

(1975) 09 OHC CK 0031

In the Orissa High Court

Case No : Special Jurisdiction Case No's. 135 and 136 of 1973

State of Orissa

APPELLANT

Vs

Kameswari Associated Rice Mills

RESPONDENT

Date of Decision : 26-09-1975

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 24(2)(b)

Citation : (1976) 42 CLT 98 : (1976) 42 CLT 93 : (1975) 36 STC 561

Hon'ble Judges : R.N. Misra, J;N.K. Das, J

Bench : Division Bench

Advocate : B.K. Mohanti, for the Respondent

Judgement

R.N. Misra, J.—Under orders of the court, made on an application of the State u/s 24(2)(b) of the Orissa Sales Tax Act (hereinafter referred to as the "Act"), the Member, Sales Tax Tribunal, has stated the case and referred the following question for opinion of the court:

Whether, in the facts and circumstances of the case, the supply of rice under the Orissa Rice Procurement (Levy) Order, 1964, would constitute sale for the purpose of taxation under the Central Sales Tax Act ?

2. The assessee-a rice mill-in terms of the provisions of the Orissa Rice Procurement (Levy) Order, 1964 (hereinafter referred to as the "Levy Order"), made certain sales to the Government of India and effected supplies of the same to different destinations as directed by the appropriate authority during the periods 1964-65 and 1965-66. In assessment proceedings under the Central Sales Tax Act, the assessee took the stand that the transactions were not "sales". The assessee's contention was rejected and estimates were made both on the price of rice as also the gunny bags at the prescribed rates. In the first appeal, the assessee reiterated its contention that under the Levy Order, there cannot be any sale. That contention was negatived and the assessments were upheld. Before the Tribunal, reliance was placed on a decision of this court in the case of

Bhagirath Agarwal and Brothers v. Sales Tax Officer, Ganjam I Circle (1971) 2 C.W.R. 795, where it was held that supplies under Levy Orders cannot be treated as sales. The Tribunal accordingly annulled the assessments.

3. The short question for determination is as to whether supplies effected in terms of the Levy Order constitute "sales". Clause 3 of the Levy Order provided:

Levy on rice.-(1) Every licensed miller shall sell to the purchase officer at the controlled price,-

(a) at the commencement of this Order, 50 per cent of the quantity of rice held in stock by him at such commencement; and

(b) beginning with such commencement and until such time as the purchase officer otherwise directs, 50 per cent of the total quantity of rice produced or manufactured by him in his rice mill every day.

(2) Every licensed dealer shall sell to the purchase officer at the controlled price,-

(a) at the commencement of this order, 50 per cent of the quantity of rice held in stock by him at such commencement; and

(b) beginning with such commencement and until such time as the purchase officer otherwise directs,-

(i) 50 per cent of the total quantity of rice got milled by him every day out of his stock of paddy ; and

(ii) 50 per cent of the total quantity of rice purchased or otherwise acquired by him for the purpose of sale from persons other than licensed millers or licensed dealers.

(3) ...

(4) ...

Undoubtedly the transactions in rice which has been subjected to sales tax were the sales effected under Clause 3 of the Levy Order. The assessee contended that the supplies made by it were not sales and, therefore, sales tax was not exigible. The Sales Tax Officer and the first appellate authority negatived the assessee's contention, but the Tribunal accepted the same on the basis of a decision of this court as referred to by it.

4. The question was examined by a Bench of this Court in the case of Union of India v. Sales Tax Officer, Balasore (1971) 1 C.W.R. 693. The learned Chief Justice, who delivered the judgment of the Division Bench, relying upon the decision in the case of Chhitter Mal Narain Das Vs. Commissioner of Sales Tax, , held that fifty per cent of the rice procured under the Levy Order which constituted compulsory acquisition would not be exigible to tax. The same question came up for examination before this court in the case of Bhagirath Agarwal and Brothers v. Sales Tax Officer, Ganjam I Circle (1971) 2 C.W.R. 795

and the same view was reiterated. In fact, the Tribunal has relied upon this decision for holding in favour of the assessee.

