

(1999) 07 PAT CK 0118
In the Patna High Court
Case No : C.W.J.C. No. 1182 of 1998 (R)

Spiritco

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 19-07-1999

Acts Referred:

Additional Duties of Excise (Goods of Special Importance) Act, 1957 — Section 2, 3
Bengal Finance (Sales Tax) Act, 1941 — Section 5(2)
Bengal Finance (Sales Tax) Rules, 1941 — Rule 3, 3(23), 3(28)
Bihar Finance Act, 1981 — Section 12, 3, 4, 7, 7(3)
Drugs and Cosmetics Act, 1940 — Section 3

Citation : (1999) 3 PLJR 210

Hon'ble Judges : S.N. Jha, J;Aftab Alam, J

Bench : Division Bench

Advocate : S.S. Mittal, for the Appellant; I.S. Choudhary, for the Respondent

Final Decision : Allowed

Judgement

S.N. Jha, J.—The Petitioner seeks a declaration that handloom bandage cloth is a sales tax free commodity and no tax thereon can be levied under the Bihar Finance Act, 1981. It further seeks quashing of assessment orders for the periods 1989-90 1990-91, 1991-92 and 1992-93 to the extent sales tax has been levied on handloom bandage cloth and the claim for exemption has been rejected. Quashing of the consequential demand notice pursuant to the impugned assessment orders is also sought.

2. The Petitioner is a partnership firm engaged in the business of medicines and surgical goods at Dhanbad. In course of business it buys and sells handloom cloth for surgical purpose. The Petitioner claims to be carrying on the business since the year 1975. According to it, the goods in question was always treated as tax free goods and no tax was levied on its sale.

3. It may be mentioned here that for the assessment period 1983-84 the Petitioner was initially allowed exemption on sale of handloom bandage cloth by

the assessing officer, viz., Deputy Commissioner of Commercial Taxes, Urban Circle, Dhanbad, on 3.8.85. However, a fresh assessment order was passed on 17.5.93. in which the sale of the hand loom bandage cloth was included as part of taxable turn-over. The Petitioner preferred appeal before the Joint Commissioner of Commercial Taxes (Appeals) Dhanbad, which was rejected on 31.5.95. The Petitioner has challenged the said two orders seeking similar declaration that handloom bandage cloth is tax-free commodity in C.W.J.C. No. 8044 of 1995(R). We tentatively decided to deliver a common judgment. After considering the matter, we later decided to decide the two cases by separate judgments as the other case could be decided on a rather short point without going into the larger question as to whether handloom bandage cloth is sales tax free commodity under the Bihar Finance Act or not while in the present case that is the only point for consideration.

4. The case of the Petitioner is that what the Petitioner buys and sells is handloom cloth and not bandage. It buys the cloth by yards and sells the same by yards without cutting for rolling it into sizes or shapes. According to the Petitioner, the goods cannot be used as bandage in the form it is sold without being cut to shape and size and being sterilized. Handloom cloth, it is submitted can be used not only as bandage but for various other purposes, such as, binding or layering material for books, envelopes, shoes etc. It cannot, therefore, be said to be a surgical goods exigible to sales tax under the Bihar Finance Act. The Petitioner has placed reliance on the cases of Delhi Cloth and General Mills Ltd. v. Commercial Tax Officer (1975) 36 STC 575, and Radhika v. State of Orissa (1977) 39 STC 93.

5. The Respondents have filed counter affidavit. They have firstly challenged the maintainability of the writ petition on the ground that the same has been preferred without exhausting the statutory remedy of appeal as was done with respect to assessment period 1983-84 giving rise to C.W.J.C. No. 8044 of 1995 (R), and the same is therefore fit to be dismissed on this ground alone. On merit it has been stated that the State Government in exercise of power u/s 7(3) of the Bihar Finance Act has specified the goods exempted from levy of sales tax. So far as cotton fabrics and handloom cloth vide entry 21 of the said notification are concerned, the exemption is available provided the goods have borne the incidence of duty under the Additional Duties of Excise (Goods of Special Importance) Act, 1957. Since the goods in question have not borne the incidence of duty under the said Act no exemption can be claimed under the notification. According to the Respondents, the bandage cloth falls under the category "medicines and drugs" which has been specified in the notification dated 1.10.89 issued u/s 12 of the Bihar Finance Act, and the same is taxable @ 7%. The Respondents rely on a decision of the Supreme Court in Chimanlal Jagjivandas Sheth Vs. State of Maharashtra, wherein roller bandage, amongst other things, has been held to be a substance used for or in treatment of diseases and hence "drug" u/s 3(b) of the Drugs and Cosmetics Act, 1940.

