
(1994) 07 SC CK 0016

In the Supreme Court Of India

Case No : Civil Appeal No"s. 2947-50 (NT) of 1977

State of Orissa

APPELLANT

Vs

Johrimal Gajanand

RESPONDENT

Date of Decision : 18-07-1994

Acts Referred:

Central Sales Tax Act, 1956 — Section 3
Orissa Sales Tax Act, 1947 — Section 2, 5(2)(A)

Citation : (1994) 4 JT 635 : (1994) 3 SCALE 377 : (1994) 6 SCC 57 : (1994) 95 STC 93

Hon'ble Judges : Kuldip Singh Singh, J;A. S. Anand, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. The Sales Tax Tribunal, Orissa (the Tribunal) stated a case and referred the following question for the opinion of the High Court:

Whether on the facts and in the circumstances of the case, the Member Sales Tax Tribunal is correct in holding that even sales in course of inter-State trade and commerce, can be sale inside the State if the goods are inside the State of Orissa, and whether his interpretation of the definition of "sale" as given in Section 3(g) of the Orissa Sales Tax Act, 1947 and the Explanation attached to the definition "sale" is correct?

The High Court answered the question in the affirmative and in favour of the assessee. These appeals by the State of Orissa are against the judgment of the High Court.

2. The respondent-assessee is a registered dealer under the Orissa Sales Tax Act, 1947, (the Act). The assessee purchased certain goods from a registered dealer on the basis of declaration furnished by it for resale of the purchased goods in the State of Orissa. The goods were however sold in the course of inter-State trade. The Sales Tax Officer came to the conclusion that the declaration furnished

by the assessee was violated and, as such, it became liable under the proviso to Section 5(2)(A)(a)(ii) of the Act. Against the assessment made, the respondent preferred appeals under the Act before the Assistant Commissioner of Sales Tax which were dismissed. The assessee thereafter preferred appeals before the Sales Tax Tribunal, Orissa. The Tribunal by its order dated March 2, 1973 annulled the assessment and directed the refund penalty, if paid. The Tribunal - at the instance of the appellant - referred the above quoted question for the opinion of the High Court.

3. Section 5(2)(a) of the Act, to the extent it is relevant reads as under:

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) the sale of any goods notified from time to time as tax free u/s 6 and of the packing materials, if any in respect of such goods;

(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 and 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.

"Sale" is defined in Section 2(g) of the Act" to mean as under:

...with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge and the words "buy" and "purchase" shall be construed accordingly;

Explanation: (a) A sale or purchase of goods shall be deemed to take place inside the State if the goods are within the State -

(i) in the case of specific or ascertained goods at the time the contract of sale is made, and

(ii) ...

(b) ...

4. The High Court answered the question in favour of the assessee on the following reasoning:

In this case there is no dispute that specific or ascertained goods were the subject-matter of sale because these goods were purchased from registered

dealers. There is no material on the record to show that the goods were not within the State of Orissa when the contract of sale was made. In the facts before us normally it should be presumed that the goods were actually within the State unless the Taxing Department established the contrary. Therefore, in view of the definition of "sale", it must be deemed that the sale took place within the State in regard to the goods.... Under the scheme of the Act, sales tax is leviable at a single point and a registered dealer at the point of sale is entitled to pass on the incidence of sales tax to the buyer. Where the buyer is a registered dealer, upon furnishing a declaration in terms of Section 5(2)(A)(a)(ii) of the Act he is entitled to exemption from payment of sales tax and the payment of tax is shifted and deferred to a point where the sale takes place in favour of a consumer, an unregistered dealer or is a transaction in respect of which no declaration has been furnished ever when the purchasing dealer is a registered dealer. Section 5(2)(A)(a)(ii) authorises a dealer to exclude from the "gross turnover" the 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. The proviso occurring in Section 5(2)(A)(a)(ii) requires the sale price of goods used by the purchasing dealer for the purposes other than those mentioned in his certificate of registration to be included in his taxable turnover. The assessee before us had purchased bin from registered dealers and had furnished declaration. It is not disputed that it was entitled to make such purchases free of tax on furnishing declarations. Its declaration contemplated that it would resale the goods so purchased in Orissa. As we have already found, the goods purchased by the assessee were as a fact resold in Orissa, but these sales, by application of the provisions of the Central Act became the first sale under the Central Act. It is true that the scheme under the Act collecting Orissa sales tax at the differed point has not worked out, but in the facts of the case it cannot be said that the assessee used the goods purchased by it for a purpose other than that specified in its certificate of registration which alone would attract the application of the Proviso under Which the additional demand has been raised. If the assessee as a fact resold the goods in Orissa, but on account of some supervening law that transaction is made taxable under some other Act and tax under the Orissa Sales Tax Act was not impossible, it would not amount to any violation of the declarations by the assessee. We agree with the contention raised on behalf of the assessee that the Proviso cannot be applied to a case of this type. In our opinion, the Tribunal came to the correct conclusion in the matter.

