

(1955) 04 OHC CK 0011

In the Orissa High Court

Case No : Special Jurisdiction Case No. 59 of 1950

Ramakrishna Deo

APPELLANT

Vs

The Collector of Sales Tax

RESPONDENT

Date of Decision : 12-04-1955

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 2

Citation : AIR 1955 Ori 164 : (1955) 21 CLT 491

Hon'ble Judges : Panigrahi, C.J.;Narsimham, J

Bench : Division Bench

Advocate : K. Patnaik, for the Appellant; B. Mohapatra and G. Dhal, for the Respondent

Judgement

Panigrahi, C.J.—This application comes before us on a reference made by, the Revenue Commissioner u/s 24, Orissa Sales Tax Act (Act 14 of 1947). The questions referred to us for opinion are the following:

"(1) Whether the Maharaja of Jeypore in leasing out the right "to cut and remove timber and collect forest produce is a "dealer" under Clause (c) of Section 2, Orissa Sales Tax Act?

(2) Whether the transactions evidenced by leases, a copy of which is on record, of the right to cut and remove timber and collect forest produce, amount in law to lease of immovable property?

(3) Whether the royalty and seigniorage payable under the lease constitute "rent" or "price"?

(4) Whether the trees and forest produce is moveable property coming under the definition of "goods" under the Orissa Sales Tax Act or is immovable property?"

2. The Maharaja of Jeypore owns extensive forest areas and gets a large income from forest produce. He keeps a depot where timber and other forest produce are sold, and this business is run by the Chief Forest Officer of the Jeypore

Samasthanam. The officer holds a Dealer's Registration Certificate, No. KO--434 and pays sales tax under the Act.

In addition he has also entered into certain contracts with businessmen for the extraction and manufacture of Railway sleepers. He was called upon to get himself registered as a dealer by the Sales Tax authorities in respect of these contracts entered into by the Samasthanam with sleeper contractors.

The Chief Forest Officer disputed his liability to taxation in respect of these transactions and, under protest, took out a Registration Certificate No. KO--960. For the assessment quarter ending 31-12-1947 he has been taxed on a taxable turnover of Rs. 30,584-8-3, and for the quarter ending 31-3-1948, his gross turnover has been determined by the Department at Rs. 2,492,22-6-5 and the proportionate taxable turnover has been determined by the Department as amounting to Rs. 2,44,257-8-0.

The petitioner went up in appeal to the Cot-lector and thereafter in revision to the Revenue Commissioner, but without success. The Revenue Commissioner has made the above reference to this Court, as the points of law involved are of far-reaching not only to the petitioner, but also to the Sales Tax authorities themselves.

3. The liability of the petitioner depends upon the true construction to be put on the contracts entered into with the numerous, sleeper contractors permitting the latter to use his forest and timber for extracting and manufacturing sleepers. A copy of one such agreement entered into by the Maharaja with Messrs. Dear and Co., Ltd., is on the record and it would be necessary to set out a few of the important clauses of the agreement for a better appreciation of the nature of the transactions.

4. The agreement purports to be an agreement "for extraction and sale of Sal wood from the Kotpad, Umarkote and Nowrangpur range forests." Clause 1 states that for and in consideration of sums of money to be paid by the Company in the manner and at the times and rates hereinafter specified and subject to the terms and conditions hereinafter appearing, the Maharaja agrees to sell, and the Company agrees to buy, all the Sal trees for the manufacture of sleepers and scantlings which may be marked by the Forest Department for felling in the reserved, protected and unreserved lands of the Umerkote, Nowrangpur and part of Kotpad ranges, marked out as the leased areas.

Clause 2 says that the Company shall have the right and liberty within the said area to fell all Sal trees so marked as aforesaid, and convert the same into sleepers in the leased area and to export the timber so converted therefrom during a period of six years. The clause contains a provision for renewal, for a further period of five years.

