

(1973) 03 OHC CK 0026

In the Orissa High Court

Case No : Special Jurisdiction Case No's. 79 to 83 of 1969

State of Orissa

APPELLANT

Vs

Utkal Distributors Private Ltd.

RESPONDENT

Date of Decision : 07-03-1973

Acts Referred:

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

Citation : (1974) 34 STC 347

Hon'ble Judges : G.K. Misra, C.J.; S. Acharya, J

Bench : Division Bench

Advocate : R.K. Mohapatra, Sales Tax, for the Appellant; A.B. Misra, for the Respondent

Judgement

G.K. Misra, C.J.—Messrs. Utkal Distributors Pvt. Ltd. (opposite party) were assessed to sales tax, with or without penalty, for the quarters ending 31st March, 1963, 30th June, 1963, 30th September, 1963, 31st December, 1963, and 30th June, 1964, on account of supplies of materials such as hard granite rubble stones, bond stones, etc. Against the orders of assessment, the opposite party preferred first appeals before the Assistant Commissioner, Sales Tax, Cuttack. The appeals were dismissed.

In second appeal, the Tribunal by a common judgment passed on 23rd December, 1968, allowed the appeals and annulled the assessment holding that the contract in question was a works contract. The Tribunal refused to take in additional evidence a letter dated 22nd June, 1965, from the Under Secretary to the Government of Orissa in the Revenue Department to the Revenue Divisional Commissioner, under Rule 61 of the Orissa Sales Tax Rules, 1947, though it admitted a letter dated 9th January, 1968, from the Executive Engineer, Salandi Dam Division, to the opposite party. Being aggrieved by the orders of the Tribunal annulling the assessment, the State of Orissa asked for a reference u/s 24(1) of the Orissa Sales Tax Act, 1947 (hereinafter to be referred to as the Act).

The Tribunal referred the following two questions to be answered by this court:

(1) Whether, on the facts and circumstances of the case, the Tribunal was right in accepting in evidence the letter dated 9th January, 1968, of the Executive Engineer, Salandi Irrigation Project, which was not produced before the assessing or the first appellate authority and which was specifically objected to on behalf of the applicant under Rule 61. of the Orissa Sales Tax Rules, 1947, in the course of hearing of the second appeal?

(2) 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?

2. Before us, the letter dated 22nd June, 1965, which was not accepted by the Tribunal was tiled, and the learned Advocate for the opposite party did not take any exception to the letter being looked into for determination of the point in issue. Similarly, the learned standing counsel did not take exception to the letter dated 9th January, 1968, which has been accepted by the Tribunal. In this view of the matter the first question would be answered in the positive, that is to say, the Tribunal was right in accepting in evidence under Rule 61 the letter dated 9th January, 1968.

3. The real question for consideration in these applications is, whether the supply of materials as per the terms of the agreement between the Public Works Department (P. W. D.) and the opposite party constitutes a "works contract" or a "sale" within the meaning of Section 2(g) of the Act.

4. A copy of the agreement was filed before us by the learned standing counsel for our consideration. It contains terms and conditions for the supply of metals and chips from Bajabati and Mandia (Pakhar) quarries to Expressway Organization by the opposite party. From the letter dated 22nd June, 1965, from the Revenue Department to the Revenue Divisional Commissioner it would be clear that Bajabati and Pakhar quarries originally belonged to Darpan Estate of Rani Umeswari Suthoo. After vesting of the estate, those quarries came under the ownership of the Government of Orissa in the Revenue Department who transferred them to the Public Works Department so that they would work out the quarries departmentally. As the quarries were not worked out departmentally and had been handed over to the contractors on realising royalty of Rs. 2 for one hundred cubic feet, the Revenue Department wanted to take back those quarries from the P. W. D. That question is not, however, relevant.

The letter merely highlights the fact that the quarries were transferred to the Public Works Department who allowed them to be worked out by the contractors on charging a small royalty. The letter dated 9th January, 1968, written by the Executive Engineer, Salandi Dam Division, to the opposite party does not relate to these quarries as would appear from the fact that the Executive Engineer mentioned therein that the quarries belonged to the Forest Department which fact is repelled by the letter dated 22nd June, 1965. This letter also does not throw any light on the true character of the impost.

5. The essential terms and conditions for the supply of metals and chips from

Bajabati and Mandia (Pakhar) quarries, relied upon by Mr. Misra and the learned standing counsel, may be extracted:

Terms and conditions: (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.

6. 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.

