? The answer is obviously no. The work of packing is not only incidental to the work of pressing, but under the statute it is obligatory. Under these circumstances, in our opinion, packing is an integral part of pressing of cotton undertaken by the factory. It cannot refuse to do so. Nor can the constituent of the factory who has brought the cotton to it for pressing claim that the factory should not pack the pressed bale.

The law regulates the method and the manner in which the job of pressing is to be performed and when packing has been made incumbent by law on the part of the factory, it becomes integral part of the job undertaken by it to be performed. In order that a process may become an integral part of the work undertaken to be performed, it is not necessary that the materials used by the person who has undertaken the performance of that work should be transformed in any other material. The Madhya Pradesh High Court in *The Nimar Cotton Press Vs. Sales*

Tax Officer and Another, has observed that the hessian cloth and iron hoops which were used for packing were not in any way materials "worked into the cotton, and there was no question of iron hoops and hessian cloth vesting by accession in the owner of the cotton. The packing material remained extraneous.

If the meaning of these words is that they did not form part of the cotton in our opinion it is not necessary that in order that the process of packing of the cotton be deemed to be a part of pressing, it must necessarily be found that the packing material has become part of the cotton inside it. We have already mentioned that the process of packing is incidental to the process of pressing. The view taken by the Revenue Board is also that the use of hessian cloth and iron hoops was necessarily the essence of the operation of pressing in the absence of which the pressed cotton would not remain in that shape. Thus there is a definite finding of the Board of Revenue on this point and this is a finding of fact which we must accept and there is little that can be urged to the contrary. It is urged by the learned Deputy Government Advocate appearing on behalf of the Department that the hessian and the iron hoops are materials which could be sold by the various constituents after the cotton has been used by them, but this does not affect the matter. In that way, every wrapping material whether of significant or insignificant price has some money value however little it may be. In this case, it cannot be said that the material used by the factory for wrapping was of such high value that prima facie it may be presumed that the intention of the factory was to sell it.

52. We are therefore of the view that questions referred to us by the Board of Revenue should be answered in the negative. In all these three references we order that the parties shall bear their own costs.