A further stipulation contained therein is to the effect that only the sleepers and scantlings referred to in Clause 5 extracted from Sal trees and passed by the

Company, shall become the property of the Company. All slabs, hutts, topends, rejected sleepers and other pieces of timber shall remain the sole property of the Maharaja who may dispose them of in such manner as he may deem fit. All sleepers converted in areas under operation, shall bear the Company's mark either of rejection or passing.

All rejected sleepers shall be collected in a depot either departmentally or by a contractor and checked both by the company and the departmental men before being challenged. No rejected sleepers shall be allowed for transport, without both the Company's challan and the departmental permit.

Then comes Clause 4 which authorises the Company to fell marked trees", and convert them into broad gauge, meter gauge and narrow gauge sleepers as economically as possible.

Clause 5 permits the company to saw the scantlings and other small timber as an experiment for one year.

Clause 6 is intended to enable the Company to carry out its work under the agreement in a systematic manner and expeditiously, and the Company is to abide by such rules as may from time to time be made by the Chief Forest Officer for regulating fellings in the leased area.

Clause 7 is an important condition of the agreement. It says that the company shall work the forest in an economical manner and on silvicultural principles for extraction and supply of sleepers and scantlings as aforesaid and the Company shall pay to the Maharaja the following royalties: broad gauge---27 per cent, of the selling price; meter gauge--20 per cent, of the selling price; narrow gauge--20 per cent, of the selling price; and scantlings other than those sold to the railways--30 per cent, of the selling price of the Company.

The selling price is the price paid by the Sleeper Control Officer, Eastern Group, to the company for sleepers extracted from the Jeypore Estate forests. The Company is also liable to pay land cess of 9 annas in the rupee on all the royalty it pays to the Maharaja and also a proportionate share of any local cess which the Government may impose.

If, during the period of the lease any railway is constructed in or through the Samasthanam thus helping in the despatch of the sleepers in the said forests to such stations as are required by the buyers the royalty to be paid on the sleepers is to be increased to the extent of half of any savings in the cost of transport effected by the company as shown by their accounts.

Under Clause 10, the company undertakes to pay a minimum royalty of Rs. 20,000/- annually, provided that if the company through no fault of its own fails to export timber to the value of the minimum royalty in any year of the contract, it shall be permitted to make up the difference between the royalty paid and such minimum royalty in the year next following that in which the deficit occurs.

There is also a proviso to the effect that the said minimum royalty shall cease to be payable if at any time during the said term of the lease, it shall be found that there are not sufficient Sal trees available to manufacture enough sleepers to cover the said minimum royalty.

Then follow certain other clauses in the agreement granting certain rights and privileges to the Company as to how to use the forest area for the execution of the contract. The Company is bound to pay them annas two per head of draught animal employed in the exportation of sleepers.

Clause 18 reserves the right to the Chief Forest Officer to sell or deal in any other forest produce in the leased area except timber sold to the Company under this indenture.

Under Clause 19 the customary rights and privileges of the inhabitants of the neighbouring villages to remove Sal and other trees on casual licenses, obtained from the Forest Department for agricultural, domestic and building purposes and by the Estate, Local Fund and Government Officials, for public purposes are expressly reserved.

Clause 22 lays down that the company is to allow facilities to the Forest Department for checking stocks of sleepers in its depots and in its transit from the leased area, by any person authorised by the Chief Forest Officer, and shall maintain and permit an inspection of all accounts in connection with the work showing (a) the number of trees felled during the month; (b) the stock or converted sleepers at the commencement of the month, (c) sleepers converted during the month, and (d) the balance in stock at the close of the month.

By Clause 26 the Company is prohibited from transferring or sub-letting any of the rights and privileges granted by the agreement without the prior consent, in writing, of the Chief Forest Officer having been obtained.

Clause 30 says that in the event of circumstances arising outside the control of the Company rendering the working of the forest areas impossible or totally unprofitable to the said company, and should the company under those circumstances express its desire to abandon its work under the contract, it may be permitted to do so on giving one month's notice in writing to the Chief Forest Officer on payment of the minimum royalty for a period of one year.

