

(1989) 01 OHC CK 0023

In the Orissa High Court

Case No : Criminal Jurisdiction Case No. 133 of 1981

Orient Paper and Industries Ltd.

APPELLANT

Vs

Orissa State Electricity Board

RESPONDENT

Date of Decision : 23-01-1989

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2, 3
Constitution of India, 1950 — Article 226, 366(12)
Electricity (Supply) Act, 1948 — Section 49, 49A, 59
Electricity Act, 1910 — Section 39
Finance Act, 1978 — Section 36
Penal Code, 1860 (IPC) — Section 378

Citation : (1989) 67 CLT 693 : (1989) 67 CLT 601 : (1989) 42 ELT 552

Hon'ble Judges : H.L. Agarwal, C.J.; S.C. Mohapatra, J

Bench : Division Bench

Advocate : B.K. Mohanti, Ch. P.K. Misra, R.L. Bose, S.P. Choudhary, J.P. Patnaik and K.K. Jena, for the Appellant; G. Rath and A.B. Misra, Standing Counsel (Central), for the Respondent

Judgement

S.C. Mohapatra, J.—In this application under Article 226 of the Constitution of India, levy of duty on Electricity under Central Excises & Salt Act, 1944 (hereinafter referred to as "the Act") as amended by Section 36 of Finance Act 1978 is assailed by the petitioner, a Company registered under the Indian Companies Act, 1913.

2. Petitioner carries on the business of manufacture of paper and paper board, for which it has a factory at Brajarajnagar. It has also a plant to manufacture Caustic Soda which is required to be used for the production of paper. Electricity is necessary for the purpose of running the factories. For that purpose, petitioner has a power plant to generate electricity. It also gets supply of electricity from the Orissa State Electricity Board (hereinafter referred to as "the Board") on payment of charges.

3. After the Act was amended in 1978, providing for levy of duty on electricity by

including item 11E to the first schedule, the Board demanded additional amount from the petitioner, which it was to pay under the Act. Petitioner approached this court and obtained an interim stay which fact was intimated to the Board. Thereafter, in the year 1980, the Board amended the tariff taking into account all factors that contributed to the increase in the cost of generation of electricity including the levy under the Act. To avoid the demand at such higher rate under the tariff, the present writ application has been filed

4. There can be no dispute that under Sections 49, 49A and 59 of the Electricity Supply Act, 1948 the Board is competent to revise the tariff from time to time. Section 59 of the Electricity Supply Act, 1948 gives the guideline for fixation of tariff which provides that Board shall adjust its tariff so as to ensure that after meeting all maintenance and management expenses, taxes and interest payable, the surplus as the state government may specify is to be included. Levy under the Act is a tax, which the Board is liable to pay. In case, this levy is valid in law, petitioner cannot question the revised tariff. Accordingly, Mr. B.K. Mohanti, learned Counsel for the petitioner made his submissions to impress us that levy under the Act on Electricity is beyond the Legislative power as provided in entry 84, List I of the Seventh Schedule to the Constitution.

5. Entry 84 reads as follows:

"84. Duties of Excise on tobacco and other goods manufactured or produced in India except -

(a) alcoholic liquors for human consumption,

(b) opium, Indian hemp and other narcotic drugs and narcotics but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

This entry makes it clear that Legislation can be made for imposition of duties of excise on goods manufactured or produced in India. Under the authority of this entry the Act was enacted. Section 3 of the Act authorises levy of duty of excise on all excisable goods. The term "excisable goods" has been defined in Section 2(d) of the Act to mean "goods specified in the first" schedule as being subject to duty of excise. Electricity has been specified in the first schedule after amendment and accordingly, is excisable goods. On a plain reading of the various provisions there can be no doubt that Electricity is an excisable goods liable to be taxed under the Act.

5. Mr. Mohanti submitted that Electricity is not goods and accordingly by Section 36 of the Act 19 of 1978 inclusion of item HE to the first schedule to the providing for levy of duty on electricity at two paise per kilowatt-hour is beyond the Legislative power. In support of the same Mr. Mohanti relied upon the definition of "goods" in Article 366(12) of the Constitution and upon the decision reported in *Avtar Singh v. State of Punjab*, 1965 S.C.D. 328 and the *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.*, (1958) IX S.T.C. 353 and

submitted that electricity is not movable property and accordingly not goods.

6. In the State Of Madras v, Gannon Dunkerley & Co. (Madras) Ltd. (supra) Supreme Court was considering the scope of levy of sales-tax on goods which are involved in works contract and are embodied to be immovable property. It was held that in cases whereby the very nature of the work the goods lose their character of movable property to be embodied to the work itself, it becomes a part of the immovable property. This decision has thus, no application to the present case.