7. 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.

8. Not a single decision has been cited on either side which could throw light on this question. Section 2(g) of the Act, so far as relevant, runs thus:

2. (g) "Sale" means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration,....

One of the essential constituents of the definition of "sale" is "transfer of property in goods". If the impugned transaction is to be a sale, then the property in the materials must have been in the contractor who transferred the same to the P. W. D. If the contractor had been engaged only to work out the quarries by the P. W. D. who asked for the supply of materials, the question of payment of royalty to the owner would not arise. The contractor would merely extract the stones and the chips and supply them to the Express Highway. By charging royalty at the stipulated rate, however low it may be, a jural relationship of a licensor and licensee was created between the Public Works Department and the contractor. The title in the chips, therefore, vested in the contractor. Admittedly, those chips were supplied to the P. W. D. and there was a transfer of movable property. Hence the supply constituted a sale.

9. The third clause in the agreement, that the contractors are not allowed to sell any quarry produce to any private parties, does not detract from the aforesaid

conclusion. A similar term came up for construction before the Supreme Court in C.B. Gosain Vs. State of Orissa, At page 768, their Lordships observed thus:

Another clause provided that the appellant 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.

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

10. 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.

11. The learned standing counsel placed reliance on Seth Pamandas Sindhi v. State of Madhya Pradesh [1963] 14 S.T.C. 74, Mooljee Ramjee v. Deputy Commissioner, Commercial Taxes [1966] 17 S.T.C. 255, Muthurama Reddiar v. State of Madras [1968] 22 S.T.C. 174 and Sahaj Ram Rehandmal v. Commissioner of Sales Tax [1969] 23 S.T.C. 109.

Mr. Misra placed reliance on Commissioner of Sales Tax M.P. Vs. Purshottam Premji, M. Ponnuswamy Udayar v. Government of Madras [1968] 22 S.T.C. 208 and Calcutta Co. Ltd. v. Commissioner of Sales Tax [1964] 15 S.T.C. 554.

12. We now propose to discuss the authorities cited before us on either side.

13. In Seth Pamandas Sindhi v. State of Madhya Pradesh [1963] 14 S.T.C. 74, the facts were as follows:

The petitioner had taken several contracts for the supply of ballast to the railways. The Collectors of various districts gave leases of quarries to the petitioner in their districts for quarrying stones and sand. The petitioner extracted the material and sold it in the form of ballast to the railways as contracted. Their Lordships held that it was not as if the execution of any work was entrusted to the petitioner and in that execution the petitioner used the ballast. There was an agreement to sell the material, namely, ballast as such, and that being so, the supply of ballast could not but be regarded as a sale transaction.

The case was correctly decided, but it does not render any assistance for decision in this case. That was a simple case where the dealer took lease of the quarries and worked them out as his own and not as an agent of the railways.

14. The facts in Mooljee Ramjee v. Deputy Commissioner, Commercial Taxes [1966] 17 S.T.C. 255, were as follows:

The railways did not take out a licence for the quarrying. The assessee applied

to the State Government for a quarrying permit and that application was recommended by the railways. The rules of the State Government enabled an applicant for a quarrying permit to get a licence, free of charge for seignior age, if it is satisfied that the material quarried is to be used for the purpose of the Central Government. A permit for free quarrying was granted to the assessee subject to the condition that the quarried material was to be supplied to the railways. From these facts it is clear that when the assessee quarried jelly from the unassessed waste land belonging to the Government of Madras, the quarried jelly became the property of the assessee. The assessee could not be considered to be the agents of the railways for the purpose of the quarrying, and the transaction was held to be a sale.

This is also a simple case where the title vested in the assessee and there was transfer of title from the assessee to the railways. It does not lay down any principle for determination of the issue in this case.

15. In *Muthurama Reddiar v. State of Madras* [1968] 22 S.T.C. 174, the assessee entered into a contract with the Neyveli Lignite Corporation for the supply of pebbles of certain specifications collected from a site belonging to the Government and in respect of which the Corporation had obtained a licence for quarrying on payment of seigniorage fee. The contract specified the consideration payable to the assessee as a certain sum per 100 cubic feet of pebbles supplied. The contract stipulated that the assessee should pay the requisite seigniorage fee of thirty naye paise per unit of 100 c. ft. payable to the Government and that fee would be recovered from the assessee's bills for the quantity of pebbles collected and supplied by him.