5. The view taken, by the Sales Tax authorities is that the transactions embodied in the contract amount to a sale of Sal timber, as a minimum royalty has been reserved under the contract, and that the Maharaja is a "dealer" as he has entered into similar contracts with 42 other lessees. The contention urged on behalf of the Maharaja is that the agreement does not amount to "sale of goods" nor is he a "dealer" within the meaning of the Sales Tax Act.

The two important points that arise for decision, therefore, are:

1. Whether the transactions evidenced by the agreement amount to a sale of

goods; and

2. Whether the Maharaja is a "dealer" carrying on the business of selling.

It appears to us that the question as to whether the agreement amounts to lease of immovable property is wholly beside the point. Nor is a mere recital in the body of the agreement itself, that Sal timber is sold sufficient to make the transaction a sale if really it is not one. Of course, standing timber attached to the earth is immovable property under the Transfer of Property Act, but there is no sale of the standing trees as such under the agreement.

What is conveyed to the contractor is the right and privilege of felling Sal trees and extracting sleepers therefrom. Under the agreement property in the sleepers so extracted is conveyed to the contractor and a proportionate amount of the sale price is paid as royalty for the permission granted for such extraction. A royalty does not represent the price of the article allowed to be taken by the contractor.

It is a periodical payment made by the contractor in consideration of the benefits which he is granted by the Maharaja. These benefits are set out in detail in the agreement itself and the royalty fixed does not represent the price of the sleepers extracted.

To quote the words of Lord Denman C, J. in -- Reg v. Westbrook (1847) 10 QB 178 (A)

"royalty is, in substance, a rent. It is the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows."

In -- AIR 1943 153 (Privy Council) . the Privy Council, while discussing the nature or the royalties derived from working a coal mine held (at p. 158 of the report) that

"royalties are clearly income and not, capital. They are periodical payments for the continuous enjoyment of the various benefits under the lease. The actual acquisition of the property in a particular ton of coal at the moment when the lessees have cut and taken away the coal is only the final stage." The royalty receivable by the Maharaja does not in any sense represent "the sale price" of the timber sold., That expression is defined as "the amount payable to a dealer as a valuable consideration for the sale or the supply of any goods".

In Income Tax Commissioner, Bombay v. Metro Goldwyn Mayer (India) Ltd. AIR 1939 Bom 257 (C) the Bombay High Court had to consider an agreement between the Culver Corporation" of New York and Messrs. Metro Goldwyn Mayer, India, Ltd. In that case the relationship between the two companies was constituted by a contract which defined the parties as "vendor" and "vendee" the non-resident being called the vendee.

The vendor sold to the vendee the sole and exclusive rights of re-selling,

exhibiting, leasing, and otherwise exploiting, in motion picture productions controlled or purchased by the vendor. The vendee undertook to provide an efficient sales-force and had to pay 70 per cent of the takings to the vendor. Beaumont C. J. held that the arrangement between the parties was something in the nature of a "license" and "certainly not, in my opinion a sale out and out".

The view taken by the Sales-Tax Department therefore, that the contract, in the present case, is a contract of sale because payment of royalty was reserved, and that the minimum royalty represents the "sale price" is erroneous.

6. But even on the assumption that the contract amounts to a sale the petitioner cannot be assessed to tax unless he is a "dealer" within the definition of the Sales Tax Act. A "dealer" is defined as "a person carrying on the business of selling or supplying goods in Orissa. The form prescribed under the rules for applying for registration, is Form II printed at p. 47 of the Orissa Commercial Tax Manual, Vol. II, part I.

The word "business" is not defined in the Act, or in the rules, but the Form prescribed under the rules for application for registration indicates what is intended. Form II requires a declaration to be made by the applicant for a dealer's registration certificate. The last paragraph of that form reads as follows:

"The following classes of goods are ordinarily purchased by me

(a) for re-sale

(b) for use in the execution of contract."

