(1976) 06 PAT CK 0005

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 712 of 1975

Radha Prasad Sah and Others APPELLANT

Vs

The State of Bihar and Another RESPONDENT

Date of Decision : 21-06-1976

Acts Referred:
Sales of Goods Act, 1930 — Section 4

Citation : (1977) 25 BLJR 1 : (1977) 10 PLJR 124 : (1977) 39 STC 77

Hon'ble Judges : K.B.N. Singh, Acting C.J.;S. Ali Ahmad, J

Bench : Division Bench

Advocate : G.N. Verma, J.N.P. Verma and Vijoyeshwar Prasad, for the Appellant; S.N. Jha, Standing Counsel No. 2 and Shardanand Jha, J.C., for the Respondent

Final Decision : Dismissed

Judgement

K.B.N. Singh, Ag. C.J.

1. In this writ application the petitioners have prayed for issuance of writs or directions to the respondents not to compel the petitioners to get registered as a "dealer" under the Bihar Sales Tax Act, 1959 and to pay tax under the said Act and also to quash the notice (annexure 1) asking them to produce their books of account and the order dated 6th March, 1974 (annexure 2), of the Commissioner of Commercial Taxes rejecting the prayer of the petitioners for exempting them from payment of additional sales tax and to recall the notice (annexure 1).

2. The 130 petitioners are running Government Fair Price Shops in the district of Bhagalpur. Their case is that they are retailers of Government Fair Price Shops. An agreement to that effect was entered into between the Governor of Bihar and each of the petitioners and, according to the terms and conditions of the agreement, the Government has to arrange for issue of rice, wheat, sugar, etc., at a price fixed, to the petitioners and they have to sell only such rice, wheat, sugar, etc., to the consumers of the area who hold ration cards at the price and the quantity fixed by the Government and strictly in accordance with the

directions issued by the Government from time to time. The petitioners are not at liberty to sell commodities obtained from any other source. It is also averred that the petitioners have no right to claim continuance of the allotment of the commodities supplied to them as the officers concerned have the full right to cancel the allotment at their discretion without assigning any reason or without giving any notice to them and they are not entitled to claim any damage or compensation for such cancellation or variation in the allotment. As between them and the Government on the one hand and between them and the consumers on the other, there was or is no mutual assent as a result of negotiations, express or implied and, as such, these transactions are not "sale" within the meaning of the Sale of Goods Act, 1930 and, accordingly, they are not "sale" as defined in the Bihar Sales Tax Act, 1959. According to the petitioners, they cannot decline to carry out the order of the Government and, if they do so, they are liable to be penalised and they have no freedom to fix the price of the commodities dealt in by therrj nor do the consumers have any freedom of choice with respect to the quantity and quality of the commodities supplied to them. The petitioners are entitled to a gross profit of Rs. 1.80 only per quintal. According to the petitioners, since they do not sell "goods" they are not "dealers" as defined in the Bihar Sales Tax Act, 1959 (hereinafter referred to as "the Act") and they are not liable to pay sales tax in respect of the transactions carried on by them. Alternatively, they have also averred that the definition of the word "sale" as given in the Act and that given in the Sale of Goods Act, 1930, are quite contradictory and, as such, the definition of the word "sale" in the Act is ultra vires and unconstitutional. Their case further is that after respondent No. 2 issued the notice (annexure 1) under Sub-section (5) of Section 16 of the Act calling upon the petitioners to produce their books of account, the secretary of the Fair Price Shops Association filed a representation before the Finance Minister of the Government of Bihar with a prayer that necessary instructions be issued to the authority concerned not to levy sales tax on the petitioners for the transactions carried on by them. The representation was rejected and the secretary of the Fair Price Shops Association was informed by letter dated 6th March, 1974 (annexure 2), that the notice issued to the petitioners under the Act was a legal and valid notice.

3. A counter-affidavit has been filed on behalf of the respondents refuting the claim of the petitioners. It is stated therein that the petitioners'' transactions are "sale" within the meaning of the Indian Sale of Goods Act, 1930 and also under the Sales Tax Act and the petitioners are "dealers" within the meaning of the Act. It is further stated therein that the levy of additional tax on gross turnover was introduced for the first time by the Bihar Sales Tax (Fourth Amendment) Ordinance, 1971 (Bihar Ordinance No. 107 of 1971), which, after successive Ordinances, has been enacted as an Act of the legislature, namely, Bihar Finance Act, 1974. That the retail price of the foodgrains is fixed by the local officers, namely, the District Magistrate and/or the Sub-divisional Magistrate after adding retailer''s margin as per instructions of the Government in that regard.

Government in the supply depArt ment merely determines the wholesale price, which includes sales tax and additional tax at the prescribed rate and they are also paid at source along with the price of the foodgrains, to which Rs. 1.80 per quintal as retailer''s commission is added and then at the aggregate price the foodgrains are sold to the ration card holders. It is also stated therein that the notice (annexure 1) has been issued only for the purpose of levy of additional tax in accordance with the provisions contained in Section 3B of the Act on the gross turnover of the sales of the commodities by the petitioners other than exempted commodities such as sugar and, as the additional tax is legally payable on the gross turnover of the concerned commodites, it was necessary to issue the impugned notices to the petitioners and to ask them to get themselves registered under the Act.

