

(1970) 09 P&H CK 0024

In the Punjab And Haryana At Chandigarh

Case No : Letters Patent Appeal No. 56-A of 1967

The Excise and Taxation Officer (Assessing Authority) and
Another

APPELLANT

Vs

Jaswant Singh

RESPONDENT

Date of Decision : 09-09-1970

Acts Referred:

East Punjab Control of Bricks Supplies Act, 1949 — Section 3

Citation : (1971) 27 STC 582

Hon'ble Judges : Harbans Singh, C.J; Prem Chand Jain, J

Bench : Division Bench

Advocate : R.N. Mittal, for A.G, for the Appellant; Siri Chand Goyal, for the Respondent

Final Decision : Allowed

Judgement

1. This order of ours would dispose of Letters Patent Appeals Nos. 56-A and 57 of 1967, which have been filed under Clause 10 of the Letters Patent, by the Excise and Taxation Officer and the State of Punjab, against the judgment and order of a learned Single Judge of this court by which the writ petitions filed by the respondents were allowed and the assessment orders were quashed, as common questions of law and fact arise in both these appeals.

2. On the admitted facts, the short question that arises for consideration in these appeals is whether the supplies of bricks to the named persons in specified quantities against permits issued by the District Food and Supplies Controller, Hissar, and the Block Development Officer, Dabwali, constitute sales and are liable to sales tax. The learned Single Judge relying on the decision of the Supreme Court in New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar, , upheld the pleas of the respondents and held that such supplies did not constitute sales and were not liable to assessment.

3. After hearing the learned counsel for the parties, we are of the view that these

appeals deserve to be allowed.

4. The learned Single Judge while deciding the matter in favour of the respondents, relied on the decision of the Supreme Court in *M/s. New India Sugar Mills Ltd.*'s case. The facts as found by the High Court and accepted by their Lordships of the Supreme Court are found at "page 1210 of the report and read as under:

The admitted course of dealing between the parties was that the Government of various consuming States used to intimate to the Sugar Controller of India from time to time their requirement of sugar, and similarly the factory owners used to send to the Sugar Controller of India statements of stock of sugar held by them. On a consideration of the requisitions received from the various State Governments and also the statements of stock received from the various factories, the Sugar Controller used to make allotments. The allotment order was addressed by the Sugar Controller to the factory owner, directing him to supply sugar to the State Government in question in accordance with the despatch instructions received from the competent officer of the State Government. A copy of the allotment order was simultaneously sent to the State Government concerned, on receipt of which the competent authority of the State Government sent to the factory concerned detailed instructions about the destinations to which the sugar was to be despatched as also the quantities of sugar to be despatched to each place. In the case of the Madras Government it is admitted that it also laid down the procedure of payment, and the direction was that the draft should be sent to the State Bank and it should be drawn on Parry and Company or any other party which had been appointed as stockist importer on behalf of the Madras Government.

5. It was on the basis of the above-mentioned facts that their Lordships of the Supreme Court came to the conclusion that there was no room for mutual assent in those transactions; but in our opinion the facts of the cases in hand are materially different from the facts of that case and the ratio of that decision does not apply to the facts of these appeals.

6. It is common ground that the sales tax which has been assessed related to the supply of bricks which had been made by the respondent-firm to various consumers who obtained permits for the supply of such bricks under the Punjab Control of Bricks Supplies Order, 1956, (hereinafter referred to as the Control Order) which had been issued u/s 3 of the East Punjab Control of Bricks Supplies Act, 1949 (hereinafter referred to as the Act). Under this Order, no manufacturer or dealer can manufacture or sell or offer to store for sale bricks except under and in accordance with the conditions of a licence granted under the Control Order. Under Clause 9, no person shall purchase or sell or offer to sell or supply any bricks save against a permit issued by the Director or the District Magistrate and subject to all the conditions laid in such permit. Clause 10 lays down that no person shall purchase or sell bricks at a price higher than that which may be fixed by the Director or the District Magistrate. Clause 11 prescribes that no

manufacturer or dealer shall act in contravention of any directions issued by the Director or the District Magistrate. The application for the grant of a permit for the purchase of bricks has to be made to the District Magistrate in form "C" appended to the Control Order, as provided by Clause 12. Clause 14 prohibits the consumer from varying or altering the contents of the permit under the Control Order. Clauses 15 onwards make provisions for ensuring that a manufacturer or dealer of bricks complies with the provisions contained in the Control Order.

7. Considering the provisions of the Control Order referred to above, it cannot be held that the dealings in question were controlled at every stage leaving no room for consensus. From the perusal of the provisions of the Control Order all that could be gathered is that the Director or the District Magistrate may fix the base price of the bricks and determine buyers. So far as other matters are concerned, the parties are free to decide their own terms by consent. It was not disputed by Mr. Siri Chand Goyal, learned counsel, that the brick-kiln owner was not bound to supply the bricks immediately on the presentation of the permit and that it was open to him to agree with his customers as to the date on which the bricks were to be supplied and also the place of delivery. It is also an undisputed fact that the brick-kiln owner is well within his rights to fix the time and mode of payment. In certain cases, the customer may purchase the bricks only and may make his own arrangement for carrying them while in other cases the customer may like the delivery to be given at a particular place and for that purpose the brick-kiln owner and the customer shall decide mutually as to what arrangements have to be made. Transport of bricks and its charges, from one place to another, is dependent on the mutual agreement of the parties. Thus it would not be correct to say that the transactions between the assessee-respondent and the customers were completely controlled and regulated by the Director or the District Magistrate, that is, the authority constituted under the Control Order. The view we have taken is fully supported by a recent decision of the Supreme Court in *Indian Steel and Wire Products Ltd. Vs. State of Madras*, . The facts of that case were almost identical to the ones we have in these cases and somewhat similar provisions of a Control Order were being interpreted. In that case also the pleas of the appellant (*Indian Steel and Wire Products Ltd.*) were that the steel products were supplied in pursuance of the Iron and Steel (Control of Production and Distribution) Order, 1941, which was issued under the Defence of India Act, 1939, and that it was the Controller who determined the persons to whom the goods were to be supplied, the price at which they were to be supplied, the manner in which they were to be transported and the mode in which the payment of the price was to be made. Their Lordships, after considering the provisions of the Steel Control Order and other material placed before them, held that:

