
(1960) 09 MP CK 0019

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 34 of 1959

The Nimar Cotton Press

APPELLANT

Vs

Sales Tax Officer and Another

RESPONDENT

Date of Decision : 26-09-1960

Acts Referred:

Central Provinces and Berar Sales Tax Act, 1947 — Section 2, 4

Citation : AIR 1961 MP 88 : (1960) JLJ 1090 : (1961) 6 MPLJ 84 : (1961) 12 STC 313

Hon'ble Judges : P.V. Dixit, C.J.; V.R. Nevaskar, J.; K.L. Pandey, J

Bench : Full Bench

Advocate : R.S. Dabir and V.S. Dabir, for the Appellant; M. Adhikari, General and H.L. Khaskalam, Asst. Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Dixit, C.J.

By this application under Article 226 of the Constitution of India, the petitioner seeks a writ of certiorari for quashing an order of assessment of the Sales Tax Officer, Khandwa, imposing on him sales-tax of Rs. 1291-3-0 and a penalty of Rs. 800/- for his failure to apply for registration under the Central Provinces and Berar Sales Tax Act, 1947. The assessment was made in the following circumstances.

The petitioner is the proprietor of a cotton pressing concern at Khandwa. The business of the concern consists in pressing and baling ginned cotton supplied by merchants. The cotton is delivered by the petitioner to his clients in bales covered with hessian cloth and secured by iron hoops. The petitioner charged an inclusive rate for pressing and for packing. The Sales Tax Officer held that the applicant was liable to pay sales-tax on the value of hessian cloth and iron hoops used in the baling process and accordingly made an assessment of sales-tax for the period from 1st September 1956 to 31st August 1957.

He relied on the decision of a Division Bench of this Court in Jaikishan Gopikishan Vs. Commissioner, Sales-tax, where it was held with reference to the Madhya Bharat Sales Tax Act, 1950, that the owner of a ginning and pressing factory carrying on the business of baling and pressing cotton supplied by the customer and of delivering the pressed cotton in the form of bales covered with hessian cloth and secured by iron hoops, and making a consolidated charge for the pressing as well as packing was liable to pay sales tax on the value of hessian and iron hoops used in the baling process as these materials were goods and there was a sale in regard to them when the assessee transferred the property in those goods to the customers for consideration.

The Sales Tax Officer determined the value of hessian cloth and iron hoops by adding ten per cent as "reasonable margin profit" to the price paid by the assessee for the purchase of hessian and hoops. He found the purchase price paid by the assessee was Rs. 38,736/- and after making the ten per cent addition determined the sale price of hessian and hoops used in the baling process at Rs. 42,610/-.

The present petition is founded mainly on the ground that the decision in Jaikishan Gopikishan Vs. Commissioner, Sales-tax, was contrary to the later decisions of the Supreme Court in The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., , and Pandit Banarsi Das Bhanot Vs. The State of Madhya Pradesh and Others, ; that the Sales Tax Officer should have held on the authority of the Supreme Court decisions that the transaction of the supply of ginned cotton by merchants to the petitioner for pressing and baling and of the delivery by the petitioner to the merchants of the pressed cotton in the form of bales was a works contract; that in the absence of an agreement between the petitioner and the merchant concerned with regard to the sale and purchase of hessian and iron hoops it could not be held that there was a sale of this material in the transaction; that, therefore, the petitioner was not liable to pay any sales-tax on the value of hessian and iron hoops used by him in the baling process; and that such an agreement could not be inferred merely by the circumstance that a consolidated charge was made for pressing and packing.

When this petition first came up for hearing before a Division Bench, Shri Dabir, learned counsel for the assessee, urged that the decision in the case of Jaikishan Gopikishan Vs. Commissioner, Sales-tax, required reconsideration in the light of the judgments of the Supreme Court in the two cases referred to above. The Division Bench thought it desirable that the present case should be heard by a larger Bench as the argument advanced by the learned counsel raised various important questions, one of them being whether the authority of Jaikishan Gopikishan Vs. Commissioner, Sales-tax, was in any way weakened or destroyed altogether in its application to the present case because of the two decisions of the Supreme Court. Accordingly the matter has come up before us.

