

(1980) 07 OHC CK 0010

In the Orissa High Court

Case No : Special Jurisdiction Case No's. 61, 62 and 63 of 1975

State of Orissa

APPELLANT

Vs

B.P.R. Construction

RESPONDENT

Date of Decision : 08-07-1980

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 24(1)

Citation : (1980) 50 CLT 196 : (1980) 46 STC 422

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

Bench : Full Bench

Advocate : K.C. Lenka, for the Respondent

Judgement

R.N. Misra, J.—The Member, Additional Sales Tax Tribunal, Orissa, stated these cases u/s 24(1) of the Orissa Sales Tax Act, 1947, and referred the following two questions for the opinion of the court:

(i) Whether, on the facts and circumstances of the case, the transaction between the assessee and the public works department is not a sale as denned under the Act ? and

(ii) Whether, on the facts and in the circumstances of the case, the contract entered in the F-2 standard form is a works contract and, therefore, sales tax was not payable?

2. When the references came up for hearing before a Division Bench, the learned standing counsel heavily relied upon the Bench decision of this Court in the case of State of Orissa v. Utkal Distributors Private Ltd. [1974] 34 S.T.C. 347 in support of his stand and the assessee's counsel while conceding that the ratio of the reported decision was against him, maintained that the same was not correct and required to be tested by a larger Bench. Accepting the plea, this case has been asked to be heard by a Full Bench.

3. We may straight proceed to deal with the reported decision. The second

question in that case was :

Whether, on the facts and in the circumstances of the case, the contract in question is a works contract or is a contract for sale of chattels as such?

Both the questions referred to the court in the present case are substantially covered by the second question. The Utkal Distributors Private Ltd. had undertaken to supply metals and chips from two quarries to the Expressway Organisation. The relevant terms of the contract were :

(3) They are not allowed to sell any quarry produce to any private parties....

(9) The rates are exclusive of sales tax. Royalty of Rs. 2 (Rupees two only) per 100 c. ft. (one hundred cubit feet) for all kinds of materials will be recovered from their bill.

The learned Chief Justice observed :

Whether the supply of materials by the opposite party constitutes a "sale of goods" or a mere works contract would depend upon the determination of the true character of the transaction. If the two quarries belong to the P. W. D., having ownership in the chips and stones, then the acts done by the opposite party merely constitute labour, and the transaction would be a works contract not exigible to sales tax. If, on the other hand, the title to the stone chips vested in the opposite party (hereinafter to be referred to as the contractor), then the supply of the materials would constitute a sale. The only feature for investigation in this case is, as to in whom the title to the chips and stones initially vested.

Reliance is placed by the learned standing counsel on Clause (9) of the agreement in support of the contention that though the quarries belong to the P. W. D., the contractor acquired title to the materials on payment of royalty of Rs. 2 per 100 c. ft., and this payment of royalty is not explainable in any other manner than as a licence coupled with a grant by the P. W. D., in favour of the contractor to extract chips and bond stones.

Reference was made by the Division Bench to the case of Chandra Bhan Gosain v. State of Orissa [1963] 14 S.T.C. 766 where the Supreme Court had observed :

Another clause provided that the appellant (assessee) would not be able to sell the bricks to other parties without the permission of the company. Apparently, it was contemplated that without such a provision the appellant could have sold the bricks to others. Now he could not sell the bricks at all unless they belonged to him.,

and observed:

Thus the prohibitive Clause (3) in the agreement does not destroy the conclusion derived from Clause (9) that the transaction constituted a sale."

This Court came to hold :

Bereft of authority, and purely on elementary analysis of the legal position, we are clearly of the opinion that the supply of materials by the contractor to the P. W. D. constituted a sale and was exigible to sales tax. The learned Tribunal's view that it was a pure works contract is contrary to law.

Certain authorities cited at the Bar were then referred to and analysed and in paragraph 19 of the decision, the court said :

Thus, none of the aforesaid decisions cited on either side runs counter to the conclusion reached by us, on an elementary analysis, that the opposite party in this case acquired title to the chips and stones extracted from the aforesaid two quarries on payment of royalty to the P. W. D. The supply of materials by the opposite party to the P. W. D. constitutes sale within the meaning of Section 2(g) of the Act and is exigible to sales tax.