6. Since the whole case of the Petitioner rests on the abovenoted judgment of the Calcutta and the Orissa High Court it would be apt to refer to the facts of those cases and the decision arrived at. In *Delhi Cloth and General Mills Company Limited v. Commercial Tax Officer* (supra) the Revenue had rejected the Assessee's claim for exemption with respect to the sales of stitched bedsheets and stitched towels negating its contention that such items were "cotton fabrics" and, therefore, subject to the levy of excise duty, it may be mentioned here that under Rule 3(28) of the Bengal Sales Tax Rules read with Section 5(2)(a)(vi) of the Bengal Finance (Sales Tax) Act, sales of cotton fabrics, rayon or artificial fabrics, woolen fabrics and tobacco were exempted. The explanation appended to Clause (28) of Rule 3 provided that, "In this clause, the expression "cotton fabrics", "rayon" or "artificial fabrics", "woolen fabrics" and "tobacco" respectively have the same meaning as in items 19, 22, 21 and 4 of the First Schedule to the Central Excise and Salt Act, 1944." Section 2(c) of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 also contained similar provision. It laid down, "the words and expression "sugar", "tobacco", "cotton fabrics", "woolen fabrics" and "rayon" or "artificial silk fabrics" shall have the meaning respectively assigned to them in item nos. 1, 4, 19, 21 and 22 of the First Schedule to the Central Excise and Salt Act, 1944. Item No. 19 of the First Schedule to the Central Excise and Salt Act laid down that, "cotton fabrics" mean all varieties of fabrics manufactured either wholly or partly from cotton, and include dhoties, sarees, chadars, bed-sheets, bed-spreads, counterpanes and table cloths, but do not include any such fabrics..."

The Petitioner-company produced a letter of the Superintendent, Central Excise, Delhi Division to the effect that it had been as special case permitted by the Board to cut the running pieces of cotton fabrics in the licenced premises and to stitch at both ends for the purpose of making bed-sheets, bed-spreads, cotton towels, cotton napkins, and that it (the company) pays basic duty, additional duty and cess at the time of their clearance on the basis of area of original running length pieces of cotton fabrics from which these were made.

An argument was made that Item No. 19 of the First Schedule to the Central Excise and Salt Act includes only those "cotton fabrics" which are manufactured as chadar, bedsheets, bed spreads etc., as such, and not those which are prepared by cutting woven textile materials into shorter lengths and then stitching up the two ends. The High Court rejected the contention. It held that when item No. 19 of the Schedule to the said Act does not exclude stitched bed-sheets, bed-spreads etc., there was no basis for holding that the stitched materials which continue to retain the essential nature of the "cotton fabrics" were liable to sales tax. In this connection the Court observed that the cutting of running length into shorter length and stitching at the two ends are part of the process of manufacturing bedsheets, bed-spreads, chadars etc. but it does not result in a new product.

7. It would, thus, appear that the question as to whether the sale of stitched bed-

sheets, towels etc. was exigible to sales tax was answered in favour of the Assessee in view of the express provisions of the Bengal Sales Tax Rules read with item No. 19 of the First Schedule to the Central Excise and Salt Act. In terms of explanation appended to Rule 3(23) of the Bengal Sales Tax Rules, "cotton fabrics" (which was admittedly an exempted item) had the same meaning as assigned to it in item No. 19 to the Schedule of the said Act. The term "cotton fabrics" in item No. 19 included, chadars, bed-sheets and bed-spreads amongst other things. In other words, if cotton fabric, which was an exempted item had to be given the same meaning as assigned to it under the Central Excise and Salt Act and in terms of item No. 19 of the First Schedule thereto, it included chadars, bed-sheets, bed-spreads also, it is obvious that their sale could not be exigible to sales tax.

