

(1964) 08 AP CK 0009

In the Andhra Pradesh High Court

Case No : Tax Revision Case No's. 44 and 45 of 1963

The State of Andhra Pradesh

APPELLANT

Vs

Gannon Dunkerley and Co. (Private) Ltd.

RESPONDENT

Date of Decision : 14-08-1964

Acts Referred:

Andhra Pradesh General Sales Tax Act, 1957 — Section 22(1)

Citation : (1965) 1 AnWR 151 : (1965) 16 STC 120

Hon'ble Judges : P. Chandra Reddy, C.J.;Narasimham, J

Bench : Division Bench

Advocate : Third Government Pleader, for the Appellant; Ranganathachari, for the Respondent

Final Decision : Allowed

Judgement

Narasimham, J.—These two revision petitions are preferred by the State of Andhra Pradesh u/s 22(1) of the Andhra Pradesh General Sales Tax Act, 1957 (Act No. 6 of 1957) against the orders of the Appellate Tribunal excepting certain sales of commodities by Messrs Gannon Dunkerley & Co., Madras (Private) Ltd., from the taxable turnover for the assessment years 1958-59 and 1959-60. T.R.C. No. 44 of 1963 relates to the assessment year 1958-59 and T.R.C. No. 45 of 1963 to the assessment year 1959-60. The Appellate Tribunal held that the sales were not taxable as they were not regular dealers in the commodities sold.

2. The facts are these: Messrs Gannon Dunkerley & Co., Madras (Private) Ltd., are works contractors and registered dealers in sanitary wares, sundry articles, etc. They have their head office at Madras and branches at Hyderabad, Visakhapatnam, Vijayawada, Rajahmundry etc. Their office at Rajahmundry is the principal place of business in the State of Andhra Pradesh. For the year of assessment 1958-59 a sum of Rs. 31,941-06 representing the sales of sundry articles to wit, cement bags, casurina poles, iron scrap etc., was included in the taxable turnover by the Assessing Authority and confirmed by the Appellate Authority. Similarly for the year 1959-60, a sum of Rs. 20,276-75 representing

such sales was included by the Assessing Authority in the taxable turnover and confirmed by the Appellate Authority. The Appellate Tribunal excluded these sums, and the State has therefore preferred these revisions.

3. There is no controversy that the company, which will hereinafter be referred to for convenience as the assessee, carries on the business of construction of buildings, bridges etc. For these constructions, the company purchased materials, cement, casurina poles, hardware goods etc. The said materials, which were left over were sold and sales tax was collected from the purchasers. The assessee claimed exclusion of these sales from the taxable turnover on the ground that they were not dealers in buying and selling those articles and as such those sales had to be excluded.

4. So, the question for our consideration is whether on the facts and circumstances set out above, the said amounts representing the sales of articles like cement bags, casurina poles, iron scrap, etc., were properly excluded by the Appellate Tribunal.

5. Sri Ranganathachari argued (1) that the sales of the said items did not arise in the course of the assessee's business, (2) that the transactions of disposal of the said articles did not amount to sales within the meaning of the Act, and (3) that there was no profit making motive in the said sales. We will presently examine these contentions.

6. The term "sale" is defined in Section 2 (n) of the Act as meaning "every transfer of the property in goods by one person to another in the course of trade or business for cash, or for deferred payment, or for any other valuable consideration etc." Section 2(e) defines "dealer" as meaning "any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment etc.

7. The sum and substance of Sri Chari's contention is that the assessee does not carry on the business of buying and selling articles like cement, casurina poles, scrap iron etc., and is therefore not a dealer, and a sale of those goods did not arise in the course of their business.

8. Before we refer to the cases that he relied on, it does not appear to us that the said contention can be acceded to. There is no dispute that as building and bridge contractors, the assessee-company purchased these materials, a surplus whereof was later sold. These sales occurred as often as they carried on the business of works contracts. The assessee carries on business in the construction of buildings and bridges and so it follows as a necessary corollary that these sales are as regular as their main business. We may say that it is the assessee's subsidiary business connected with the main business.