4. The principal question that arises for determination, therefore, is whether the petitioners'' transactions are "sales" and the petitioners are "dealers" within the meaning of the Act as also whether the definition of "sale" under the Act is ultra vires being contrary to what is given in the Sale of Goods Act. The other question that arises for determination is the liability of the petitioners to pay additional sales tax u/s 3B of the Act.

5. The liability to pay general sales tax and special sales tax is on every "dealer" under the charging Section 3 of the Act, subject to the conditions laid down therein. The expression "dealer" has been defined in Clause (f) of Section 2 of the Act, which reads as follows :

Dealer means any person who sells or purchases any goods whether for commission, remuneration or otherwise and includes any undivided Hindu family, firm, company or corporation, any depArt ment of Government, any society, club or association.

Explanation.-(1) A factor, a broker, a commission agent, a del credere agent, an auctioneer or any other mercantile agent, by whatever name called and whether of the same description as hereinbefore mentioned or not, who sells goods, as aforesaid, shall be deemed to be a dealer for the purpose of this Act.

(2) The manager or agent of a dealer who resides outside Bihar and who sells goods in Bihar shall, in respect of such business, be deemed to be a dealer for the purpose of this Act.

A reference to the above definition will show that it is a comprehensive one, capable of bringing within its fold the petitioners also who carry on business of running fair price shops, provided that the transaction carried on by them are "sale". The expression "sale" has been defined in Clause (p) of Section 2 of the Act and the portion relevant for our purpose may be usefully quoted here:

Sale means any transfer of property in goods for cash or deferred payment or other valuable consideration including such transfer of property in goods made by a society, club or association, but does not include a mortgage or hypothecation of or a charge or pledge on goods ; and all grammatical variations and cognate expressions shall be construed accordingly and ''purchase'' means such acquisition of property in goods.

Explanation.-(1) A transfer or acquisition of goods on hire-purchase or under any other system in which payment of valuable consideration is made by instalments, shall, notwithstanding the fact that the seller retains the title in the goods as security for the payment of the valuable consideration or for any other reasons, be deemed to be a sale or purchase.

6. It is now settled law that the concept of "sale" under the sales tax laws enacted by various States in pursuance of entry No. 54 of List II of the Seventh Schedule to the Constitution has to be understood as "sale of goods" within the meaning of Section 4 of the Sale of Goods Act: vide State of Madras v. Gannon Dunkerley & Co. A.I.R, 1958 S.C. 560 Section 4 of the Sale of Goods Act reads as follows :

4. (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one pArt -owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale, when the time elapses or the conditions are fulfilled, subject to which the property in the goods is to be transferred.

The four elements required to constitute a "sale" within the meaning of the Sale of Goods Act, are :

(i) That the pArt ies must be competent to contract;

(ii) that there should be mutual assent ;

(iii) that the property in the thing is to be transferred ; and

(iv) that the price in money is to be paid.

In the case of T.V. Sundram Iyengar and Sons Vs. The State of Madras, , their Lordships of the Supreme Court referred to the aforesaid decision in the case of The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., and observed as follows :

The expression ''sale of goods'' is a nomen juris, its essential ingredients being an agreement to sell movables for a price and property passing therein pursuant to that agreement.

Judged in that light, there does not appear to be anything in the definition of "sale" in the Bihar Sales Tax Act which is in conflict with that given in the Sale of Goods Act, as the ingredient of "sale" under both the statutes is that property in goods must pass from the seller to the buyer under a contract of sale for a price.

7. Mr. Verma, the learned counsel for the petitioners, however, has urged that the transactions between the owners of fair price shops and the ration card holders are not sale inasmuch as there is no mutual assent between the petitioners and the ration card holders and the transactions between the pArt ies being the result of compulsion and the pArt ies having no choice or volition in the matter, they are not "sale" within the meaning of the Sale of Goods Act, which could be exigible to tax under the Bihar Sales Tax Act. There cannot be any dispute that where all the ingredients of sale are regulated or controlled by any statute, such transactions do not amount to "sale of goods" and they cannot be exigible to sales tax, as there is no element of volition or freedom of choice or option for the transacting pArt ies to the contract so as to be termed as a contract of sale. Where, however, any one of the essential elements of "sale" are left to the choice or volition of the transacting pArt ies, such transaction, in spite of the supply of goods being regulated or controlled in respect of the other three elements by statute or control order, will be held to be sale exigible to sales tax. Unless the mutual assent is completely excluded, it will in law be a contract for sale. In the instant case, a copy of the agreement entered into by the petitioners with the Governor of Bihar under which they were allowed to run fair price shops has not been filed. From what is stated in the writ petition, it appears that under the agreement, the price of the goods, which includes the commission the petitioners will get, the purchasers and the quantity of the goods to be supplied to the latter are fixed. It is not disputed that the goods supplied to the petitioners by the Government are to be sold to the ration card holders on payment of price fixed by the Government and the petitioners cannot charge higher price than the price fixed by the Government from the ration card holders and the quantity of the goods to be supplied to each of the ration card holders is also fixed. There is, however, some amount of volition left to the ration card holders. A ration card holder may not purchase a pArt icular commodity from the fair price shop as he may not need it or due to its being of inferior quality or the like and it is not known what the petitioners would do, in that circumstance, with the goods which the ration card holder refused to purchase. There is no compulsion on the purchaser to purchase all the prescribed goods from the fair price shop. There cannot be thus any manner of doubt that such transactions between the petitioners and the ration card holders are "sale" in view of the following observations of their Lordships of the Supreme Court in the case of Salar Jung Sugar Mills Ltd. etc. Vs. State of Mysore and Others, in relation to an identical transaction, which may be usefully quoted here :