8. In *Radhika v. State of Orissa* (supra) also the question for consideration was more or less the same. The Assessee had objected to assessment with respect to pillow covers as being a mill made fabrics which was an exempted item under Entry No. 33. The relevant Entry read, "all mill-made fabrics made wholly or partly of cotton, staple, fibre, rayon, artificial silk or wool including processed fabrics made in the processing mill". The Orissa High Court held that although by process of cutting and stitching at three ends of the cloth a new commodity emerges but it does not cease to be mill-made cloth. The exemption being in relation to mill made cloth, it would be applicable to pillow covers. The High Court noticed the aforementioned decision of the Calcutta High Court in *Delhi Cloth and General Mills Company Limited v. Commercial Tax Officer*. It may be mentioned here that although the dispute related to pillow covers, the Court mentioned other item of mill-made cloth such as, bedsheets, napkins and towels as continuing to be mill-made fabrics within the meaning of Entry 33.

9. At this stage the relevant provisions of the Bihar Finance Act and the notification made thereunder may be seen. Section 3 of the Act which contains the charging provision, lays down that subject to the provisions of that part of the Act, the sales tax or the purchase tax, as the case may be, shall be paid by every dealer if his gross turn over during the relevant period exceeds the specified quantum, on sales and purchases made inside Bihar on or from the date of commencement of the Bihar Finance Act, 1981. Section 7 of the Act which contains the exemption clause provides that no tax shall be payable on sales or purchase of goods which had taken place (a) in course of inter-State trade or commerce, (b) outside the State, and (c) in course of import of goods into, or export of the goods out of the territory of India. Apart from these general exemption, which, as a matter of fact, is in accordance with the Central Sales Tax Act, 1956 and flows from the relevant provision thereof, the State Government is empowered, by notification and subject to such conditions or restrictions as it may impose, to exempt from the sales tax or purchase tax (a) sales of any goods or class or description of any goods (b) sales of any goods or class or description of goods to or by any class of dealers (c) any sale or category or description of sales and (d) purchase of any goods by any class of dealers or any purchase or

category or description of purchases of such goods. Sub-section (4) of Section 7 lays down that where exemption from levy of tax under any sale or purchase of goods is claimed by dealer the burden of proof shall lie on such dealer, and prescribed authority may require the dealer to substantiate the claim in the prescribed manner.

The State Government has issued notification in terms of Section 7(3) of the Act specifying the goods which are exempted from levy of sales tax. Entry 21 which is the relevant entry, as amended by notifications S.O. 611 dated 29.6.83 and S.O. 735 dated 1.8.85, runs as follows:

Cotton fabrics, rayon or artificial silk fabrics, woolen fabrics, sugar and tobacco subject to levy of additional duty of excise u/s 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957, read with Schedule appended thereto, and which have borne the incidence of duty under the said Act, and handloom cloth excluding pure silk cloth, silk dhoties and silk sarees of handloom origin.

10. The stand of the Revenue that as the goods in question have not borne the incidence of the duty under the Additional Duties of Excise (Goods of Special Importance) Act, the Petitioner is not entitled to the benefit of exemption, is devoid of substance. From bare reading of Entry 21 it is apparent that the condition/restriction that sale of only such goods (specified in the Entry) are exempted which have borne the incidence of duty under the aforesaid Act is limited to items mentioned in the first part of the Entry, viz., cotton fabrics, rayon or artificial silk fabrics, woolen fabrics, sugar and tobacco. The item "handloom cloth, occurring in the latter part of the Entry is an independent and distinct item, not suffixed or circumscribed by any such condition/restriction. It would not be out of place to mention here that Entry 21 as is originally stood vide notification nos. S.O. 14547 dated 26.12.77 and S.O. 15146 dated 19.11.78, was in a different form as hereunder:

Cotton fabrics, rayon or artificial silk fabrics, woolen fabrics, sugar and tobacco, subject to levy of additional duty of excise u/s 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 read with Schedule appended thereto. Handloom cloth and pure silk fabric which borne the incidence of duty under the Additional Duties of Excise (Goods of Special Importance) Act, 1957.

It would, thus, appear that while in the case of cotton fabrics, rayon or artificial silk fabrics, woolen fabrics, sugar and tobacco, sales were exempted "Subject to levy of the additional duty of excise under the Additional Duties of Excise (Goods of Special Importance) Act, the sale of handloom cloth and pure silk fabrics was exempted from sales tax provided they had actually borne the incidence of duty under that Act. The question, therefore, as to whether the goods in question have actually borne the incidence of duty under the Additional Duties of Excise (Goods of Special Importance) Act or not is of no consequence for determining the issue regarding exigibility of handloom cloth. The plea of Revenue in this regard is, therefore, fit to be rejected.

