

(1997) 01 AP CK 0044

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 18273 and 18758 of 1995

Raasi Cement Ltd. and Another

APPELLANT

Vs

Commercial Tax Officer, Miryalaguda, Nalgonda District,
Andhra Pradesh and Another

RESPONDENT

Date of Decision : 24-01-1997

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 6
Constitution of India, 1950 — Article 14, 19(1), 301

Citation : (1997) 106 STC 169

Hon'ble Judges : S.S. Mohammed Quadri, J;B. Sudershan Reddy, J

Bench : Division Bench

Judgement

Syed Shah Mohammed Quadri, J.—In these writ petitions constitutional validity of section 6-C of the Andhra Pradesh General Sales Tax Act, 1957 (for short, "the Act") as amended by Act 22 of 1995 has been questioned (hereinafter referred to as "the impugned provision"), as being violative of articles 14, 19(1)(g) and 301 of the Constitution of India and alternatively a declaration is sought that the impugned provision has no application in respect of transactions of sale or purchase of containers which are specifically dealt with under items 157 and 188 of the First Schedule to the Act (or short, "the First Schedule") whether such containers are sold separately or along with their contents.

The writ petitions are heard together and are being disposed of by a common judgment.

2. To appreciate the contentions of the learned counsel for the parties, we shall refer to the facts mentioned in the affidavit accompanying Writ Petition No. 18273 of 1995. The first petitioner is a company registered under the Companies Act and the second petitioner is its shareholder. The first petitioner-company was incorporated for manufacture and sale of cement which, at that time, was fully controlled by the Cement Control Order, 1967. Under the said order the price of the cement and the gunny bags/HDPE woven sacks (for short, "containers") was

separately fixed and accordingly tax was being levied separately under items 18, 157 and 188 of the First Schedule. After the sale of the cement was decontrolled, the authorities continued to levy sales tax in the same manner. The goods enumerated in the First Schedule including cement and the containers were subjected to single point tax. By Act 11 of 1984, section 6-C was inserted in the Act with effect from July 8, 1983. The constitutional validity of section 6-C was questioned in this Court in a batch of writ petitions (known as Raj Sheel case); in *Raj Sheel Vs. The State of Andhra Pradesh*, the validity of section 6-C was upheld and observing that the said provision was only clarificatory in nature, the writ petitions were dismissed. The petitioners therein filed appeals before the Supreme Court of India. The judgment of the High Court in so far as it relates to the constitutional validity of section 6-C as also with regard to the same being declaratory in nature was upheld by the Supreme Court and it was observed that the question, whether there was actual sale of containers being a question of fact, ought to have been determined on the facts of each case and as that was not done by the authorities under the Act as well as the High Court, the cases were remanded for fresh disposal in accordance with the observations made therein by setting aside the judgment of the High Court on that aspect [see *Raj Steel and Others Vs. State of A.P. and Another*,]. While so, the State Legislature amended section 6-C by Act 22 of 1995 with effect from April 1, 1995, which is now assailed in these writ petitions praying alternatively to grant the declaration, noted above.

3. In the counter-affidavit, filed on behalf of the first respondent, it is submitted that section 6-C before amendment created a statutory presumption of sale of containers and that by the amended provision the deeming provision is deleted and it is enacted that the rate of tax on the containers sold with the goods shall be the same as that of goods packed or filled irrespective of whether there is separate sale or agreement for sale for the containers and the goods packed or filled, entered into between the parties. u/s 5 of the Act specific goods falling under various items of the First Schedule attract single point tax at the rate mentioned thereunder; when the containers, gunnies and HDPE woven sacks are sold as such they are taxed under entries 157 and 188 respectively but when some goods are packed in those containers they will be taxable under the impugned provision. The rationale behind charging the containers at the rate of the contents when sold therewith is that the container is sold as a convenient mode of delivery of the contents and the purchasing parties comprehend goods as integrated cement bags and not cement and bags separately. It is only when the impugned provision is attracted, the containers will be taxed at the rate of the contents but when the containers are sold as such the rates of tax provided in entries 143, 157 and 188 of the First Schedule will be applicable. It is added that the tax paid on containers under the impugned provision attracts the provision of set-off contained in G.O.Ms. No. 374, Revenue, dated April 25, 1987 and from out of the tax payable at the rate of the contents the tax already levied and paid on the containers, will be deducted. It is stated that the rate of tax on

the gunny bags under item 157 is 9 per cent whereas the rate of HDPE/PP woven sacks is at the rate of 4 per cent and that tax paid at the above rate on the containers is allowed to be deducted from the tax payable on them at the rate of the contents. It is stated that the impugned provision is not violative of any of the provisions of the Constitution. The classification of containers into two categories, sold as such and sold with contents, is reasonable classification having nexus to the object of levying tax. When the contents are packed in the gunnies or HDPE woven sacks they got merged with the contents even though they are shown as having been sold separately and in such a case the impugned provision will be attracted and the containers are taxed at the rate of the contents.