Counsel for the appellants contended that mutual assent in the present case would not be free but compulsory and the pArt ies would have no choice in the matter and therefore there would be no sale. The most common-place illustration of supply and acceptance of goods resulting in sale under the present conditions is furnished by the present system of sale of rationed goods. There are ration shops in pArt icular areas. Ration cards are distributed to residents in that area. The owners of these cards are required to go to the pArt icular shop mentioned in the card for supply of rationed Art icles. Price is also regulated by the Rationing Order. Therefore, the parties, the price, the shop, the supply and the acceptance of goods in accordance with the provisions of the Rationing Order are all regulated. When one presents a ration card to the shop and the shop owner delivers the rationed Art icles and the holder of the ration card accepts them and pays the price, there is indisputably a sale.

The decision of the case of New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar, relied on on behalf of the petitioners was noticed by their Lordships in the aforesaid decision. That case is clearly distinguishable inasmuch as the assessee-manufacturer of sugar in Bihar who supplied sugar to the State of Madras at controlled prices pursuant to the orders of the Sugar Controller did not enter into any agreement with the purchaser of the sugar. It was in that context that it was held in that case that the despatches of sugar by the Bihar manufacturer to the State of Madras did not amount to "sales" liable to sales tax under the Bihar Sales Tax Act. The other case relied upon by Mr. Verma, namely, Chhitter Mal Narain Das Vs. Commissioner of Sales Tax, is also similar in nature to that of New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar, . In that case, under Clause 3 of the U. P. Wheat Procurement (Levy) Order a licensed dealer is compelled to deliver the Controller or his authorised agent every day fifty per cent of the wheat procured or purchased by him and it was, therefore, held that there was no scope for negotiation and that supply of wheat pursuant to that clause and acceptance thereof did not result in a contract of sale.

8. Once it is held that the petitioners'' transactions are "sale", they are liable to pay additional sales tax u/s 3B of the Act, provided that the other conditions laid down therein are satisfied. The relevant portion of Section 3B may be usefully quoted here :

Notwithstanding anything contained in Sub-section (3) of Section 4, or Section 5, 6, 6A or 7. or in any notification issued thereunder, every dealer liable to pay tax u/s 3 or Section 3A shall, with effect from the 1st December, 1971, pay an additional tax at such rate, not exceeding one per centum of his gross turnover, as the State Government may from time to time, by notification in the official Gazette, fix.

It may not be out of place to mention that the provision of this Section has been held to be valid by a Bench of this Court in the case of Chakardharpur Biri and Tobacco Merchants'' Association v. State of Bihar 1972 P.L.J.R. 611. In case it is held that, the petitioners are liable to pay additional sales tax u/s 3B of the Act, they also become liable to get themselves registered u/s 9(1) of the Act, the relevant provision of which may be usefully quoted here :

No dealer who is liable to pay tax u/s 3 or Section 3A or additional tax u/s 3B shall sell or purchase goods unless he has been granted and is in possession of a valid registration certificate.

The stand of the State is that the notice issued to the petitioners is under the provision of Section 16(5) of the Act which lays down that if on information received, the prescribed authority is satisfied that reasonable grounds exist to believe that any dealer has been liable to pay tax under this Act in respect of any period and has nevertheless wilfully failed to apply for a registration certificate, or having so applied, failed to furnish any pArt iculars or information required for the purposes of Section 9, the prescribed authority shall, after giving the dealer a reasonable opportunity of being heard, assess, to the best of its judgment, the amount of tax, if any, due from the dealer in respect of such period and all subsequent periods ; and the prescribed authority may direct that the dealer shall pay, by way of penalty, in addition to the amount of tax so assessed, a sum not exceed ing one and a half times the amount, provided that no proceeding for such assessment shall be initiated except before the expiry of eight years from the expiry of the period to which it relates. It is thus apparent that there is no invalidity in the notice issued to the petitioners nor any has been pointed out to us.

9. The result is that there is no merit in this writ petition and it is accordingly dismissed. But, in the circumstances, there will be no order as to costs. ApArt from deciding the legal questions, I shall not be deemed to have decided any question involving the liability of the petitioners, if any, which properly falls for decision by the sales tax authorities.

S. Ali Ahmad, J.

10. I agree.