Before us, Shri Dabir, learned counsel for the assessee, basing himself solely on the two Supreme Court decisions, submitted that the contracts which the

petitioner entered with his customers for pressing and baling the cotton supplied by them and of delivering the pressed cotton in the form of bales covered by hessian cloth and secured by iron hoops were works contracts; that unless there was an agreement between the petitioner and the customer with regard to the sale of iron hoops and hessian cloth it could not be held that there was a sale of this material used in the baling process; and that the passing of property in iron hoops and hessian cloth was merely ancillary to the contract for performance of work.

While opposing the petition, learned Advocate-General said that if the applicant was in any way aggrieved by the assessment order he had an alternative remedy by way of an appeal and revision under Sections 22 and 22-A of the Act; that the petitioner had in fact filed an appeal against the assessment order which was pending; that even if it be held that the applicant was liable to pay sales tax on hessian and iron hoops only if there was a contract for the sale of this material, it would be open to the Department to urge before the appellate authority that inasmuch as the Sales Tax Officer decided the matter solely on the basis of 1957 MPC 94: 1957 8 STC 286: ((S) AIR 1957 M P 40) (supra), and on the circumstance of a consolidated charge without making any investigation into the question of fact about the existence of an agreement for the sale and purchase of hessian and iron hoops, the case should be remitted to the Sales Tax Officer for an investigation into, and a finding of fact about, the existence of such an agreement. It was said that in these circumstances the petition should be dismissed.

In our judgment, the objections raised by the learned Advocate-General must prevail. But the rejection of the petition on those objections does not relieve us of the duty of expressing an opinion on the tenability of the view taken in 1957 MPC 94: 1957 8 STC 286: ((S) AIR 1957 M P 40) (supra), in the light of what has been said by the Supreme Court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, and *Pandit Banarsi Das Bhanot Vs. The State of Madhya Pradesh and Others*, . It is necessary to do so for the guidance of the appellate, authority.

In order to determine the validity of the contention of the learned counsel for the asses-see that the authority of the decision in *Jaikishan Gopikishan Vs. Commissioner, Sales-tax*, , if not destroyed altogether, is, considerably weakened as a result of the decisions of the Supreme Court, it is first necessary to examine the two Supreme Court decisions.

In *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, the Supreme Court considered the validity of the provisions of the Madras General Sales Tax Act, 1939, in regard to works contract as amended in 1947. The word "sale" as defined in Section 2(h) of that Act included a transfer of property in goods involved in the execution of a works contract. The expression "works contract" was also defined in Section 2(ii) of that Act as meaning any agreement for carrying out for cash or for deferred payment or other valuable consideration,

the construction, fitting out, improvement or repair of any building, road, bridge or other immovable property or the fitting out, improvement or repair of any immovable property.

The definition of "turnover" given in the Act provided that the "amount for which goods are sold shall, in relation to a works contract, be deemed to be the amount payable to the dealer for carrying out such contract" after excluding, according to the rules prescribed, such amount as representing costs of labour. The Supreme Court held that a power to enact a law with respect to tax on sale of goods under Entry 48 must, to be intra vires, be one relating to the act of selling the goods, and that the Legislature cannot in the purported exercise of its power to tax sales, tax transactions which are not sales by merely enacting that they shall be deemed to be sales.

Accordingly the Supreme Court held that the provisions of the Madras Act, so far as they purported to tax works contract on the basis of a notional sale, were ultra vires. It must be remembered that the Supreme Court only negatived the power of the State to tax a works contract as such. That the levy of sales tax on a works contract, if it includes sale of goods, would be proper, is clear from several passages in the judgment of the Supreme Court in AIR 1958 SG 560 (supra).

The works contract considered by the Supreme Court related to the construction of a building and the question was whether the value of certain material used by the assessee in the execution of the building contract was liable to sales tax on the basis that the material was sold by the assessee to the party who had employed the contractor for the construction of a building on his own land. The agreement between the parties in the case before the Supreme Court was that the contractor should construct a building according to the specifications contained in the agreement and in consideration thereof receive payment as provided therein. While dealing with such an agreement, the Supreme Court first pointed out the essentials of "sale". Venkatarama Aiyar, J., delivering the judgment of that Court said:

"Thus, according to the law both of England and of India, in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods which of course presupposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale. Thus, if merely title to the goods passes but not as a result of any contract between the parties, express or implied, there is no sale. So also if the consideration for the transfer was not money but other valuable consideration, it may then be exchange or barter but not a sale. And if under the contract of sale, title to the goods has not passed, then there is an agreement to sell and not a completed sale."

