

(1975) 08 KL CK 0005
In the High Court Of Kerala
Case No : T.R.C. No. 71 of 1973

Mookken Devassy Ouseph and Sons

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 28-08-1975

Acts Referred:

Citation : (1975) 36 STC 501

Hon'ble Judges : P. Narayana Pillai, J;G. Viswanatha Iyer, J

Bench : Division Bench

Advocate : T.L. Viswanatha Iyer and E.R. Venkiteswaran, for the Appellant; The Government Pleader, for the Respondent

Judgement

P. Narayana Pillai, J.—The question arising for consideration here is the taxability under the Kerala General Sales Tax Act (15 of 1963) of an amount of Rs. 2,59,079 being the estimated value of gunny bags used as containers of wheat and rice sold to retail dealers by the revision petitioner who is a registered dealer authorised to conduct wholesale trade in wheat and rice. Under the contract between him and the Government he has to purchase the goods from the Food Corporation of India and sell the same to retail dealers at the rates specified from time to time. The profit that he is to get in the trade is also fixed from time to time by the Government. The transactions involved here are of the year 1965-66. During that year the petitioner sold goods purchased by him from the Food Corporation of India to the retail dealers at the rates specified by the Government. The goods purchased by the petitioner from the Food Corporation of India were contained in gunny bags. It was in the same condition that he sold the the same to the retail dealers. On the ground that when the goods were sold by the petitioner to the retail dealers there was sale by him of the gunny bags in which they were contained also, the petitioner was assessed to tax by the Sales Tax Officer. His appeals from it to the higher authorities were unsuccessful. It was thereafter that he moved this court by this petition for revising those proceedings.

2. The question whether the value of containers is independently assessable to tax has come up for consideration in several decisions. In *Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd.*, a case of works contract, the Supreme Court held that packing materials formed an integral part of the process of re-drying tobacco and so sales tax could not be levied independently on the value of packing materials.

3. In *Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh* [1868] 17 S.T.C. 624 (S.C.), the question was whether sales tax could be levied on the value of containers and packing materials, which consisted of cardboard and dealwood, of cigarettes when on the sale of cigarettes sales tax could not be levied as sales or purchases of tobacco and all its products were exempted from sales tax. The Supreme Court said that they could be taxed only if there was an agreement, express or implied, between the assessee and its customers to sell the containers and packing materials, that whether there was such an agreement or not was a pure question of fact and that that question could not be decided on fictions or surmises. After remarking that the law on the subject was well settled, the earlier decision of the court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, wherein it was held that agreement for transferring title to goods presupposed that the agreement was supported by money consideration and that if that element was not present there could be no sale, was cited in support. After all that the position was explained thus :

...The authority concerned should ask and answer the question whether the parties in the instant case, having regard to the circumstances of the case, intended to sell or buy the packing materials, or whether the subject-matter of the contracts of sale was only the cigarettes and that the packing materials did not form part of the bargain at all, but were used by the seller as a convenient and cheap vehicle of transport. He may also have to consider the question whether, when a trader in cigarettes sold cigarettes priced at a particular figure for a specified number and handed them over to a customer in a cheap cardboard container of insignificant value, he intended to sell the cardboard container and the customer intended to buy the same ? It is not possible to state as a proposition of law that whenever particular goods were sold in a container the parties did not intend to sell and buy the container also. Many cases may be visualized where the container is comparatively of high value and sometimes even higher than that contained in it. Scent or whisky may be sold in costly containers. Even cigarettes may be sold in silver or gold caskets. It may be that in such cases the agreement to pay an extra price for the container may be more readily implied.

There the case was remanded to the High Court for consideration of the question whether there was an agreement to sell the packing materials or whether the packing materials, which were comparatively of insignificant value, were used only as a convenient vehicle to put the purchasers in possession of the cigarettes sold.

4. Commissioner of Taxes Assam, Shillong Vs. Prabhat Marketing Co. Ltd., Gauhati, was a case of assessment on the value of containers of hydrogenated oil when sale of that oil itself was exempt from sales tax. The Supreme Court observed that sales tax could be levied on the value of the containers only if there was an express or implied agreement for the sale of the containers.