Form III, printed at p. 49 of the same volume, is prescribed for certificate of Registration, and condition 3 of that form reads as follows :

"3. Sale of the following goods to this dealer will be, free of tax

(a) for re-sale in Orissa.

(b) for use in the execution of contracts." This would also indicate that a dealer who has to apply for, and obtain a Certificate for Registration, is one who purchases goods either for re-sale in Orissa, or for use in the execution of contracts.

Admittedly, the petitioner does not make any purchases of timber for supplying to the contractor under the agreement. The entire timber required for the manufacture of sleepers is obtained from his own forests.

These trees are not planted, nor is any manual labour expended for their growth. They grow spontaneously in the forests and are assessed to land revenue. The element of "purchase" which is one of the necessary ingredients of the "business" as contemplated under the Orissa Sales Tax Act is therefore lacking in the present case. If the Maharaja had engaged himself in the business of planting trees and selling them, after converting them into sleepers, the position would be different.

He neither grows the trees, nor manufactures sleepers out of these trees which own (owe?) their existence to natural growth. It is idle, to expect that he, would maintain any accounts of the value of these trees. I have already referred to the two Forms, II and III which indicate that a person is not to be regarded as a dealer unless he buys and sells.

Section 15, Orissa Sales Tax Act deals with accounts and says that every registered dealer shall keep a true account of the value of goods bought and sold by him, and the Collector is empowered to require the dealer by notice in writing to keep such accounts. Section 16 empowers the Collector to require the dealer to produce before him any accounts relating to the stocks of goods, or of purchases, sales, and deliveries of goods by the dealer.

These provisions make it clear that a dealer is required to keep an account of the value of goods bought and sold by him. Since, admittedly, the Maharaja does, not buy either timber or sleepers it must be held that he is not a "dealer" as contemplated in the Act. In a similar case relating, to sale of paddy grown by an assessee on his lands, the Patna High Court held that the "appellant was not a dealer within the meaning of the Bihar Sales Tax Act as he was not carrying on any business of selling agricultural produce or goods in Bihar.

See -- Visheshwar Singh Vs. Province of Bihar, . There is also an interesting case reported in -- "Producers Co-operative Distributing Society" v. Commissioner of Taxation" 1948 16 ITR Supp 87 (E). Where the Privy Council, in an appeal from the High Court of Australia, made a distinction between milk and cream produced by a farmer, and the subsequent conversion of that cream into butter. It was observed at p. 91 of the Report:

"Their Lordships are prepared to assume that, did the farmer himself make the butter, such butter would be an agricultural product within the meaning of the definition. In such a case the farmer uses or cultivates the land for production of butter just as he uses or cultivates it for production of milk and cream.

But from the fact that butter may be an agricultural product as defined, it does not, in their Lordships' view, follow that butter which is not solely the product of the farmer's use or cultivation of his land must also be an agricultural product as defined. In this particular case such use or cultivation results only in one definite product --cream. At that stage a distinct organized industry appears on the scene."

In the case before us also, there are two types of businesses which are distinguishable. One is the business of felling trees and selling at organized depots by the Forest Department of the Maharaja himself. The other business is that of allowing the contractors to extract sleepers from his forests. This latter business is the business of the contractor and not of the Maharaja.

In --. "Commr. of Income Tax v. Manavedan Tirumalpad" AIR 1930 Mad 764 (F), their Lordships of the Madras High Court observed that

"they were unable to distinguish between the income derived from the sale of paddy which is grown on land, and the income derived from the sale of timber cut in a forest."

It has also been held in -- "Dy. Commissioner of Commercial Taxes, Coimbatore v. Lakshmi Saraswathi Motor Service" AIR 1954 Mad 954 (G), that the sale of old buses by a Transport Company does not make the company a "dealer."