In *Chhitter Mal Narain Das Vs. Commissioner of Sales Tax*, a similar provision under the U.P. Wheat Procurement (Levy) Order, 1959, was being examined. A Bench of two learned Judges stated the legal position thus :

On the date of the commencement of the U.P. Wheat Procurement (Levy) Order, upon the licensed dealer was imposed a liability to deliver half the quantity of wheat on hand, and he had also to supply to the State Government 50 per cent of the quantity of wheat procured or purchased by him every day beginning with the date of commencement of the Order. If he failed to carry out the obligation he was liable to be penalised. To ensure that he carried out his obligation his premises were liable to be searched and his property sequestered. The Order ignored the volition of the dealer.

We are unable to hold that there was any contract between the asses-sees and the State pursuant to which the goods were sold within the meaning of the U.P. Sales Tax Act.

In the meantime on 1st November, 1971, a larger Bench of seven Judges in the case of *Salar Jung Sugar Mills Ltd. etc. Vs. State of Mysore and Others*, examined the question as to whether transactions under the Mysore Sugarcane (Regulation and Supply) (Munirabad) Order, 1965, amounted to "sale" exigible to sales tax. The larger Bench reviewed all the decisions relevant to the point in issue including the decision in *Chhitter Mal Narain Das Vs. Commissioner of Sales Tax*. The legal position was settled thus:

The Control Orders are to be kept in the forefront for appreciating the true character of transactions. It is apparent that the area is restricted. The parties are determined by the Order. The minimum price is fixed. The minimum quantity of supply is also regulated. These features do not complete the picture. The entire transaction indicates that the parties agree to buy and sell. The parties choose the terms of delivery. The parties have choice with regard to obtaining supply of a quantity higher than 95 per cent of the yield. The parties can stipulate for a price higher than the minimum. The parties can have terms for payment in advance as well as in cash. A grower may not cultivate and there may not be any yield. A factory may be closed or wound up and may not buy sugarcane. A factory can reject goods after inspection. The combination of all these features indicates that the parties entered into agreement with mutual assent and with volition for transfer of goods in consideration of price. Transactions of purchase and sale may be regulated by schemes and may be liable to restrictions as to the manner or mode of sale. Such restrictions may become necessary by reason of co-ordination between production and distribution in planning the economy of the country....

Yet, it was held that there was sufficient room for consensus and sales tax would be exigible.

5. According to Mr. Mohanti for the assessee, the larger Bench decision did not overrule the decision in *Chhitter Mal Narain Das Vs. Commissioner of Sales Tax*, . The provisions of the Control Order dealt with by the larger Bench were different from those of the U. P. Wheat Procurement (Levy) Order, the terms whereof are similar to those of the Rice Procurement (Levy) Order, which is material for the case before us. Therefore, Mr. Mohanti claims that the decision of the Supreme Court in *Chhitter Mal Narain Das Vs. Commissioner of Sales Tax*, is still a binding authority and, on that basis, the decision in this case must be in favour of the assessee. Mr. Mohanti also places reliance on the decision of the Supreme Court in the case of *State of Tamil Nadu etc. Vs. Cement Distributors Private Ltd. etc. etc.*, , delivered more than a year after the decision in *Salar Jung Sugar Mills Ltd. etc. Vs. State of Mysore and Others*, . It is contended that if *Chhitter Mal Narain Das Vs. Commissioner of Sales Tax*, had been overruled by the larger Bench decision in *Salar Jung Sugar Mills Ltd. etc. Vs. State of Mysore and Others*, , the same could not have been relied upon in the case of *State of Tamil Nadu etc. Vs. Cement Distributors Private Ltd. etc. etc.*, disposed of more than a year after. As we find, *Salar Jung Sugar Mills Ltd. etc. Vs. State of Mysore and Others*, was not at all referred to in the later decision of the Supreme Court and, therefore, it is difficult to accept the logic of Mr. Mohanti's contention.