5. A similar view was taken by the Supreme Court in M. A. Razack & Company v. State of Madras [1967] 19 S.T.C. 135 (S.C.) also, where the question was whether on the value of packing material of chewing tobacco sales tax could be levied. That decision shows that the value of the packing material as compared to the value of the contents of the packet is really an important matter and that if it is insignificant, an agreement to sell packing material independently of the contents cannot under the general law be implied.

6. Shamsuddin Akbar Khan & Co. v. State of Orissa [1970] 26 S.T.C. 280, Binod Mills Co. Ltd., Ujjain v. Commissioner of Sales Tax, M.P. [1972] 29 S.T.C. 413, Goverdhan Cement Agencies Private Ltd. v. State of Mysore [1974] 33 S.T.C. 269, Bhagirathi Agarwal & Brothers v. State of Orissa [1974] 34 S.T.C. 84 and Burhwal Sugar Mills Company Ltd. v. Sales Tax Officer [1969] 23 S.T.C. 241 are decisions of the Orissa, Madhya Pradesh, Mysore and Allahabad High Courts, where also it was held that on the value of packing materials sales tax could not be levied unless there was agreement, express or implied, to sell them and that if their value was insignificant compared to the value of the articles for packing which they were used implied agreement to sell them could not be inferred.

7. In Tushar Trading Co. v. State of Kerala [1971] 28 S.T.C. 214, a Division Bench of this Court had to deal with a similar question. There the turnover of Rs. 26,460.19 represented value of packing materials like gunnies, mats, coir and twine used for transporting copra by the assessee, who was a dealer in coconuts and copra. In the invoices drawn in favour of the purchasers for the purchase of copra, the price of packing materials had been shown separately. The Tribunal found that while copra could be taxed at 2 per cent, the turnover of packing materials had to be taxed at 10 per cent. The controversy was whether the turnover of packing materials also should not be taxed only at 2 per cent as the sale of packing materials was only incidental to the sale of copra. Following the Supreme Court decisions, this court found that there was no implied sale of the packing materials and held that as there was no implied sale of the packing materials the turnover of Rs. 26,460.19 was assessable to tax only at 2 per cent. This court said in that case t

The mere fact that in making out the invoice the expenses incurred in the use of gunny bags for transport of copra are separately shown by itself does not mean that there was any contract of sale, express or implied, in respect of gunny bags and other packing materials and the buyer intended to buy the same except as a vehicle for transport of the copra purchased. Further the value of the packing materials is so insignificant to the value of the contents that in view of the decision in Razack & Co. v. State of Madras [1987] 19 S.T.C. 135 (S.C.), it is not

possible to imply any separate contract of sale regarding the packing materials.

8. The same view was taken by another Division Bench of this Court in *Mulji Ratanshi & Company v. State of Kerala* [1972] 30 S.T.C. 596.

9. A Division Bench of this Court recently considered this matter in *A. Srinivasa Pai v. State of Kerala* [1975] 36 S.T.C. 482 (T. R. C. Nos. 35, 36 and 37 of 1973). There the question was whether on the value of gunny bags, tea-chests and F.A.C.T. manure bags used as containers of foodgrains sales tax could be levied. This court held that while the estimated turnover of gunny bags and tea-chests could be taxed, that of F.A.C.T. manure bags could not be taxed. In that decision, this court after citing the decisions in *Government of Andhra Pradesh v. Guntur Tobaccos Ltd.* [1965] 16 S.T.C. 240 (S.C.), *Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh* [1966] 17 S.T.C. 624 (S.C.), *Commissioner of Taxes Assam, Shillong Vs. Prabhat Marketing Co. Ltd., Gauhati*, and *M. A. Razack and Company v. State of Madras* [1987] 19 S.T.C. 135 (S.C.), said :

In the light of the above principles it is impossible to hold that tea-chests and gunny bags are things of no value or the value they fetch is too insignificant to be taken into consideration. They are independent commercial commodities having substantial resale value and they do not lose their physical or commercial identity when foodgrains are packed in them It must, therefore, be inferred that in fixing the value of the contents the value of the containers has also been taken into consideration, and when that is the position, the contention that the rate at which the contents are sold is the same with or without the container is of no significance. It is not possible to infer that the bag or the tea-chest was conveyed free along with its contents.