4. Mr. A. K. Ganguli, the learned Senior Counsel appearing for the petitioners, has contended that if the interpretation of the impugned provision by the Revenue is accepted, the impugned provision would become unconstitutional because the containers which are taxable at a different rate will be liable to be taxed at a higher rate, that is, at the rate of the contents and further the same containers will be liable to be taxed at different rates depending upon the nature of contents. Notwithstanding the change in the wording of the unamended section 6-C and the amended provision, submitted the learned counsel, the same position would obtain in law. He argued that by enacting the impugned provision the State Legislature had camouflaged the judicial power and for this reason alone the impugned provision was liable to be struck down.

5. The learned Special Government Pleader for Taxes supported the interpretation of the impugned provision by the Revenue contending that unmistakably that provision indicates that the container will have to be taxed at the rate of contents, so the containers cannot be taxed at the rate different from the rates applicable to the contents. He maintained that the classification of the containers into two categories sold as such and sold along with the contents, is a reasonable classification and the impugned provision is not violative of article 14 of the Constitution. He has submitted that by enacting the impugned provision the State Legislature has in no way camouflaged the judicial power and that that contention is wholly misconceived.

On the above contentions, the short question that arises for consideration is, what is the true import of the impugned section 6-C ? And is it violative of article 14 of the Constitution of India ?

6. The question of levying sales tax on the containers at the rate applicable to the contents has given rise to perennial litigation. The turnover of sale of cement is taxable under item 18 of the First Schedule at the rate of 10 paise in a rupee with effect from July 8, 1983 (but now it is taxable at the rate of 16 paise in a rupee with effect from April 1, 1995); item 19 provides that the containers other than gunnies, bottle and plastic containers are taxable at the rate of 5 paise in the rupee with effect from July 8, 1983 (with effect from April 1, 1995 those goods are taxable at the rate of 9 paise in the rupee); under item 157 of the

First Schedule gunnies are taxable at the rate of 5 paise in the rupee with effect from July 1, 1985 (with effect from April 1, 1995 those goods are taxable at the rate of 9 paise in the rupee); under item 188 of the First Schedule high density polythene polypropylene (HDPE/PP) woven sacks were taxable at the rate of 1 paise in the rupee with effect from June 15, 1987 (with effect from April 1, 1995 those goods are taxable at the rate of 4 paise in the rupee). Before insertion of section 6-C by Act 11 of 1984 with effect from July 8, 1983, cement was being taxed under item 18 and gunnies were taxed under item 157 at the then respective prevalent rate. Entry 188 was added with effect from June 15, 1987 and HDPE/PP woven sacks were being taxed at the rate applicable to them. After the insertion of section 6-C, gunny bags, HDPE/PP woven sacks, in which cement was packed, were sought to be taxed under item 18 at the rate applicable to cement. The constitutional validity of section 6-C was questioned in a batch of writ petitions in this Court. In *Raj Sheel's case* [1987] 64 STC 398 the Division Bench of this Court which considered the question of taxability of containers, gunnies and bottles u/s 6-C, held that having regard to the nature of the goods, cement bags and beer bottles, and the trade practice the containers were necessary concomitants in the transaction and that the transfer of property in the containers was incidental or unavoidable and that the sale transaction had to be regarded as composite and integrated sale of containers and their contents and that what was really sold was the bottled beer or the cement packed in gunny bags and that the consideration paid by the purchaser to the dealer consisted not only of the price of the contents, viz., beer or cement but also the price of the container, that is, bottles and the cartons in the case of beer and gunnies in the case of cement. In the appeal filed against the said judgment of the High Court, the Supreme Court, in *Raj Sheel's case* [1989] 74 STC 379 observed (i) that the transaction of sale might consist of sale of the product and a separate sale of the container housing the product with respective sale consideration for the product and the container separately; or (ii) it may consist sale of the product and the sale of the container, both the sales being conceived of an integrated components of a single transaction; or (iii) it might consist of the sale of the product and the transfer of the container without any sale consideration thereof; and that the question in every case as to what was the nature and ingredients of the sale would be a question of fact and that in every case the assessing authority had to ascertain the true nature and character of the transaction upon the facts and circumstances pertinent to the transaction. It was also pointed out that the burden would lie upon the Commercial Tax Officer to prove that turnover was liable to tax : he had to decide the crucial question whether the containers were subject to separate sale or agreement for sale, express or implied. It laid down certain guidelines to determine the question whether a transaction of sale of the containers was an independent transaction and whether the containers and the contents were sold independently. It was explained that section 6-C (as inserted by Act 11 of 1984) envisaged a case where it was the goods which were sold and there was no actual sale of the containers but it would be deemed that there was such a sale and that in that