11. The moot question is whether the goods sold by the Petitioner-Assessee is handloom cloth pure and simple. The Petitioner contends that the goods are purchased and sold by yards without cutting it into shapes or sizes. It is submitted that handloom cloth can be used for various purposes, such as binding or layering material for books, envelopes etc., and not necessarily as bandage for medical purposes. The Petitioner also contends that even where such handloom cloth is cut into pieces of particular size and shape and sold as such, they retain their original identity as handloom cloth and, therefore, are not exigible to sales tax

12. The former plea, *prima facie*, can be accepted where the goods are sold in bulk to hospitals or other institutions of that type. Where such goods are sold to ordinary customers it is difficult to believe that they would be sold by yards without being cut into pieces of particular size and shape. There may be different uses of handloom cloth. But one would not go to a medicine shop dealing in drugs and surgical goods to buy cloth. If he has to buy cloth he would go to a cloth shop. This is true of handloom cloth as well.

13. It is the second alternative plea, mentioned above, which has been argued with emphasis and I wish to discuss here. The point is where handloom cloth is sold as pieces of particular shape and size, as bandage, they retain their original identity as "handloom cloth" or a new product comes into existence. The word "bandage" appears to have been derived from the root word "band". The dictionary meaning of the word "band" is "a strip of cloth or the like, to bind round anything as a hatband, waist-band etc." The dictionary, meaning of the word "bandage" is "a strip of swathe of cloth used by surgeon to keep a part of the body pressed, to apply pressure or to retain dressings or apparatus in position". It is well settled that where a word is not defined in the statute it has to be given a plain dictionary meaning unless such a meaning is found to be inconsistent with the context or the object of the Act. If a particular word is understood in the common parlance having a particular meaning, which is in accord with its plain dictionary meaning, it would be unnecessary to stretch the definition and give a fictional or notional meaning to it. When a running cloth including hand loom cloth is cut into pieces and sold as bandage in shops dealing in medicines and surgicals goods, it cannot be said that it has retained its original identity as cloth, pure and simple. A cloth will be cloth in whatever form it is used, but it does not mean that it is to be called cloth even after it has changed its form. With due respect, if the logic given by the learned Judges of the Calcutta High Court in the case of Delhi Cloth and General Mills Company Limited (*supra*) was correct, even where cloth has been cut into pieces and stitched as wearing apparel, it would continue to retain its original identity as cloth. Moreso in the context and for the purpose of taxing statutes where the tax and duties are levied on the basis of description of the goods and not on the basis of what it was originally before being converted into particular goods. Thus, where as a result of some process a new product has come into existence, having a definite marketable commodity, the question as to exigibility of that

product to tax or duty is to be determined not with reference to its original identity but with reference to the identity it comes to assume.

14. The Respondents have relied on *Chimanlal Jagjivandas Sheth Vs. State of Maharashtra*, in support of their contention that the bandage has been held to be a "drug" therein, and since medicines and drugs is taxable item u/s 12 of the Bihar Finance Act, the Petitioner cannot escape the liability of sales tax with respect to its sales.

The decision in *Chimanlal Jagjivandas Sheth v. State of Maharashtra* has been rendered in a different context. The Appellant of that case was convicted for being in possession of large quantity of spurious absorbant cotton wool, roller bandage, gauze and other things. The point for consideration was whether absorbant cotton wool, roller bandage and gauze are substance used for in treatment of diseases. The Supreme Court held that the goods in question were substances intended to be used for or in the treatment of diseases of human beings and animals and, therefore, "drugs" u/s 3(b) of the Drugs and Cosmetics Act, 1940. Although, thus, the decision has been rendered in a different context, it cannot be ignored altogether. What follows from the decision is that bandage (and other such items), so called, is a surgical goods and where it is sold in shops dealing in medicines or surgical goods, it cannot be said that what is being sold is cloth, i.e. handloom cloth and not bandage.

15. It would not be out of place to mention here that in the Central Excise Tariff Act, 1985 wadding, gauze, bandages and similar articles (for example, medicines, adhesive plasters, poultices) for medical, surgical, dental or veterinary purposes have been mentioned as separate items of goods under subheading 3004.00 under chapter XXX of the Act. The bandage and similar items which are used for dressing purposes in surgical cases have not been separately specified in the Schedule of the notification u/s 12 of the Bihar Finance Act. However, if they are held to be "drug" as interpreted by the Supreme Court, they would fall under the entry "medicines and surgical goods" as contended by the Respondents.