The learned Chief Justice then dealt with the meaning of royalty and said:

The meaning of the word "royalty" was considered in *Surajdin Laxmanlal v. State of M.P.* AIR 1960 M.P. 129 Their Lordships took the meaning from Wharton's Law Lexicon and Mozley and Whiteley's Law Dictionary. In paragraph 7, their Lordships observed thus:

"In Wharton's Law Lexicon (Fourteenth Edition) the word "royalty" has been explained as "payment to a patentee by agreement on every article made according to his patent; or to an author by a publisher on every copy of his book sold ; or to the owner of minerals for the right of working the same on every ton or other weight raised". In Mozley and Whiteley's Law Dictionary (Sixth Edition) "royalty" has been defined as "a pro rata payment to a grantor or lessor, on the working of the property leased, or otherwise on the profits of the grant or lease. The word is especially used in reference to mines, patents and copyrights.

It, therefore, appears that royalties are payments which the Government may demand for the appropriation of minerals, timber or other property belonging to the Government."

The same view has been taken in *Bherulal v. State of Rajasthan* AIR 1956 Raj. 161 and *Bherulal Vs. State of Rajasthan and Another*,

All these decisions support our conclusion that on payment of royalty the opposite party acquired title to the chips and stones extracted from the quarries.

4. In the classic decision of the Supreme Court in *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.* [1958] 9 S.T.C. 353 the concept of "sale" was examined at great length and it was said thus :

It will be seen from the foregoing that there is practical unanimity of opinion as to the import of the word "sale" in its legal sense, there being only some difference of opinion in America as to whether price should be in money or in money's worth, and the dictionary meaning is also to the same effect....

Benjamin on Sale" was quoted with approval and four ingredients were pointed out to constitute "sale", namely :

(1) Parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer ; and (4) a price in money paid or promised.

In many later cases distinctions have been drawn depending upon the peculiar facts of such cases but nowhere the constituent ingredients are doubted. The definition given in the Sales Tax Act also does not basically change the position.

5. If the assessee had undertaken a labour contract, he would not have had to pay royalty particularly when the quarry belonged to the State. Payment of royalty is in lieu of the right to exploit as also appropriate. What has been said by the Supreme Court in the case of State of Madhya Pradesh v. Orient Paper Mills Ltd. [1958] 9 S.T.C. 353 with reference to payment of royalty in a forest lease case may be usefully quoted:

We are satisfied that despite its description, the deed confers in truth and substance a right to cut and carry timber of specified species. Till the trees are cut, they remain the property of the owner, namely, the appellant. Once the trees are severed, the property passes. Royalty is a feudalistic euphemism for the price of the timber. We may also observe that the question before us is not so much as to what nomenclature would aptly describe the deed but as to whether the deed results in sale of trees after they are cut. The answer to that question, as would appear from the above, has to be in the affirmative.

What has been said by the Supreme Court leaves no room to doubt that royalty can be "sale price" and when the chips and stones are severed and collected and royalty is paid or becomes due, appropriation takes place. It is at this point that the contractor with the right to work in the quarry becomes the owner of the goods.

6. Mr. Lenka for the assessee tried strenuously to assail the observations of the Supreme Court and in fact furnished a written note for the purpose and cited some other precedents. We are of the view that the aforesaid observation in regard to royalty is in accord with the accepted view and is also binding on us. Once we hold that way, reference to the cases cited by Mr. Lenka becomes a futile exercise which need not be undertaken. The analysis made by the learned Chief Justice in State of Orissa v. Utkal Distributors P. Ltd. 1974 34 S.T.C. 347 in our opinion, is correct and the ratio of the decision is not open to attack. We affirm the conclusion of the decision.

7. In the case before us, the assessee had undertaken to supply stones and chips and to stack the severed material on an approved site. The department had undertaken to supply the explosives for blasting for a price and even became entitled to charge 4 per cent of the cost of the explosives as storage charge. There was stipulation for payment of royalty to the forest department at

prevailing rates for working the quarry. The work in different stages was open to departmental inspection. There was no restriction on sale of chips and stones collected by the assessee from the quarry to others. Admittedly, the quarries upon which the assessee was permitted to work belonged to the State Government and he was allowed to appropriate the chips and stones extracted by him on payment of royalty at the stipulated rate.

8. The conditions in the contract make it clear that the assessee who was the owner of the goods sold the same for a price to the public works department and the sale price became exigible to tax. The view taken by the Additional Member that it amounted to a works contract was reached on a complete misconception of the legal position.

Our answer to the two questions referred are :

(i) On the facts and in the circumstances of the case, the transaction is a sale exigible to tax ; and

(ii) On the facts and in the circumstances of the case, the contract in question was not a works contract.

The assessee shall pay the costs of the revenue. Hearing fee is assessed at Rs. 250 (Two hundred and fifty).

K.B. Panda, J.

9. I agree.

P.K. Mohanti, J.

10. I agree.