event the tax would be leviable on such deemed sale of the containers at the rate of tax applicable to the sale of the goods (contents) themselves. Observing that that section could at best be regarded as a provision by way of clarification of an existing legal situation, it was explained that where the transaction was one of sale of goods only, all that could be taxed was also of the goods and the rate to be applied must be the rate as in the case of the goods and that the price of the goods was determined upon consideration of every component including the value of the packing material (containers) but nonetheless price was the price of the goods; unamended section 6-C laid down that upon analysis of the components of the sale price of the goods the rate of tax which would apply to the container component would be the rate applicable to the goods themselves and that was for the simple reason that it was the price of the goods alone which constituted the transaction between the dealer and the purchaser as irrespective of the component of the sale price which the purchaser was paying the parties understood that the price paid was that of the goods. Rejecting the contention of the appellant-dealer that the rate applicable to the packing material in the Schedule should be applied to the sale of such packing material in a case falling under unamended section 6-C when in fact there was no sale of packing material as such but was so treated only by legal fiction and for a limited purpose, it was held :

".....Section 6-C merely clarifies and explains that the components which have entered into determining the price of the goods cannot be treated separately from the goods themselves, and that no account was in fact taken of the packing material when the transaction took place, and that if such account must be taken then the same rate must be applied to the packing material as is applicable to the goods themselves."

In that view of the matter it further held that the question of unconstitutionality of section 6-C on the ground of the same being discriminatory would not arise.

It would be appropriate to notice here the provisions of section 6-C as it stood before amendment and as it stands after amendment, that is, the impugned provision.

provision	Amended	Unamended provision
-----	-----	-----
		"6-C. Levy of tax on packing material. - Notwithstanding anything in sections 5 and 6-A, anything contained in section 5F, section 6 and materials are sold or purchased, section 6A, the rate of tax the material in which the goods on packing material sold with are so packed shall be deemed the goods shall be the same to have been sold or purchased as that of the goods packed along with the goods and the or filled, whether or not tax shall be leviable on such there is separate sale or sale or purchase of the materials agreement for sale for at the rate of tax, if any, as the packing material and applicable to the sale, or, as the goods packed

or filled." the case may be, purchase of goods themselves."

7. A plain reading of the impugned provision suggests that it deals with the rate of tax on container (packing material) sold with contents (goods packed). If there is no sale of the container along with contents, the impugned provision will not be attracted. When the container is sold along with the contents, the rate of tax on the container will be the same as that on the contents even if the terms and conditions of that sale or agreement for sale, are separate from the terms and conditions of sale of the contents; in other words, where the container housing the contents is sold separately from the contents or is governed by a separate agreement for sale, independent of the sale of the contents, such sale or agreement will be disregarded and the rate of tax on such container will be the same as the rate of tax applicable to the contents. To discern the true import of the impugned provision it will be useful to advert to the aforementioned three modes of the sale of the contents and the containers referred to by the Supreme Court in *Raj Sheel's case* [1989] 74 STC 379. They are transactions of sale consisting of : (i) a sale of the product and a separate sale of the container housing the property with respective sale consideration for the product and the container separately; (ii) a sale of the product and the sale of the container both being conceived of an integrated single sale transaction; and (iii) a sale of the product with the transfer of the container without any sale consideration thereof. The impugned provision, it is assumed will be attracted in the first two modes of sale but not to the third one as in that case there is no sale of the container and the impugned provision applies when the container is sold along with the contents. We have already noticed the scope of the unamended section 6-C of the Act. The unamended provision was held not to apply to the first of the abovementioned modes of sale of the contents and the containers. In that mode, the sale of the contents and the sale of the container were treated as separate sales and the terms of the sale or agreement for sale, express or implied, were directed to be ascertained to determine the rate of tax applicable to them. But now such a sale is sought to be brought within the clutches of the impugned provision so as to preclude the plea that the container is sold separately or is governed by terms of a separate agreement for sale independent of the sale of the contents. The sale of the container along with the sale of the contents is enough to attract the impugned provision. In the aforementioned second mode of integrated sale which was earlier held to be a single transaction, the price of the container was treated as a component of the price of the contents and for that reason the rate of tax applicable to the contents covered both the contents as well as the container. It appears to us, under the impugned provision, the same result is attempted to be achieved. Regarding the third mode of sale, where there is no sale of the container having regard to its negligible price or otherwise; though there is transfer of property in the container in favour of the purchaser of the contents, the impugned provision will not apply for the simple reason that it is attracted only when there is a sale of the container. However, the