Sales cannot be implied if the containers are valueless. Similarly, for the containers or packing materials to constitute goods which can be the subject-matter of taxable sales they should be independent commercial commodities, in the sense that they should not form an integral part of the manufacture of the goods contained in them. Even in the case of valuable containers or packing materials which are independent commercial commodities and which do not lose their physical identity when articles are packed in them, sale of them cannot be implied if their value, whether it is substantial or not, is insignificant compared to the value of the articles contained in them. That is the purport of the decisions of the Supreme Court in *Hyderabad Deccan Cigarette Factory v. State of Andhra Pradesh* [1966] 17 S.T.C. 624 (S.C.) and *M. A. Razack and Company v. State of Madras* [1987] 19 S.T.C. 135 (S.C.) and I take the decision in *A. Srinivasa Pai v. State of Kerala* [1975] 36 S.T.C. 482 (T. R. C. Nos. 35, 36 and 37 of 1973), only in that light, because although it is stated there that in the case of independent commercial commodities which have substantial resale value sale can be implied, it is also stated there after citing the Supreme Court decisions that the value of the gunny bags and tea-chests were not "too insignificant", the comparison evidently being with the value of the articles for packing which they were used.

10. In the present case, there was no express agreement for sale of the gunny bags. Their value as estimated even in the order of assessment is less than 1/80 of the value of the articles contained in them. Therefore they had only an insignificant value compared to the value of the articles contained in them. The agreement between the Government and the petitioner was that the petitioner should sell the articles to the retail dealers at the rates to be specified by the Government. There is no case for the department that the articles were sold by the petitioner to the retail dealers at a price higher than that. The petitioner got the articles in gunny bags and supplied them to the retail dealers also in the same condition, that is, in gunny bags. The gunny bags were used only as a convenient and cheap vehicle for transporting the articles to the retail dealers. Whether the articles were supplied to the retail dealers in gunny bags or loose, the sale price was the same. Nothing extra was charged for the gunny bags at the time of the sale of the articles contained in them. In such circumstances, an agreement of sale of the gunny bags cannot be implied.

11. The Tribunal has in its order stated that there was a subsequent Government order by which the Food Corporation of India was authorised to collect tax on packing materials also and that that indicated that tax could be collected on them previously also. There is no warrant for that assumption.

12. In the result, the order of assessment passed by the sales tax authorities in respect of the gunny bags valued at Rs. 2,59,079 is set aside and this revision petition is allowed with costs.

G. Viswanatha Iyer, J.—I agree. Since the question arising for determination is fairly important I would like to state a few words of my own.

2. The questions raised for decision are the following :

(i) Whether the Tribunal was right in holding that there was an implied contract of sale of the containers in the wholesale distribution of foodgrains by the petitioner ?

(ii) Whether the decision of the Tribunal that there was a sale of containers by the petitioner, is supported by any evidence or material ? Is not the sale by the petitioner merely of the rationed articles ?

(iii) Whether the Tribunal was right in holding that the petitioner is a "dealer" as defined in the Kerala General Sales Tax Act, 1963 ?

(iv) Whether the Tribunal was not in error in holding that the petitioner is not an agent of Government in the matter of wholesale distribution of the rationed articles ?