7. In Avtar Singh v. State of Punjab (supra) the question for consideration was whether extraction of electricity from the supply line would come within the mischief of theft u/s 378 of the Indian Penal Code. Referring to Section 39 of the Indian Electricity Act, it was observed :-

"With regard to the first reason that Section 39 of the Act extended the operation of Section 378 of the Code, it seems to us beyond question that Section 39 did not extend Section 378 in the sense of amending it or in any way altering the language used in it. Section 378, read by itself even after the enactment of Section 39 would not include a theft of electricity for electricity is not considered to be movable property...."

It is true that for the purpose of an offence, Supreme Court expressed that electricity is not considered to be movable property. In this case, however, there was no controversy in that regard to be resolved. Controversy was raised before the Supreme Court in a decision reported in Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur, . While considering whether sales-tax can be levied under the Madhya Pradesh General Sales tax-Act, on electricity, the Supreme Court upheld such levy by observing as follows :-

"...what has essentially to be seen is whether electric energy is "goods" within the meaning of the relevant provisions of the two Acts. The definition in terms is very wide according to which "goods" means all kind of movable property. Then certain items are specifically excluded or included and electric energy or electricity is not one of them. The term "movable property" when considered with reference to "goods" as defined for the purposes of sales-tax cannot be taken in a narrow sense and merely because electric energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be movable property when it has all the attributes of such property. It is needless to repeat that it is capable of abstraction, consumption, and use which, if done dishonestly, should attract punishment u/s 39 of the Indian Electricity Act, 1910. It can be transmitted transferred, delivered, stored, possessed etc. in the same way as any other movable property...."

The aforesaid passage would have a strong bearing to the present case in view of the fact that power to Legislate for levy of tax on sale or purchase or goods is provided in entry 54 in List II of the Seventh Schedule to the Constitution and

power to Legislate for levy of tax on manufacture and production of goods is authorised under entry 84 in List 1 of the seventh schedule and "goods" has been defined in the Constitution where in both the Entries Levy of tax on goods is dealt with "goods" having an inclusive definition in the Constitution is to be given a wide meaning. Electricity has a value, which has utility and the same is transferable also. Therefore, taking broad meaning, there is no escape from the conclusion that electricity is goods coming within the meaning of the word as defined in Article 366(12) of the Constitution. It has been laid down in the decision reported in *The Jiyajeerao Cotton Mills Ltd. Vs. State of Madhya Pradesh*, that Legislative entries in the Constitution are to be interpreted in a broad way so as to give the widest power to the Legislature and not in a narrow and pedantic sense. Entry 84 in List I of the seventh schedule therefore, is to be given a wide interpretation, specially when power of taxation of the Union is wide unlike the restricted power of the state to tax specific subjects as provided in List II. When the Parliament in its wisdom added electricity in the first schedule of the Act for levy of duty, the wisdom of the Parliament is to be respected.

8. Mr. Mohanti submitted that the wisdom of the Parliament is to be interpreted from the various Legislations in the field with regard to manufacture and production since Parliament is well aware of the meaning of the phrase "manufacture and production". In the State Financial Corporation Act 1951, while defining "industrial concern" in Section 2(c) Parliament used the word "manufacture" in respect of goods and "generation" in respect of electricity. Same is the phrase in the Central Sales Tax (Registration and Turnover) Rules, 1957 made under the Central Sales-tax Act 1956. Forms "A" and "B" used the word "manufacture" or "production" in case of goods and used the term "generation" in relation to electricity. From this Mr. Mohanti submitted that the wisdom of the Parliament if respected would not include generation of electricity to be manufactured or produced and accordingly, item HE included in the first schedule of the Act is also inconsistent with the Legislative wisdom. I am not inclined to appreciate the contention of Mr. Mohanti. Rather Parliament being aware that in the Rules made under the Central Sales-tax Act or in the definition of "industrial concern" in the State Financial Corporation Act "manufacture" or "production" has been used in respect of goods it has included electricity as goods for levy of tax.

9. In conclusion,

(i) electricity is goods as has been held in *The Commissioner of Sales-tax's case* (supra),

(ii) generation of electricity for the purpose of the Act is manufacture or production of electricity, since the term "manufacture" or "production" is to be given a wide meaning,

(iii) inclusion of tax leviable under the Act on the Board has rightly been included in the tariff as amended in the year 1980.

10. Before concluding, I cannot but take note that the return filed on behalf of opposite parties 2 to 4 was ignored on account of non-service of copy of the same on opposite party No. 1. Opp. Parties 2 to 4 are the officers of the Union Government. In spite of the Order dated 11-5-1983, no step was taken for compliance of the order and for acceptance of the return even till the date of hearing. Serious view ought to be taken by the Union Government in this regard in future.

11. In the result, the writ application has no merit which is accordingly dismissed. There shall, however, be no order as to costs.

H.L. Agrawal, CJ

12. I agree.

13. Writ application dismissed.