7. Learned counsel for the Department referred us to a case reported in -- "Birendra Nath Guha v. State of Bihar" 1954 5 STC 273 (H), The question raised in that case was whether the transaction of sale took place within the territorial limits of Bihar or outside. Another case reported in -- "K. V. Varkey v. Agricultural Income Tax and Rural Sales Tax" Officer, Peermade" 1954 5 STC 348 (I), deals with the meaning of the word "Tea" occurring, in the Travancore General Sales Tax Act.

Yet another case to which our attention was invited, is reported in --- "Vaidyanatha Ayyar v. The State of Madras" 1954 5 STC 94 (J). There the assessee converted the sugarcane grown by him into jaggery under a process of manufacture and sold the jaggery. It was held that he was carrying on the business of selling jaggery and was, therefore, a dealer. None of these cases has any bearing on the question raised in the present case.

8. It was finally argued that the Maharaja was carrying on the business of selling through his agents, viz., Messrs. Dear & Co., Ltd., and was, therefore, liable to be taxed. It was urged that a liberal interpretation should be given to the definition of the word "dealer" & the petitioner should be held liable to tax. This argument is an argument of despair and runs counter to the well recognised principle, laid down by -- "Lord Sumner in *Levene v. Commissioners of Inland Revenue*" 1928 AC 217 (K), that

"a taxing statute must impose a charge in clear terms, or fail, since it is to be construed *contra proferentem*."

I would like to quote here the observations of Lord Russell, in -- "*Inland Revenue Commissioners v. Westminster*" 1936 AC 1 (L) :

"I confess that I view with disfavour the doctrine that in taxation cases, the subject is to be taxed if, in accordance with the Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case.

As Lord Cairns said many years ago in -- "*Partington v. Attorney-General*" (1869) 4 HL 100 (M); "As I understand the principle of all fiscal legislation, it is this : If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject

within the letter of the law, the subject is free however apparently within the spirit of the law the case might otherwise appear to be".

If all that is meant by this doctrine is that having, once ascertained the legal rights of the parties you may disregard mere nomenclature and decide the question of taxability or non-taxability in accordance with the legal rights -- well and good. That is what this House did in the case of -- "Secretary of State in Council of India v. Seoble" 1903 AC 299 (N), that and no more.

If, on the other hand, the doctrine means that you may brush aside deeds, disregard the legal rights and liabilities arising under a contract between parties, and decide the question of taxability or non-taxability upon the footing of rights and liabilities of the parties being different from what, in law, they are then I entirely dissent from such a doctrine."

In -- AIR 1940 183 (Privy Council) , the Privy Council adopted the above principle and thought it necessary to "protest against the suggestion that in revenue cases the "substance of the matter" may be regarded as distinct from the strict legal position." It is clear, therefore, that though the petitioner receives a royalty under the agreement, and makes an income, it cannot be said that the transactions are in substance sales or that he is a "dealer" carrying on the business of selling within the meaning of the Orissa Sales-tax Act.

9. I am satisfied that the Act does not apply to the facts of this case and that the transactions evidenced by the agreement do not constitute sale of goods. Our answers to the questions referred to us, therefore, are :

1. The Maharaja of Jeypore is not a dealer under Clause (c) of Section 2, Orissa Sales Tax Act.

2 The royalty payable under the agreement constitutes "income" and not "sale price" of the goods sold.

Questions (3) and (4) referred to us do not call for decision and we offer no opinion on them.

10. The petitioner is accordingly entitled to a declaration that the tax levied upon his transactions is not justified by the provisions of the Orissa Sales Tax Act, and the tax, if paid, shall be refunded to him. The petitioner shall also have the costs of this application which we assess at Rs. 250/-.

Narasimham, J.

11. I agree with the order proposed by my Lord the Chief Justice.

12. The principal question which is sufficient for the disposal of this reference is whether on the admitted facts of the case the petitioner can be said to be a person "carrying on the business of selling goods" in Orissa so as to be a "dealer" as defined in Clause (c) of Section 2, Orissa Sales Tax Act, 1947. The petitioner was, at all relevant times, the proprietor of the impartible estate of

Jeypore.

