

(1980) 07 OHC CK 0013

In the Orissa High Court

Case No : Special Jurisdiction Case No. 193 of 1975

State of Orissa

APPELLANT

Vs

Bharat Saw Mill

RESPONDENT

Date of Decision : 17-07-1980

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 5(2)(A)(a)(ii)

Citation : (1980) 50 CLT 281 : (1980) 46 STC 389

Hon'ble Judges : R.N. Misra, J;P.K. Mohanti, J;K.B. Panda, J

Bench : Full Bench

Advocate : B.K. Mohanti, for the Respondent

Judgement

R.N. Misra, J.—The Member, Sales Tax Tribunal, Orissa, has stated this case and referred the following two questions for opinion of the court:

(i) Whether, in the facts and circumstances of the case, conversion of logs into sized logs and timber involved a manufacturing process and whether as a result of such process a different commercial commodity produced ?

(ii) Whether, in the facts and circumstances of the case, the purchase of round logs and timber after process in the saw mill constituted contravention of the provision contained in the proviso to Section 5(2)(A)(a)(ii) of the Orissa Sales Tax Act, 1947 ?

2. When this reference came for hearing before a Division Bench, it has been referred to a larger Bench for examining the correctness of the decisions of the Division Benches of this Court in the cases of State of Orissa v. Rajani Timber Traders [1974] 34 S.T.C. 374 Krupasindhu Sahu & Sons v. State of Orissa [1975] 35 S.T.C. 270 and State of Orissa v. Patel Saw Mill [1976] 37 S.T.C. 392 and to resolve the conflict, if any, appearing therein.

3. In the statement of the case drawn up by the Tribunal, it has been indicated:

...In this case also there is no clear picture as to the different sizes and shapes to

which the logs were transformed by sawing them in the saw mill. All that is available on record is that the logs which were extracted from the forest were converted into different shapes and sizes by sawing them in the saw mill. It was not specifically found whether the different shapes and sizes of timber were meant for manufacture of furniture, door frames, window-frames, doors, windows and the like.

Embarassed by this categorical finding of fact, the learned standing counsel asked us to call upon the Tribunal to submit a supplementary statement of facts after investigation. We do not, however, find any justification to do so at this belated stage. On the facts stated, there is no scope for the submission of the learned standing counsel that the logs had undergone a change and had transformed into a new commodity different from what had been purchased. It is quite possible that the logs were cut into different sizes for making transport, storage or the like convenient and with no intention to bring about a new commodity into existence for meeting the specific demand of the customers. On this simple position the question that has been referred by the Tribunal for opinion cannot be answered in a manner different from the conclusion reached by the Tribunal. The burden lay on the revenue to establish that there had been a contravention of the declaration given by the dealer that he would resell the goods within the State of Orissa, in order to apply the proviso to Section 5(2)(A)(a)(ii) of the Act and, in the absence of material to so hold, the assessee is bound to have the benefit. We would accordingly answer the questions referred to us by saying that, on the facts and in the circumstances of the case, there was no material for supporting a finding that a different commercial commodity had been produced and sold and the assessee, therefore, did not become liable in terms of the proviso to Section 5(2)(A)(a)(ii) of the Act.

4. We shall now proceed to examine if there has been any conflict of judicial opinion in the three decisions of this Court indicated in the referring order. The relevant provision in the Act, as it stood prior to its amendment by Orissa Act 3 of 1976, read thus :

5. Rate of tax.-(1)...

(2)(A) In this Act, the expression "taxable turnover" means that part of a dealer's gross turnover during any period which remains after deducting therefrom :-

(a) his turnover during that period on-

(i) ...

(ii) sales to a registered dealer of goods specified in the purchasing dealer's certificate of registration as being intended for resale by him in Orissa and on sales to a registered dealer of containers or other materials for the packing of such goods:

Provided that when such goods are used by the registered dealer for purposes

other than those specified in his certificate of registration, the price of goods so utilised shall be included in his taxable turnover.

By the amendment of 1976, the proviso was substantially amended and read thus:

Provided further that where any goods specified in the certificate of registration are purchased by a registered dealer free of tax after furnishing a declaration as being intended for resale in Orissa, but are utilised by him for any other purpose, the price of the goods so purchased shall be allowed to be deducted from the gross turnover of the selling dealer but shall be included in the taxable turnover of the purchasing dealer.