6. We have now to consider two Bench decisions of this Court. The first one is the case of *Choudhury & Sons v. State of Orissa* [1973] 32 S.T.C. 271. The question for consideration was whether supplies made under the very Levy Order of 1964 amounted to "sale". Several cases of the Supreme Court were taken note of including that of *Chhitter Mal Narain Das Vs. Commissioner of Sales Tax*, . The reference was made to the decision of the larger Bench in *Salar Jung Sugar Mills Ltd. etc. Vs. State of Mysore and Others*, and the following observation in the latter decision was referred to:

(1) Statutory orders regulating supply and distribution of goods under Control Orders in a State did not absolutely impinge on the freedom to enter into contract. Delimiting areas for transactions or parties or denoting prices for transactions were all within the area of individual freedom of contract with limited choice ;

(2) Parties were certain and denned, the property in the goods was transferred from the grower to the factory (here from the licensee to the Joint Director of Food) and there was consideration for the transfer. The statutory orders required the parties to enter into agreements and the agreements contained intrinsic evidence that the growers agreed to sell and the factories agreed to buy. There was offer, inspection and appropriation of goods to the contract. The mutual consent was not merely implicit but was explicit. The transactions constituted "sales".

The Division Bench continued saying:

Chhitter Mal Narain Das Vs. Commissioner of Sales Tax, was referred to at page

258 of the report. It is true whether it was correctly decided or not has not been indicated, but the test that has ultimately been put in the latter case of the Supreme Court when applied to Chhitter Mal Narain Das Vs. Commissioner of Sales Tax, would clearly indicate that the conclusion of the earlier case is not correct. Considering the Procurement (Levy) Order and keeping in view the test indicated in Solar Jung Sugar Mills Ltd. v. State of Mysore [1970] 29 S.T.C. 246 (S.C.), we have no doubt in our mind that the conclusion reached in Chhitter Mal Narain Das Vs. Commissioner of Sales Tax, would not be appropriate and it can still be said that there was a sale. The view taken by the Tribunal that there was a sale, therefore, must stand.

The other Division Bench case of this Court is that Union of India v. Jagannathpur Rice Mill (1974) 40 C.L.T. 956. The very question directly came for consideration. The learned Chief Justice made an analysis of the provisions of the Procurement Order and apart from referring to the decision in Solar Jung's case [1972] 29 S.T.C. 240 (S.C.), also referred to the law of Contract by Cheshire and Fifoot, quoted a passage from the book by the learned authors and concluded :

The aforesaid passages clearly bring out the essential features of a contract in Control Orders into bold relief. The Control Order fixes various terms. With all the terms restricting the volition on the part of one party, if the other party chooses to accept the terms, then there may be a contract. As has been observed by the learned author in the underlined sentence, the only choice left to the individual is to accept or decline the transaction in toto.

As we have already observed, under the Levy Order there is room for exercise of volition in some sphere which was even taken notice of in Chit-tar Mai Narain Das v. Commissioner of Sales Tax [1970] 26 S.T.C. 344 (S.C.).

Reliance was placed by Mr. Das on State of Tamil Nadu etc. Vs. Cement Distributors Private Ltd. etc. etc., , dealing with the provisions of the Cement Control Order, 1958. This decision does not refer to Salar Jung Sugar Mills Ltd. etc. Vs. State of Mysore and Others, . We find nothing therein to take a contrary view.

To sum up, our conclusion is that under the Order, the contracting parties have some volition in certain spheres. The transaction between the plaintiff and the defendant is exigible to sales tax....

This Division Bench decision actually took the view that an earlier decision in Union of India v. Sales Tax Officer (1971) 1 C.W.R. 693 stood overruled in view of the law stated by the Supreme Court by the larger Bench [1972] 29 S.T.C. 240 (S.C.). In fact, if Bhagirath Agarwal's case (1971} 2 C.W.R. 795 had been brought to the notice of the Bench, the same conclusion as was reached with reference to Union of India v. Sales Tax Officer (1971) 1 C.W.R. 693 would have been reached. The decision relied upon by the Tribunal to come to its conclusion, therefore, would have been declared to be bad law.

7. Having given our anxious considerations to the submissions of Mr. Mohanti, we are not able to accept the same. We would accordingly answer the question referred to us by saying :

On the facts and in the circumstances of the case, the supply of rice under the Orissa Rice Procurement (Levy) Order, 1964, would constitute sale for the purpose of taxation under the Central Sales Tax Act. We make no direction for costs.

N.K. Das, J.

8. I agree.