Their Lordships held that the transaction between the assessee and the Corporation was a sale as there was a specific stipulation for recovery from the assessee's bills of the seigniorage fee which the Corporation was liable to pay to the Government, the pebbles when removed from the earth became the property of the assessee, and were delivered to the Corporation at the agreed site as the property of the assessee.

This decision in principle supports the contention of the learned standing counsel; but the correctness of this decision is open to doubt in view of the pronouncement of the Supreme Court in *Commissioner of Sales Tax v. Putshottam Premji* [1970] 26 S.T.C. 38 at 41 (S.C.), wherein their Lordships explained such payment as being one by way of arrangement. In *Commissioner of Sales Tax v. Purshottam Premji* [1970] 26 S.T.C. 38 at 41 (S.C.), their Lordships observed thus:

The fact that the railway had provided in the agreement that the assessee shall pay the royalty due to the State Government does not in any manner detract from the legal position that the railway was the owner of the quarry. It is merely an arrangement for the payment of a royalty.

On the construction given by the Supreme Court on such tripartite agreement,

the correctness of the decision in *Muthurama Reddiar v. State of Madras* [1968] 22 S.T.C. 174 is open to doubt.

16. In *Sahaj Ram Rehandmal v. Commissioner of Sales Tax* [1969] 23 S.T.C. 109, the facts were as follows:

The ballast and boulder were collected by the dealer from the riverbed upon payment of royalty by him to the forest department. Permission for collecting ballast and boulders from the river-bed was secured by the dealer although the railway intervened in enabling it in securing the permission. The royalty paid by the dealer was not defrayed by the railway. The ballast and the boulders were prepared in accordance with the size and specifications required by the railway, and were supplied by the petitioner (dealer) at specified railway siding. The boulders in the river-bed were the property of the forest department initially. In these circumstances, it was held that there was a sale of the ballast and the boulders by the dealer to the railways.

This case supports the contention of the revenue that on payment of royalty the dealer became the owner of the property, and on transfer of the same to the railways, there was a sale.

17. In *Calcutta Co. Ltd. v. Commissioner of Sales Tax* [1964] 15 S.T.C. 554, the *Calcutta Co. Ltd.*, the petitioner in that case, entered into an agreement with the *Bhilai Steel Project* for the supply of sand to the Project from a riverbed. The agreement provided, inter alia, that the petitioner had to collect and supply sand from the river-bed in accordance with the specifications laid down therein, transport it to the Project at the Auxiliary Plant site and stack it in the bins. The petitioner was to pay all quarry fees, royalties, octroi duties and ground rent. Under the terms of the quarry lease, which the Project held from the Government, the Project was the lessee of the river-bed. The Project had the right to extract sand and dispose of it at its own will and pleasure and had to pay rent and royalty at the rates mentioned therein, but could not assign or sub-let the lands or part thereof without the previous written sanction of the lessor.

In the circumstances, the High Court of Madhya Pradesh rightly held that the supply of sand by the petitioner to the Project did not constitute sale, and was a works contract. This case renders no help to the contention of the opposite party that it did not acquire title to the chips and stones on payment of royalty.

18. The last case on which reliance was placed by Mr. Misra is an unreported decision of this court in S. J. C. Nos. 53 to 63 of 1968 (*Calcutta Co. Ltd. v. State of Orissa*) disposed of by this very Bench on 27th October, 1971. In this case the dealer undertook job-work for operating quarries and breaking stones into chips. It entered into a contract with the *Hindustan Steel Ltd.* in 1956 for quarrying and extracting stones and for delivering stone aggregates according to specification. The quarry had been taken on lease by the *Hindustan Steel Ltd.* on payment of royalty to the State of Orissa. Initially, the petitioner was paying royalty to the *Hindustan Steel Ltd.*, but the original contract was amended subsequently and

the agreement was that the Hindustan Steel Ltd. will pay royalty to the State of Orissa.

In those circumstances, it was held that the supply by the assessee to the Hindustan Steel Ltd. did not constitute sale.

The facts of this case "re analogous to those in Commissioner of Sales Tax M.P. Vs. Purshottam Premji, and the identical principle was followed.

19. 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.

20. The meaning of the word "royalty" was considered in Surajdin Laxmanlal Vs. State of M.P. and Others, . 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 and Anr. AIR 19156 Raj. 161 and Sethi Marble Stone Industries and Others Vs. The 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.

21. We would accordingly answer the second question by saying that the supply under the contract in question constituted sale.

The references are accordingly answered. There would be no order as to costs.

S. Acharya, J.

I agree.