Of these, questions (iii) and (iv) are not pressed for decision in view of the decision of this court in Deputy Commissioner v. Sreedhara Shenoy [1973] 32 S.T.C. 181. The other questions can be dealt with together. The assessee is a registered dealer under the General Sales Tax Act. It is also an authorised

wholesale dealer of foodgrains and has entered into an agreement with the Government to abide by the terms and conditions mentioned in regard to the sale of foodgrains. It purchased fairly large quantities of foodgrains and the turnover under that head for the assessment year 1965-66 was Rs. 1,28,55,226.81. Foodgrains are taxable only at the first sale point within the State. Food Corporation of India who stocks and sells the foodgrains to the petitioner is the first dealer of these articles in the State and so the subsequent sale by the petitioner to the retail dealers is not taxable. The petitioner claimed for the entire turnover of the foodgrains. But, the Sales Tax Officer assessed to tax a sum of Rs. 2,59,079 from out of it being the estimated value of the gunny bags containing the foodgrains sold. The petitioner's contention that these gunny bags are only containers of the foodgrains and they did not form part of the bargain at all was not accepted by the Sales Tax Officer and the appellate authorities and their correctness is questioned in this revision petition.

3. Earlier the view of this court in *Srinivasa Pai v. Sales Tax Appellate Tribunal* [1961] 12 S.T.C. 80 , and in some of the other High Courts was that if the title over the containers is transferred by a registered dealer the value of the containers is taxable even though the registered dealer is not carrying on the business of purchasing and selling such containers. In other words, the view was if a registered dealer transfers the title of the containers in the course of the sale of their contents sales tax can be levied on the turnover of the containers. This can no longer be said to be the correct way of looking at the question in view of the Supreme Court decisions in *Government of Andhra Pradesh Vs. Guntur Tobaccos Ltd.*, , *Hyderabad Deccan Cigarette Factory v. State of A.P.* [1966] 17 S.T.C. 624 (S.C.) , *Commissioner of Taxes Assam, Shillong Vs. Prabhat Marketing Co. Ltd., Gauhati*, and *Razack & Co. v. State of Madras* [1967] 19 S.T.C. 135 (S.C.). It is now settled that these containers can be taxed only if it can be established by the department that there was an agreement of sale either express or implied in respect of them. There is no case for the department that there was an express sale. Whether there is an implied agreement for sale is a question of fact which will depend upon the facts and circumstances of each case. The conclusion is a matter for inference on various circumstances of the case. No one circumstance can be said to be decisive. The Supreme Court in the second of the cases referred to above, namely, *Hyderabad Deccan Cigarette Factory v. State of A.P.* [1966] 17 S.T.C. 624 (S.C.) was concerned with a case of a packing material of insignificant value. Their Lordships held that this would not have been taken into account when the contents were sold and so it was held that it is not possible to infer an implied agreement of sale. Their Lordships also stated that if the value of the containers is high it may be possible to readily infer an agreement to sell. So from the value of the containers compared to the contents an inference was drawn one way or other regarding an agreement of sale. *Commissioner of Taxes Assam, Shillong Vs. Prabhat Marketing Co. Ltd., Gauhati*, was a case where it was held that the value of the containers even if mentioned in the invoice is not a conclusive test to hold that there was an

agreement of sale. So, it is clear that an agreement of sale cannot be implied from one circumstance alone irrespective of its relationship or impact on the other circumstances connected with the transaction.

4. In this connection it is necessary to notice two decisions of this court. In *West Coast Weaving Establishments v. State of Kerala* [1964] 15 S.T.C. 898, bundles of handloom cloth were wrapped or packed before sale. The question arose whether there was any implied sale of such packing materials. It was observed thus :

We think it absurd to call as "containers" the materials in which bundles of cloth are packed in the usual course of trade. It is a well-known courtesy observed by the traders that goods purchased are wrapped or packed before they are delivered to the customers and they charge nothing extra for such wrapping or packing-the case of containers made of metal, glass, etc., being quite different.