In paragraph 33 of the judgment it was emphasised by the Supreme Court that it

is of the essence of the concept of a transaction of sale that both the agreement and the sale should relate to the same subject-matter and that on the true interpretation of the expression "sale of goods" there must be an agreement between the parties for the sale of the very goods in which eventually property passes.

These observations of the Supreme Court make it clear that a contract of sale is not constituted merely by reason that the property in materials is transferred to the customer. In addition to the transfer of property in the material, there must be an express or implied agreement between the parties for the sale of the material qua material. In the building contract, which the Supreme Court considered, no such express or implied agreement for the sale of materials was present.

Venkatarama Aiyar, J., expressed the view that in a building contract, where the agreement between the parties is that the contractor should construct a building according to the specifications contained in the agreement and in consideration therefore receive payment, there is neither a contract to sell the materials used in the construction nor does the property pass (herein as movables, and that, therefore, it is impossible to maintain that there is implicit in a building contract a sale of materials as understood in law. The building contract in the case before the Supreme Court was regarded as single and indivisible. On the question of the splitting up of a building contract, the Supreme Court said:

"Another difficulty in the way of accepting the contention of the appellant as to splitting up a building contract is that the property in materials used therein does not pass to the other party to the contract as movable property. It would so pass if that was the agreement between the parties. But if there was no such agreement and the contract was only to construct a building, then the materials used therein would become the property of the other party to the contract only on the theory of accretion. The position is thus stated by Blackburn, J. in (1867) 2 CP 651, *Appleby v. Myers*:

"It is quite true that materials worked by one into the property of another become part of that property. This is equally true, whether it be fixed or movable property. Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship under repair, become part of the coat or tile ship. When the work to be executed is, as in the present case, a house, the construction imbedded on the land becomes an accretion to it on the principle *quicquid plantatur solo, solo cedit*, and it vests in the other party not as a result of the contract but as the owner of the land."

The Supreme Court thus stated that when the work to be executed is a building, construction imbedded on the land becomes an accretion to it and it vests in the other party not as a result of the contract of construction but as the owner of the land, and accordingly there can be no question of title to the materials passing as movable in favour of the other party to the contract.

The Supreme Court, however, made it clear that even in regard to building contracts there may be an agreement to pass ownership in materials as materials or qua materials for an agreed price. This is clear from the following observations in paragraph 45 of the judgment of the Supreme Court:

"It may be, as was suggested by Mr. Shastri for the respondents, that when the thing to be produced under the contract is movable property, then any material incorporated into it might pass as movable, and in such a case the conclusion that no taxable sale will result from the disintegration of the contract can be rested only on the ground that there was no agreement to sell the materials as such. But we are concerned here with a building contract, and in the case of such a contract the theory that it can be broken up into its component parts and as regards one of them it can be said that there is a sale, must fail both on the grounds that there is no agreement to sell materials as such, and that property in them does not pass as movables."

To the same effect are the observations in *Pandit Banarsi Das Bhanot Vs. The State of Madhya Pradesh and Others*, . In *Pandit Banarsi Das Bhanot Vs. The State of Madhya Pradesh and Others*, , Venkatarama Aiyar, J., said:

"Mr. B. Sen appearing for the respondents has argued that even if the expression "sale of goods" in Entry 48 is construed in the sense which it has in the Sale of Goods Act that might render the impugned provisions of the Act ultra vires only in respect of a building contract which is One and indivisible, that there might be contracts which might consist of two distinct agreements, one for the sale of materials and another for work and labour, and that in such a case, it would be competent to the State to impose tax on the sale of materials even construing that word in its narrow sense, and that these are matters which must be left to be investigated by the appropriate authorities. That undoubtedly is the correct legal position as observed in Civil Appeal No. 210 of 1956: (AIR 1958 SG 560), and accordingly, when a question arises as to whether a particular works contract could be charged to sales tax, it will be for the authorities under the Act to determine whether the agreement in question is, On its true construction, a combination of an agreement to sell and an agreement to work, and if they come to the conclusion that such is its character, then it will be open to them to proceed against that part of it which is a contract for the sale of goods, and impose tax thereon."