impugned provision leaves it open to a person to contend that there is no sale of the container and whether or not there is sale of the container will be a question of fact which has to be decided by the assessing authority if such a plea is taken. It may be noted here that the Supreme Court in *Raj Sheel's case* [1989] 74 STC 379 has held that the burden of showing that there is a taxable sale is on the assessing authority. If there is no sale of the container, it is obvious that the container cannot be taxed either independently under the relevant item of the First Schedule applicable to the container or at the rate applicable to the contents under the impugned provision.

8. In *Vasavadatta Cements Vs. State of Karnataka and another*, the appellants were manufacturers and suppliers of cement in gunny bags/plastic bags. They were required to pay sales tax u/s 5(3-D) of the Karnataka Sales Tax Act (the KST Act) on the containers at the rate applicable to the contents. They filed writ petition in the High Court of Karnataka challenging the validity of section 5(3-D) of that Act. Following the judgment in *Ranganatha Associates v. State of Karnataka* [1990] 78 STC 1 (Kar) to which we shall advert presently, the constitutional validity of the said section was upheld and the writ petition was dismissed. On appeal to the Supreme Court the appellants did not canvass the question of validity of section 5(3-D) but confined the argument to the interpretation of section 5(3-D). Observing that the said section of the KST Act is comparable to section 6-C (unamended) of the Act, it was pointed out that the observations of the Supreme Court in *Raj Sheel's case* [1989] 74 STC 379 were equally applicable to construction of section 5(3-D) and that the liability for sales tax on the gunny bags packed with cement, sold by the appellants, had to be considered having regard to the facts of each case after determining what were the ingredients of the contract and the intention of the parties.

9. The observations of the Supreme Court in *Raj Sheel's case* [1989] 74 STC 379 were made, in the context where goods (contents) were sold along with the container and there was a statutory deemed sale of the container (packing material) postulated by unamended section 6-C of the Act and in *Vasavadatta Cements Vs. State of Karnataka and another*, in the context of sale or purchase of goods contained in containers or packed in any packing material liable to tax. In the latter case section 5(3-D) of the KST Act provided, inter alia, that the rate of tax on the container will be the same as applicable to the contents whether the containers or the packing material had already been subjected to tax under that Act or not or whether the price of the containers or of the packing materials were charged separately or not. In *Raj Sheel's case* [1989] 74 STC 379 the Supreme Court clarified that the question as to what was the nature and ingredients of the sale would be a question of fact and that it was not right in law to pick out one ingredient only and deduce from it the character of the transaction; that it was not unknown that traders might for the advantage of their trade show what was essentially a single sale transaction of product and container or a transaction of sale of the product only with no consideration for the transfer of the container, as divisible into two separate transactions, one of