5. We are of the view that the High Court fell into patent error in holding that the sales in dispute were made by the assessee within the State of Orissa. It is not disputed that the said sales were in the course of inter-State trade. If the goods were to remain within the State of Orissa the sales could not be in the course of inter-State trade. To make a sale in the course of inter-state trade, it is necessary that the contract must envisage the completion of the sale as well as the movement of the goods to the other State in the course on inter-State trade. The very fact that the sales in dispute were the sales in the course of inter-State

trade, they could not be the sales within the State in terms of Section 2(g) of the Act. The Act provides for a single point levy and the tax is payable at one point or the other. When the assessee purchased the goods free of tax by giving an undertaking that the goods would be resold within the State of Orissa and subsequently violates the undertaking by selling the goods in the course of inter-State trade and commerce, the proviso to Section 5(2)(a)(ii) of the Act is directly attracted and the assessee is liable to pay tax. A sale cannot be inside Orissa and at the same time in the course of inter-State trade and commerce. In order that a sale or purchase might be inter-state, it was essential that there must be transport of goods from one State to another under the contract of sale or purchase. In *In Bengal Immunity Co. Ltd. v. State of Bihar* (1955) 2 SCR 603: AIR 1955 SC 661: (1955) 6 STC 446, occur the following observations which are apposite:

A sale could be said to be in the course of inter-State trade only if two conditions concur:

(1) A sale of goods, and (2) a transport of those goods from one State to another under the contract of sale. Unless both these conditions are satisfied, there can be no sale in the course of inter-State trade.

It is the admitted case of the assessee that the sales in question were the sales in the course of inter-state trade and if that is the position then the question of the same sales being the sales within the State did not arise.

6. We have, today, pronounced judgment in Civil Appeals Nos. 343-347 of 1987 titled] *Industrial Minerals & Metals and Anr. v. The Sales Tax Officer and Anr.*, wherein we have held that a sale in the course of the export of goods out of the territory of India cannot be a sale at the same time within the State of Orissa. On the same principles, a sale in the course of inter-State trade and commerce cannot be a sale within the State of Orissa.

7. There is, thus, patent violation of the undertaking given by the assessee. This Court in *Himatsingka Timber Co. Ltd. v. State of Orissa* (1966) 18 STC 235 dealing with Section 5(2)(A)(a)(ii) of the Act held as under-

The tax was always leviable on the first sale and it would have been so levied but for the certificate which was furnished by the company when making purchases from the local dealers. The certificate was that the sleepers and timber were for resale in Orissa and when that condition was not fulfilled, the tax became payable even u/s 5(2)(a)(ii) before the 1951 amendment.

8. In *Endupuri Narasimhan & Son v. State of Orissa and Ors.* (1961) 12 STC 282, certain sales to the petitioner therein were not included in the taxable turnover of the seller by reason of the registration certificate which the petitioner had obtained on a declaration that the goods were to be resold in Orissa. In violation of the declaration the petitioner sold the goods to dealers outside the State and he was taxed u/s 5(2)(a)(ii) of the Act. This Court held that the imposition of the

tax was not on the sales by the petitioner to person outside the State but on the purchases by him inside the State for which he gave an undertaking and violated the same by not selling the goods within the State of Orissa.

9. Even otherwise, the High Court was not justified in holding that the onus for proving that the goods at the time of the contract were not within the State of Orissa was on the sales tax authority. The assessee on purchase of the goods became liable to pay the tax but he did not do so because it was a sale from a registered dealer to a registered dealer. The assessee saved the tax and postponed the event by giving an undertaking that he would sell the goods within the State. True to the undertaking the onus to show that the goods were actually sold within the State of Orissa was on the assessee. In any case, a contract of sale by which the goods are sold and are to be transported from one State to another cannot be made a lever for the argument that though the sale is in the course of inter-State trade and commerce but nevertheless it is a sale within the State of Orissa u/s 2(g) of the Act.

10. Our answer to the question referred, therefore, on the facts and. 4h the circumstances of this case, is that the Member, Sales Tax Tribunal, was not correct in holding that even the sales in the course of inter-State trade and commerce can be sales inside the State if the goods were inside the State of Orissa and for coming to that conclusion, the Tribunal wrongly and illegally relied upon the definition of "sale" u/s 2(g) of the Act including the explanation therein.

11. We allow the appeals, set aside the judgment of the High Court. The appellant shall be entitled to costs which we assess as Rs. 5,000/- in each of the appeals.