From the material on record it is not possible to accept the contention of Mr. S.R. Banerjee, learned counsel for the appellant that the dealings in question were controlled at every stage, leaving no room for consensus. From the records before us all that could be gathered is that the Controller fixed the base price of

the steel products and determined the buyers. In other respects, the parties were free to decide their own terms by consent. As seen from the correspondence referred to earlier, the Controller allowed the appellant to supply the goods ordered either in the first quarter of the year 1953 or subsequently. In other words, the appellant could supply the goods in question at its convenience. It was open to the appellant to agree with its customers as to the date on which the goods were to be supplied. From the works order dated February 23, 1953, a copy of which was sent to one of the appellant's customers, it is clear that all orders booked were subject to the appellant's terms of business and general understanding in force at the time of booking the orders and despatch of goods. It was also open to the appellant to fix the time and mode of payment of the price of the goods supplied. Therefore it would not be correct to contend that the transactions were completely regulated and controlled by the Controller leaving no room for mutual assent.

* * * * It is true that in view of the order, the area within which there can be bargaining between a prospective buyer and an intending seller of steel products, is greatly reduced. Both of them have to conform to the requirements of the order and to comply with the terms and conditions contained in the order of the Controller. Therefore, they could negotiate only in respect of matters not controlled by the order or prescribed by the Controller. It is true, in these circumstances, the doctrine of laissez-faire can have only a limited application. That is naturally so. In certain quarters the validity of that doctrine is seriously challenged. Under the existing economic compulsions--all essential goods being in short supply--in a welfare State like ours, social control of many of our economic activities is inevitable. That does not mean that there is no freedom to contract. The concept of freedom of contract has undergone a great deal of change even in those countries where it was considered as one of the basic economic requirements of a democratic life. Full freedom to contract was never there at any time. Law invariably imposed some restrictions on freedom to contract. But due to change in political outlook and as a result of economic compulsions, the freedom to contract is now being confined gradually to narrower and narrower limits. This aspect is vividly brought out in the "Law of Contract" by Cheshire and Fifoot (6th edition) at page 23. Dealing with the question of freedom to contract, the learned author observes:

As the nineteenth century waned it became ever clearer that private enterprise predicated some degree of economic equality if it was to operate without injustice. The very freedom to contract with its corollary, the freedom to compete, was merging into the freedom to combine; and in the last resort competition and combination were incompatible. Individualism was yielding to monopoly, where strange things might well be done in the name of liberty. The twentieth century has seen its progressive erosion on the one hand by opposed theory and on the other by conflicting practice. The background of the law, social, political and economic, has changed. Laissez-faire as an ideal has been supplanted by "social security" ; and social security suggests status rather than

contract. The State may thus compel persons to make contracts, as where, by a series of Road Traffic Acts from 1930 to 1960, a motorist must insure against third-party risks ; it may, as by the Rent Restriction Acts, prevent one party to a contract from enforcing his rights under it; or it may empower a Tribunal either to reduce or to increase the rent payable under a lease. In many instances a statute prescribes the contents of the contract. The Money-lenders Act, 1927, dictates the terms of any loan caught by its provisions. The Carriage of Goods by Sea Act, 1924, contains six pages of rules to be incorporated in every contract for "the carriage of goods by sea from any port in Great Britain or Northern Ireland to any other port" ; the Hire-Purchase Act, 1938, inserts into hire-purchase contracts a number of terms which the parties are forbidden to exclude ; successive Landlord and Tenant Acts from 1927 to 1954 contain provisions expressed to apply "notwithstanding any agreement to the contrary.

8. It would be incorrect to contend that because law imposes some restrictions on freedom to contract, there is no contract at all. So long as mutual assent is not completely excluded in any dealing, in law it is a contract. On the facts of this case for the reasons already mentioned, it is not possible to accept the contention of the learned counsel for the appellant that nothing was left to be decided by mutual assent. On the other hand, we agree with the learned Advocate-General of Madras and Mr. Setalvad who appeared for the State of West Bengal, the intervener, that the Controller's directions were confined to narrow limits and there were several matters which the parties could decide by mutual assent.

9. In this very decision their Lordships have also enumerated four elements the presence of which constitutes a valid sale, viz., (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 the cases in hand, elements (1), (3) and (4) are undisputedly present. So far as element (2) of mutual assent is concerned, that too, in view of the reasons given in the earlier part of our judgment, is present. It may be observed that the earlier decision in *New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar*, was cited before their Lordships who, after narrating the facts of that case, observed:

On the basis of those facts, the court came to the conclusion that there was no room for mutual assent in those transactions. The facts of the present case are materially different from the facts of that case. Hence the ratio of that decision does not apply to the facts of the present case. Whether in a given case there was mutual assent or not is a matter to be decided on the facts of that case.

10. Thus following the law laid down by their Lordships of the Supreme Court in *Indian Steel and Wire Products Ltd. Vs. State of Madras*, , we hold that the transactions with which we are concerned herein, are sales.

11. For the reasons recorded above, we allow these appeals, set aside the

judgment and order of the learned Single Judge and dismiss the writ petitions filed by the respondents. In the circumstances of the case we make no order as to costs.