sale of the product and the other a sale of the container, with a distinct price shown against each and that problem requires factual investigation into the nature and ingredients of the transaction and that if the price of the product and the price of the container were shown separately it might be evidenced that two separate transactions were envisaged, but that circumstance alone could not be conclusive of the true character of the transaction. It is apt to notice that the impugned section provides that the rate of tax on packing material sold with the goods shall be the same as that of the packed or filled, whether or not there is separate sale or agreement for sale for the packing material and the goods packed or filled. Though neither the underlined words nor their substance was part of unamended section 6-C of the Act, the purport of the same is incorporated in section 5(3-D) of the KST Act, by enacting "whether the price of the container or of the packing material is charged for separately or not". This leads us to the enquiry as to whether the presence of those words will make any difference in interpreting the impugned provision. In *Raj Sheel's case* [1989] 74 STC 379 the Supreme Court laid stress on the fact that the authorities under the Act should have considered the simple question of fact as to whether there was an agreement, express or implied, to sell the packing material and what was the intention of the parties and that question cannot be decided on fictions or surmises. For that purpose it was indicated that the Commercial Tax Officer could ask the assessee to produce the relevant material and in default of his so doing the authority might draw an adverse inference against him; as the burden lay upon the Commercial Tax Officer to prove that the turnover was liable to tax he had to decide that question and in so doing he could rely upon the oral statements, accounts and other documents, take into consideration the nature and purpose of the packing material used and make personal enquiry. We are unable to accede to the contention of the learned Government Pleader that by incorporating the underlined words in the impugned provision the enquiry into the question of fact with regard to ingredients of sale and intention of the parties, directed by the Supreme Court in *Raj Sheel's case* [1989] 74 STC 379, in each case is dispensed with and that in view of those words now it is not necessary for the assessing authority to go into the question of ingredients of sale or agreement for sale of container where contents (goods) are packed and sold with the packing material (container) and the intention of the parties for the purpose of taxing the container under the impugned provision as in *Vasavadatta Cements*" case [1996] 101 STC 168 the Supreme Court held :

".....we are of the view that the High Court was in error in construing the provisions of section 5(3-D) to hold that the legislature has thought it fit and convenient to treat the sale of goods contained in a container as an integrated, single transaction of sale of the goods and that it makes it unnecessary to analyse the components of a particular sale and enter upon investigation to find out the real price at which the packing material is purported to have been sold, and separate it from the computation of the turnover regarding the particular goods which was packed in the packing materials or housed in the container....."

That point is *res integra* and we cannot but hold that irrespective of the incorporating the underlined words in the impugned provision treating the first mode of sale on the same footing as the second mode of sale, noted above, wherein the price of the container is treated as a component of the sale price of the contents in goods packed or filled, the assessing authority is not absolved of the obligation of determining what are the ingredients of the contract and the intention of the parties in accordance with the decision of the Supreme Court in *Raj Sheel's case* [1989] 74 STC 379 as also in *Vasavadatta Cements' case* [1996] 101 STC 168.

10. This, in our view, being the true import of the impugned provision, it now becomes unnecessary, having regard to the submission of Mr. Ganguli, to examine the other limb of the question as to whether the impugned provision is violative of article 14 of the Constitution of India. We shall, however, mention that it is now well-settled that the rule of equality enshrined in article 14 of the Constitution prohibits class legislation but permits classification provided the classification satisfies two conditions, viz., (i) it must be founded on intelligible differentia and (ii) the differentia must have a rational nexus with the object sought to be achieved by the statute in question (see *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, . Here the containers are classified into two categories : (i) containers sold as such and (ii) containers packed and sold along with the contents. This classification, in our view, is a reasonable classification and has rational nexus with the object sought to be achieved by the impugned provision. It has the advantage of making the levy and collection of the sales tax easy and minimises the scope for evasion of tax. Such a classification was upheld by the Division Bench of this Court in *Raj Sheel's case* [1987] 64 STC 398 which was approved by the Supreme Court in *Raj Sheel's case* [1989] 74 STC 379 and also by the Karnataka High Court in *Ranganatha Associates case* [1990] 78 STC 1 and also in *Vasavadatta Cements Vs. State of Karnataka and another*, , though an appeal was filed in the Supreme Court in *Vasavadatta Cements Vs. State of Karnataka and another*, , the question of constitutional validity was not questioned. We may also add here that in *Jamana Flour and Oil Mill (P) Ltd. Vs. State of Bihar*, also such a classification was upheld by the Supreme Court.

11. For the above reasons we hold that the impugned provision is not violative of article 14 of the Constitution of India and is constitutionally a valid piece of legislation. We may further hold following the judgment of the Supreme Court in *Vasavadatta Cements Vs. State of Karnataka and another*, , that notwithstanding the phraseology of the impugned provision the assessing authority has to determine in each case, the ingredients of the contract of sale or agreement for sale relating to the container and also the intention of the parties in accordance with the judgment of the Supreme Court in *Raj Sheel's case* [1989] 74 STC 379. In this view of the matter and with regard to the above interpretation of the impugned provision, we allow these writ petitions in part but in the circumstances of the case we make no order as to costs.

11. Writ petitions partly allowed.