Again, *Srinivasa Pai v. Sales Tax Appellate Tribunal, Trivandrum* [1961] 12 S.T.C. 80, was a case where the foodgrains sold were packed in gunny bags. It was observed that the gunny bags do not lose their physical or commercial identity or form a part of the foodgrains themselves and when bags of rice are sold for a price which includes the price of the gunny bags the turnover in respect of the gunny bags would be liable under the Sales Tax Act. This latter decision, as said earlier, was before the decision of the Supreme Court in *Hyderabad Deccan Cigarette Factory v. State of A.P.* [1966] 17 S.T.C. 624 (S.C.). The question whether compared to the value of the contents the price of the gunny bags will be insignificant was never considered. It proceeds on the basis that the price for which the foodgrains are sold is inclusive of the price of the gunny bags and so their turnover is taxable. The fact that the packing materials, namely, the gunny bags, retain their physical or commercial identity after the contents are removed will not be decisive of the question. The question to be considered is whether from this fact alone an agreement to sell the containers can be inferred. This aspect is not seen pressed for consideration or decided. In *A. Srinivasa Pai v. State of Kerala* [1975] 36 S.T.C. 482 (T.R.C. Nos. 35, 36 and 37 of 1973), gunny bags and tea-chests used as containers of foodgrains, sugar and provisions were held chargeable to sales tax. From the fact that the gunny bags have got a resale value or that they retained the physical and commercial identity even after the contents are removed an inference was drawn that there was a sale of these containers. Whether the assessee in that case was a wholesale dealer and whether the value of the containers was insignificant when compared to the value of the contents was never pressed for consideration. In the light of the Supreme Court decisions referred to above, what is necessary to be considered is whether from all the facts of the particular case an inference that there was an agreement of sale of the containers can be drawn.

5. In the light of the principles referred to above, the nature of the transactions in this case requires examination. The petitioner is an authorised wholesale distributor. The agreement executed by it required it to purchase the foodgrains

from the Food Corporation of India and to sell them to the retail dealers. The rate is fixed by the Government for a quintal of foodgrains. There is no evidence to show that in fixing this price the price of the containers was taken into account. The sale by the Food Corporation of India was exempted from taxation. Until 27th March, 1966, the transactions with the Food Corporation of India do not show that the price of these containers was included in the price of the foodgrains nor was a price fixed for the containers separately in the invoices. The transactions proceed on the basis that the value of the containers was insignificant compared to their contents. When that is the nature of the transaction which the petitioner had with the Food Corporation of India, the next aspect to be considered is whether there is anything to warrant an inference that the petitioner agreed to sell the containers. Sale of goods means a transfer of title for a money consideration. The money consideration for the sales effected by the petitioner to the retailers is fixed by the civil supplies authorities from time to time. That price structure shows that the wholesaler must sell the goods at the price at which it purchased from the Food Corporation of India, taking only a fixed margin of profit. In other words, there is no discretion for the petitioner to fix the price or to charge anything for the containers. Further, as per the estimate prepared by the Sales Tax Officer these gunny bags are estimated to value one rupee per bag. Even going by that estimate, the value of the containers will be only a little above one per cent and so is very insignificant when compared to the value of the food-grains. That being so, it is not possible to infer that there was an implied agreement to sell the containers. The containers are seen to have been intended only to be used by the sellers as a convenient and cheap vehicle of transport, and a cheap method of preserving the foodgrains from getting spoiled or lost In the course of trade.

6. It is seen from the order of the Appellate Tribunal that it has taken into account the directions issued from the Government to the Food Corporation of India to fix a price for the gunny bags and to collect sales tax for their turnover from 27th March, 1966. The fact that subsequent to that the same price is retained for a quintal of wheat and rice and the price structure shows that the value of the containers is included within it is no evidence to show that previously the value of the containers was ever in the mind of the Food Corporation. The fact that a low percentage of profit alone is allowed to the petitioner is not at all relevant to draw an inference that the petitioner would not have intended to supply these containers free. It was more an intermediary who got a specified profit in the distribution and no inference can be drawn from the meagre profits that it obtained in the transactions that the gunny bags were the subject of an agreement of sale. The reasons given by the Appellate Tribunal are against the principle laid down by the Supreme Court in the above case. The insignificant value of the containers compared to the value of the contents and the absence of any freedom to it to fix the price at which it can sell and the further fact that the petitioner disposed of the goods in the same condition in which it received them from the Food Corporation lead to the inference that there

was no intention to sell the containers separately. They are seen used only as a cheap means of transport and preservation. Therefore, the conclusion of the sales tax authorities that the gunny bags used as containers of food-grains is chargeable to sales tax in this case is unsustainable. In this view, I agree with the order passed by my learned brother.