16. It is to be kept in mind that it is not for the Revenue to establish that the goods in question is exigible to sales tax. Such a plea whenever taken by the Assessee is required to be substantiated by him. This is evident from the provisions of Sub-section (4) of Section 7 of the Bihar Finance Act and in accordance with the general principles. The general principle is that the person who claims exemption has to prove the same. It is, therefore, not the obligation of the Revenue to prove that the goods sold by the Petitioner are "medicines and surgical goods" within the meaning of the term and the scope of the notification issued u/s 12 of that Act, rather it is for the Assessee to establish that the goods have been specified as an exempted item u/s 7(3) of the Act. Section 12 relates to the rate of tax. Where special rates are not laid down, subject to the, other provisions of the Act the goods are to be taxed at the rate mentioned in Section 12.

17. Before I conclude the discussion, I consider it appropriate to briefly refer to the two decisions of the Surpeme Court which were noticed by the Calcutta High Court in Delhi Cloth and General Mills Company Limited's case (supra). In coming to the conclusion that the cutting of running cloth into pieces and stitching them at two ends does not result in a new product the High Court placed reliance on M/s. Tungbhadra Enterprises Limited v. The Commercial Tax Officer, (1960) 11 STC 827 and Lt. Governor, Delhi v. Ganesh Flour Mills Company Limited, (1973) 31 STC 354. In the former case, the point for consideration was whether conversion of raw groundnut oil into refined oil (Vanaspati) results in a new product. The Court found that conversion of raw groundnut oil into refined oil merely involves separation of non-oily contents of the raw oil, rendering the oily content of the oil hundred percent and, therefore, refined oil continues to be groundnut oil within the meaning of the relevant provision, notwithstanding that such oil does not possess the characteristic, colour, taste or odour etc. of the raw groundnut oil.

In the case o M/s. Ganesh Flour Mills Company Limited (supra) the department had rejected the prayer of Assessee to amend its registration certificate by including tin-plates or tin-sheets. The Assessee was engaged in the business of the sale of vegetable products (Vanaspati) and it was its case that it required tinplates and tin-sheets for packing its product for sale. The prayer had been rejected on the ground that the goods in question were declared goods and as such their purchase on the strength of registration certificate could be allowed only if they were to be resold in the form in which they had been purchased. The Supreme Court noted that for convenient and safe storage and sale, the goods i.e. Vanaspati required packing, and therefore the fact that the sheets and the plates had to be subjected to process of cutting and moulding into tin containers (by the Assessee) would not take them out of the category of materials intended for being used for packing of goods for sale. The Court observed that cutting and moulding is essential for putting the tin-sheets and tin-plates into shape with a view to adapt them for actual users.

18. The said two decisions, in my respectful opinion, therefore, cannot be used as authority for the proposition that the process of cutting handloom cloth into pieces of shape and size and their sale "bandage" does not result in a new product.

19. Adverting to the present case, from the materials on record, it does not appear as to what was Sold in the Petitioner's shop during the relevant period whether handloom cloth in yards or pieces of bandage. As indicated above, if the goods were sold in bulk by yards to hospitals or other institutions, there would be a strong presumption that what was sold, was "handloom cloth". If on the other hand, it was sold in pieces to ordinary customers, the presumption would be that what was sold was bandage. Each transaction would therefore have to be examined. From the impugned orders it does not appear to have been done so. The matter therefore requires further investigation.

20. Before I conclude, I would like to clarify that we have gone into the merit of the case notwithstanding the fact that the Petitioner had alternative remedy of appeal, in view of the decision of the Supreme Court in L. Hirday Narain Vs. Income Tax Officer, Bareilly, , in which it has been laid down that a person should not be non-suited on the ground of existence of alternative remedy where the writ petition has been admitted for hearing. Therefore, the fact that we have decided the case on merit should not be used as precedent for approaching this Court against orders of assessment without exhausting the alternative remedy provided under the Act.

21. In the result, the impugned assessment orders contained in Annexure-1 series and the demand notices contained in Annexure-2 series are quashed and the cases are remitted to the Assessing Officer, namely, Deputy Commissioner of Commercial Taxes, Urban Circle, Dhanbad, for passing fresh orders in the light of this judgment. The writ petition is, accordingly, allowed. There will be no orders as to costs.

Aftab Alam, J.

22. I agree.