By Orissa Act 4 of 1978, Clause (ii) has been amended and the amendment in the proviso has been made retrospective, but the 1978 amendment is not material for our purpose.

Under Section 5(2) for arriving at the taxable turnover, certain deductions from the gross turnover are admissible. Since under the Act, a single point tax has been accepted, sales to registered dealers are exempt from taxation, provided the purchasing dealer gives a declaration that he would resell the goods within Orissa. The selling dealer could recover the sales tax payable by him from the purchasing dealer, but as the goods in question have been declared to be sold in Orissa, the single point of collection of tax is deferred. As long as the particular goods pass from the hands of one registered dealer to another subject to the declaration as stipulated by statute, the taxable event is deferred. If the goods are not resold the liability to pay tax accrues under the proviso in the hands of the last purchasing dealer who contravenes the terms of the declaration and in his hands the tax due on his purchase price is added. This essentially is the scheme contained in Section 5(2)(A)(a)(ii) of the Act. The mandate of the law is that the goods as purchased should be sold within the State and for not being converted into another commodity. In the three cases which we are going to examine, timber had been purchased on the basis of appropriate declarations by registered dealers, but the same had been converted into logs of different sizes. The question for consideration in each of the cases was whether the conversion brought about a new material and even if the converted material be resold in Orissa, would it not constitute a contravention of the declaration.

5. In *Ganesh Trading Co., Karnal v. State of Haryana* [1973] 32 S.T.C. 623 the Supreme Court examined whether when paddy is dehusked and rice is produced there has been a change in the identity of the goods. After dealing with certain previous decisions of their own, the court pointed out:

...Now, the question for our decision is whether it could be said that when paddy was dehusked and rice produced, its identity remained. It was true that rice was produced out of paddy but it is not true to say that paddy continued to be paddy even after dehusking. It had changed its identity. Rice is not known as paddy. It is a misnomer to call rice as paddy. They are two different things in ordinary

parlance. Hence quite clearly when paddy is dehusked and rice produced, there has been a change in the identity of the goods....

The question of conversion has arisen in several decisions and courts have applied different tests for determining whether there has been a conversion. Change of form and identity is one of the tests as applied by the Supreme Court in the Ganesh Trading Co.'s case [1973] 32 S.T.C. 623. There are other cases where the test applied has been whether in the changed form the goods continue to be a substitute for what it was before the change and, therefore, in both the forms the goods are essentially one. A Bench of this Court examined whether whole mung and mung seeds broken into two pieces constituted two different goods or were essentially the same in the case of Ram Chandra Badri-narayan v. State of Orissa [1974] 33 S.T.C. 83 and accepted the position that the broken pieces were not different from the whole ones as they were essentially put to the same use. No specific guideline can be indicated to meet every situation, inasmuch as very often pressed by competition, commercial viability and trade adventure, businessmen allow their goods to undergo variations in form and shape. As a broad guideline, it can, however, be indicated that as long as the consumer is prepared to accept one commodity as a substitute of the other without reservation, there is no substantial alteration in quality and there has been no conversion in form and shape so as to divert goods amenable to various uses to specific use only, the proviso would not be attracted.

6. In the case of State of Orissa v. Rajani Timber Traders [1974] 34 S.T.C. 374 the assessee had purchased round timber logs and had converted them into sized timber. The applicability of the proviso came up for consideration. This Court held that the assessee had given an undertaking in the declaration that he would resell the timber as such in Orissa, but he got it processed to sized timber and sold the commodity in a shape different from what he had purchased. "Timber" is a generic word meaning "trees" felled or standing to be used for building, as indicated in "Words and Phrases", Volume 41, at page 631 (Permanent Edition). "Timber" used as a generic term, according to Webster, means that sort of wood which is proper for buildings, or for tools, utensils, furniture, carriages, fences, ships, and the like ; usually said of felled trees, but sometimes said of those standing, and not the articles in their completed stage, for the manufacture of which the timber may be used. Stroud's Judicial Dictionary states that "by the term "timber" is meant properly such trees only as are fit to be used in building and repairing houses...". In "Words and Phrases Legally Defined", Volume 5, it has been said :

Oak, ash and elm are timber by the common law if over twenty years old, but not so old as to have no usable wood in them. Other trees may be timber by the custom of the country.... Trees less than six inches in diameter have been said not to be timber.