9. The learned Government Pleader invited our reference to Gannon Dunkerley and Company (Madras) Private Limited v. The Government of Madras 196415 S.T.C. 40, as directly bearing on this question. In that case the present assessee

objected to the inclusion in their turnover the sale value of materials such as broken bricks, jelly and cement left over after the completion of the building contracts executed by them on the ground that they were not dealers in those materials and that the sales of those materials were only incidental to the carrying on of the contract work. That contention was overruled with the reasoning which appears at page 45:

It seems to us that in these circumstances when the assessee is undoubtedly a dealer and the necessity of disposal of the surplus material is ingrained in the very nature of the business which the assessee carries on and he has to effect sales of such surplus material there is no reason why he cannot be regarded as a dealer selling goods in the course of his business.

10. The learned Judges observed further that the question to be considered in a case of this kind was whether the sale in question was a business activity carried on by the assessee, that is to say, whether the sale had any reasonable connection with the normal course of business of the assessee and whether the intention of the assessee was to effect that sale in the course of that business. Rejecting the contention that there was no profit motive, the learned Judges observed that the question was not whether a particular sale resulted in a profit or a loss but whether a course of business activity was or was not intended to be engaged in with the profit motive.

11. Much the same reasoning underlies the decision in *A. Ebrahim and Company v. The State of Bombay* 1962 13 S.T.C. 877. In that case the assessee was a registered dealer doing wholesale and retail business of selling separated parts of ship machinery and ferrous and non-ferrous metals. While so the said dealer purchased a ship by name "Jala Veera" from the Scindia Steam Navigation Company and with the permission of the Government of India sold it to a foreign company. The question arose whether the sale proceeds formed part of the taxable turnover of the dealer. The learned Judges held that the activity of the applicant in selling the ship to the Costa Rica company had a very close connection with and akin to the normal course of business of the applicant and was in the course of the applicant's business activity and that the sale proceeds relating to the sale of the ship were rightly included in the turnover of the assessee. The test to be applied was expressed thus (at page 884):

The test, in our opinion, then is to ascertain whether in the circumstances and on the facts of the case it can be said that a particular sale is a sale in the course of business of a dealer. If the sale has a reasonable connection with the nature of the business carried on by a dealer, then the sale would be in the course of his business. If there is no such reasonable connection between the sale effected and the nature of the business carried on by the dealer, then the sale cannot be said to be in the course of the business of the dealer, and its sale proceeds cannot therefore be included in his turnover.

12. *Sri Ranganathachari* relied on *Ambica Mills Ltd., and Ors. v. State of Gujarat*

and Anr. 1964 15 S.T.C. 367. In that case the assessee owned textile mills in Ahmedabad which they had purchased as going concerns. Thereafter they embarked upon a programme of modernizing its machinery and as part of that programme they sold old looms, carding engines and other machinery during the assessment year 1953-54, They realised Rs. 2,01,808. They collected also sales tax from the purchasers. The question was whether on the facts and in the circumstances of the case the said sum was liable to be included in the taxable turnover of the mills and subjected to tax. The learned Judges observed that the sales were effected because new and modern machinery was substituted for the old and obsolete machinery, that the sales, therefore, were realizations of the assets of the mills effected in consequence of their phased programme for installation of modern plant and machinery and were not in pursuance of a design or a scheme for profit-making and that they could not be said to have carried on the business of selling the assets of the mills. Manifestly the facts of that case were different and do not present any" analogy here.

13. Sri Ranganathachari cited to us the decision of the Supreme Court in *State of Madras v. Gannon Dunkerley & Co., (Madras) Ltd.* 1958 9 S.T.C. 353 Therein it was held that in the case of a building contract, the property in the materials used did not pass to the other party to the contract as movable property, and that it would so pass if there was an agreement between the parties but that in the absence of an agreement, the contract was only to construct a building and it could not be said that there was a sale of the materials used in the construction. This decision renders little assistance to Sri Ranganathachari.

14. We are of the opinion that the correct position has been explained in the decisions cited by the learned Government Pleader,, *Gannon Dunkerley and Company (Madras) Private Limited v. Government of Madras* 1964 15 S.T.C. 40 and *A. Ebrahim and Company v. State of Bombay* 1962 13 S.T.C. 877. The tests for inclusion in the taxable turnover are whether the sales effected were connected with the nature of the business carried on by the dealer and whether the entire course of business activity was not intended to be engaged in with the profit motive. It is absolutely clear to us that these tests are satisfied in this case.

15. The sales will, therefore, be included in the taxable turnover and assessed. We, therefore, allow these revisions with costs. Advocate's consolidated fee of Rs. 150.