The principles laid down in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, , were followed in the case of *Pandit Banarsi Das Bhanot Vs. The State of Madhya Pradesh and Others*, . In both these cases it was made abundantly clear that the judgments in those cases had reference to works contracts which were entire and indivisible. In paragraph 48 of the judgment in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, , it has been observed:

"To avoid misconception, it must be stated that the above conclusion has

reference to works contracts, which are entire and indivisible..... It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment."

So also in paragraph 12 of the judgment in the case of Pandit Banarsi Das Bhanot Vs. The State of Madhya Pradesh and Others, , it has been said that the prohibition against imposition of tax is only in respect of contracts which are single and indivisible and not of contracts which are a combination of distinct contracts for sale of materials and for work and that nothing said in the judgment shall bar the sales tax authorities from deciding whether a particular contract falls within one category Or the other and imposing a tax on the agreement of sale of materials, where the contract belongs to the latter category.

The Supreme Court decisions, therefore, do not lend any support to the contention that in a contract for work, labour and materials sales tax can never be imposed on the value of the material employed in the execution of the contract. The question whether the material used in the course of carrying out a works contract is liable to sales tax depends on the existence of an express or implied agreement between the parties for the transfer of the material qua material and on proof of an intention to sell the material as such. Even in a building contract or in a contract where materials worked by one into the property of another become part of that property, there can be an agreement to sell materials as such, and if there is such an express or implied agreement, then the materials can be treated as sold separatim and assessed to sales tax.

The decision in Jaikishan Gopikishan Vs. Commissioner, Sales-tax, , was not with reference to any building contract. It related to a contract for the pressing of cotton supplied by the customers and delivery of the pressed cotton in bales covered with gunny cloth and secured by iron hoops. The ginning and pressing factory charged to its constituents a consolidated rate for pressing as well as for the iron hoops and hessian coverings. Now, so far as the supply of cotton by the customer to the ginning and pressing factory for being pressed and the delivery of the pressed cotton to the customer was concerned, there was only a bailment and not a transfer of property for value.

The cotton belonged to the customer and was delivered to him in a pressed form. The ""pressing part" of the contract was one of execution of work on the cotton. The hessian cloth and iron hoops which were used for packing were not in any way materials "worked into" the cotton, and there was no question of iron hoops and hessian cloth vesting by accession in the owner of the cotton. The packing material remained extraneous. It must be remembered that in the process of pressing cotton, the packing material is not necessary as an incident of pressing.

It is not an accessory to the work of pressing. When cotton is ginned, that is, separated from its seeds, it is in a very loose condition. In that state it cannot be easily dealt with for the purpose of trade, manufacture or transport. It has, therefore, to be pressed into bales. The compressing is not done by the hessian cloth or the iron hoops, but by a machine worked by mechanical or hydraulic power which exerts great and steady pressure on the ginned cotton in a cast and thus compresses it into bales.

The packing material is for convenience of transport and to prevent the bales from being "unloosened" during the course of handling. The necessity of packing compressed cotton varies with the factor of transport and the time within which the pressed cotton is to be spun and used for manufacture in the textile mills. If the pressed cotton is to be taken immediately to an adjoining textile mill and used for manufacture, it may be wholly unnecessary to use any packing material.

The necessity would be great if the pressed bales are to be transported over long distances or to overseas. Therefore a contract for pressing cotton and delivery of the compressed cotton in a certain kind of packing is really divisible into two distinct contracts: (i) one of labour and work, namely, the pressing of the cotton, and (ii) the other of packing the compressed cotton which is partly of material and of labour. In the "packing part" of the contract, the substance of the agreement is not the skill and labour but it is the material.

It is thus clear that even in the absence of an express agreement for the sale of packing material as such there would be a sale of the material for in a contract of pressing cotton and delivery of compressed cotton in bales covered with hessian cloth and iron hoops for a consolidated charge of pressing and packing, it is implicit that there would be a sale of the packing material and the parties are impliedly *ad idem* on the passing of the property in the material *qua* material and the addition of its price to the pressing charges. If the property in the extraneous packing material vests in the owner of the cotton on payment of a consolidated price and the vesting is not accessions, then it can only be under an implied contract of sale of the material.