His business, as ordinarily understood, was that of a zamindar collecting rents from the tenants and also collecting substantial income from the extensive forests in his zamindari. The transactions that are sought to be assessed to sales tax in the present case relate to the price or royalty received by him for permitting Messrs. Dear & Co. Ltd. to cut Sal trees in his forests, make them into sleepers and sell them to various railways.

The material portions of the agreement between the two have been quoted in the main judgment. I entirely agree with my Lord that Messrs. Dear & Co. Ltd. were not the agents of the petitioner for the purpose of felling Sal trees and converting them into sleepers and selling them to the railways. Hence, though Messrs. Dear & Co. Ltd. may be said to have carried on the business of preparing sleepers and selling them to railways it cannot be held, on the theory of agency, that the petitioner also was carrying on the same business through his agent.

13. Doubtless, the expression "business" occurring in Section 2(c), Orissa Sales Tax Act has not been defined in that Act. But some indication as to what the Legislature meant by that expression may be gathered from a scrutiny of Form II of the Forms prescribed under the Orissa Sales Tax Rules regarding the contents of an application by a dealer for registration. The following instructions are given in the Form itself for filling it up :

"Enter here the nature of the business, e.g. whether it is wholly agriculture, horticulture, mining, manufacturing wholesale or retail distribution, general merchandise contracting or catering, or any combination of two or more or them."

These instructions are fairly exhaustive and they show (omitting inapplicable portions) clearly that by the expression "business of selling" in the Act and Rules framed thereunder, the Legislature meant not the sale by the owner of the produce from his lands or forests but the sale after purchase or sale after manufacture.

This is also the accepted construction put on the expression "business" occurring in. Section 2(4), Indian Income Tax Act. In V. S. Sundaram's Law of Income Tax (Edn. 7 at pp. 81 and 83) are given the following meanings of the expression based on several English authorities :

" "Business" has a more extensive meaning than the word "trade" but ordinarily speaking "business is synonymous with "trade". In -- "Smith v. Andersen (1880) 50 LJ Ch 39, Jessell, M. R., after citing definitions of "business" from several dictionaries said "anything which occupies the time and attention and labour of a man for the purpose of profits is business."

Again;

" "trade" in its largest sense is the business of selling, with a view to profit, goods which the trader has either manufactured or himself purchased, per Lord

Davey."

14. Hence it is reasonable to hold that, the expression "business of selling goods" occurring in Section 2(c), Orissa Sales Tax Act means "the business of selling, with a view to profit, goods which the dealer has either manufactured or himself purchased from some other person for resale." Admittedly, the zamindar of Jeypore did not purchase the sleepers from some other person. Nor did he manufacture them himself or through his agent. The Patna decision on the Bihar Sales Tax Act Visheshwar Singh Vs. Province of Bihar, referred to in the main judgment is sufficient authority for this view. Doubtless, that case referred to the sale by a land-owner of paddy grown in his lands; whereas in the present case it is sale by a zamindar of the trees that spontaneously grew in his forests.

But this difference does not affect the principle laid down in that decision as to whether the landowner can be held to have carried on the business of selling.

15. Where, however, it can be held that the zamindar himself through his servants or agents, prepares the sleepers" and sells them for profit, to various railways he may be held to be a dealer carrying on such business. The petitioner does, not challenge his liability to pay sales tax in respect of such business and it is admitted that he has obtained a Dealer's Certificate for the timber business which he carries on in a depot where timber and other forest produce of the estate are sold under the superintendence of his Chief Forest Officer. But the present transaction has nothing to do with that timber business.

16. I would, therefore, agree with my Lord that the petitioner is not a "dealer" under Clause (c) of Section 2, Orissa Sales Tax Act.

17. As this answer is sufficient for the- disposal of this reference, I would reserve my opinion on the question whether the royalty payable under the agreement with Messrs. Dear & Co. Ltd. is "sale price" or not.