In Wharton's Law Lexicon, timber has been said to be felled wood for building or other such like use. Timber thus is a generic term. Sized timber has a

commercial meaning and when timber is cut into such sizes in saw mill to meet definite and specific requirements it is called sized timber. Ordinarily when a big log of timber is cut into similar logs, it is not called sized timber. In that sense, the Division Bench in the Rajani Timber Traders" case [1974] 34 S.T.C. 374 had rightly come to the conclusion that sized timber was not the same as round logs of timber and a new commodity had come into existence which rightly gave rise to the application of the proviso.

7. In *Krupasindhu Sahu & Sons v. State of Orissa* [1975] 35 S.T.C. 270 logs of timber had been purchased and were cut into sizes in saw mills. The learned Chief Justice observed in paragraph 6 of the decision :

Bereft of authorities we propose to analyse the meaning of the word "timber" as understood in common parlance, specially in commercial circles. It is to be emphasised that all that is wood is not timber though timber is wood. In common parlance timber ordinarily means long logs of wood used for purposes of beams and pillars in the construction of houses and such similar uses. After the felling of big trees and the chopping off of the branches of those trees the trunk of the tree is called timber....

Authorities for the meaning of timber, however, take a different view. The learned Chief Justice continued to observe :

...A very long piece of log may be cut into different pieces. If the pieces after cutting still remain long so as to be used as beams, pillars and such similar uses, the cut pieces would still be called timber. To illustrate, a timber originally 60 feet long is cut into three pieces of 20 feet each. Each of the three pieces retains sufficient length to be used as beams or pillars and would be still treated as timber in common parlance.

Take another illustration. After purchase of some timbers a dealer for the sake of convenience of transport may cut a portion from each end of the timber, may peel off the barks and polish the joints at some places of those timbers. Even after all these operations have been performed, the logs of wood would still be termed as timber.

Obviously the learned Chief Justice had put the user test. There may be instances when unusually long size timber would be cut into fairly long size timber which would be still maintaining its generic quality and would not become amenable to specific use only. There can be no dispute that even then it would continue to be timber. Timber cut into small sizes, for instance, a sixty feet long log when converted into sixty pieces of one foot size would certainly continue to be wood and yet would cease to be timber. On its own facts, the *Krupasindhu Sahu*"s case [1973] 35 S.T.C. 270 must be taken to have been correctly decided. Some of the observations should, however, be taken as obiter and the criticism of the *Rajani Timber Traders*" case [1974] 34 S.T.C. 374 was not warranted.

8. The last of the cases is the case of *State of Orissa v. Patel Saw Mill* [1976] 37

S.T.C. 392 The dealer purchased logs from various sources, processed the same in its mills and sold sized timber. In paragraph 7 of the decision, it was observed:

The simple question for consideration is whether, having in the registration certificate the authority to purchase only timber free from sales tax, the same being intended for resale by him in Orissa, the assessee has violated the conditions by converting the same into planks, railway sleepers, etc., and thereby brought different commodities into existence and thus has not sold timber as such entailing payment of tax under the proviso to Section 5(2)(A)(a) (ii) of the Act....

The court rightly came to hold that there had been a conversion and very different items of specific goods had come into existence in place of logs of wood. It, therefore, very appropriately found that the proviso had been rightly applied.

In our view, on the facts, each of the cases has been rightly decided and there is no conflict as such.

9. As we have already pointed out, it is difficult to lay down guideline in a straightjacket. Discretion must be left to the officers concerned to apply the proviso keeping acceptable principles in view and as long as the identity of the goods is maintained, the substitute rule is applicable and the common man is prepared to accept the goods in the two forms as substantially the same, the proviso should not be applied. We do not intend to interfere with the discretion of the officer because every situation cannot be covered by the guideline.

There would be no order for costs in this reference.

K.B. Panda, J.

10. I agree.

P.K. Mohanti, J.

11. I agree.