In *Jaikishan Gopikishan Vs. Commissioner, Sales-tax*, it was not disputed that the assessee pressing factory there acquired property in the packing materials when it purchased them for using in the baling process and that the property in the hessian cloth and the iron hoops was transferred to the customers when the bales covered with hessian cloth and secured by iron hoops were delivered to them on payment of a consolidated charge. All the conditions laid down by the Supreme Court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, for sale of goods were thus satisfied and consequently the conclusion in the case of *Jaikishan Gopikishan Vs. Commissioner, Sales-tax*, that the assessee was liable to pay sales tax on the value of hessian cloth and iron hoops supplied by it to its customers was in accord with the decision of the Supreme Court.

It is erroneous to suppose that the conclusion in *Jaikishan Gopikishan Vs.*

Commissioner, Sales-tax, rested solely on *Banarsi Das v. State of Madhya Pradesh* (1955) 6 STC 93 (Nag) and *Babulal v. D. P. Dube* (1955) 6 STC 255 (Nag). A reference to these two cases was made in *Jaikishan Gopikishan Vs. Commissioner, Sales-tax*, in order to show that, if, according to those two decisions of this Court a building contract and a contract of dyeing yarn involved the sale of even bricks built into a wall and the dye-stuff and chemicals used in colouring yarn, then a fortiori a contract for pressing cotton and delivery of pressed cotton in a certain kind of packing would involve a sale of packing material which is extraneous and which is not inextricably mixed up with cotton or with the labour and work involved in compressing the cotton.

The emphasis in the case of *Jaikishan Gopikishan Vs. Commissioner, Sales-tax*, was on the extraneous packing material not vesting in the owner of the cotton by accretion and (the ratio decidendi of the case was that the transfer of property in the extraneous packing material for which a consolidated charge was made could only be under an implied contract for the sale of the material. Therefore the fact that the decision of this Court in (1955) 6 STC 93 (Nag) (supra), which was followed in (1955) 6 STC 255 (Nag) (supra), was reversed by the Supreme Court in *Pandit Banarsi Das Bhanot Vs. The State of Madhya Pradesh and Others*, , does not in any way affect the correctness of the conclusion reached in *Jaikishan Gopikishan Vs. Commissioner, Sales-tax*, or of the reasoning in support of it.

It may be mentioned that in *Jaikishan Gopikishan Vs. Commissioner, Sales-tax*, , a reference was made to *A. S. Krishna and Co. Ltd. v. State of Andhra* 1956 7 STC 26: (AIR 1957 A P 706), *B. V. Hanumantha Rao v. State of Andhra* 1956 7 STC 486, *Varasuki and Co. Vs. The Province of Madras*, , and *Indian Leaf Tobacco Development Co., Ltd. v. State of Madras* 1954 5 STC 354. The first two cases have been dissented from recently by the Madras High Court in *United Bleachers Ltd. v. The State of Madras* 1960 11 STC 278. The dissent is on the ground that where the main contract is , merely one of service, the fact that in the performance of such service packing materials are used and charged for will not lead to a necessary inference that the sale of the materials was intended, and in the cases dissented from it was not considered whether the principal contract was one of service or of sale of any goods and it was wrongly held that there was a sale of the packing material merely by reason that the property in the material was transferred for consideration. Here, as has been pointed out earlier, the substance of the packing part of the contract is the material used and not the labour that has to be exercised in packing.

In *Chidambara Nadar Sons and Co. v. State of Madras* 1960 11 STC 321, the decisions in *Varasuki and Co. Vs. The Province of Madras*, , and 1954 5 STC 354 have been held to be in no way contradictory to the principles laid down by the Supreme Court in *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, inasmuch as in those cases there was an agreement to purchase goods to be delivered by the seller to the buyer and it was implicit in the contract that the goods would be delivered as packed and thus there was a sale of the packing

material. In the present case though there is no sale of the pressed cotton, there is an implied contract for the sale of the packing materials as such.

For these reasons we are of the opinion that the decision in Jaikishan Gopikishan Vs. Commissioner, Sales-tax, in no way runs counter to the principles laid down by the Supreme Court in The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., and Pandit Banarsi Das Bhanot Vs. The State of Madhya Pradesh and Others, . As we have said before, the question whether on the application of the principles laid down in the Supreme Court cases and in 1957 MPC 94: ((S) AIR 195T M P 40) (supra) to the facts of the present case there was a sale of the packing material must now be considered by the appellate authority. The result is that this petition is dismissed. There will be no order as to costs. The outstanding amount of security deposit shall be refunded to the petitioner.