

(2012) 12 GAU CK 0012

In the Gauhati High Court

Case No : Writ Petition (C) No. 390 and 395 of 2001

Tripura Bamboo Sticks Products Trade Cottage Industries
Union and Another

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 11-12-2012

Acts Referred:

Forest Act, 1927 — Section 2(4), 2(4)(a), 2(6), 2(7), 33(1)(b)(B)
Income Tax Act, 1961 — Section 32A, 80I

Citation : AIR 2013 Guw 87 : (2013) 2 GLT 729

Hon'ble Judges : Subhasis Talapatra, J

Bench : Single Bench

Advocate : S.M. Chakraborty and Mr. S. Bhattacharjee, for the Appellant; S. Chakraborty, Addl. GA, for the Respondent

Final Decision : Allowed

Judgement

Subhasis Talapatra, J

1. These writ petitions being WP (C) 390 of 2001 and WP (C) 295 of 2001 are embedded with a common question whether the Agarbati sticks as entered into S1. No. 5 of the Notification No. F.7(179)/FOR-FP/2001/3426-49 dated 14.05.2001 (Annexure-2 to the writ petition) is a forest produce or in other words, whether the respondents are within their authority to realise the revised royalties or royalty by virtue of the said notification dated 14.05.2001. By the notification dated 14.05.2001 the following rates of royalties for the Agarbati sticks have been prescribed:

The writ petitioners contended that the Agarbati sticks (bamboo sticks) are not forest produce but the bamboo is the forest produce in terms of the definition as provided in Section 2(4) of the Indian Forest Act, 1927 which is being excerpted for appreciation, a) the following whether found in, or brought from, a forest or not, that is to say-timber, charcoal, caoutchouc, catechu, wood-oil, resin, natural varnish, bark, lac, mahua flowers, mahua seeds, kuth and myrabolams, and

(b) the following when found in, or brought from a forest, that is to say-

(i) trees and leaves, flowers and fruits, and all other parts or produce not hereinbefore mentioned, offerees,

(ii) plants not being trees (including grass, creepers, reeds and moss), and all parts or produce of such plants,

(iii) wild animals and skins, tusks, horns, bones, silk, cocoons, honey and wax, and all other parts or produce of animals, and

(iv) peat, surface soil, rock and minerals (including lime-stone, laterite, mineral oils, and all products of mines or quarries).

For purpose of understanding the present controversy Section 2(7) requires to be referred to;

(7) "tree" includes palms, bamboos, skumps, brush-wood and canes.

2. These writ petitioners questioned the legality of the said Notification dated 14.05.2001 (Anneuxre-2 to the writ petition) purportedly issued without competence to charge such royalty on the Agarbati sticks. The impugned entry according to the writ petitioners, ultra vires to the provisions of the Indian Forest Act, 1927 whereby the control including the transit of the forest produce has been left with the designated Forest Officers as prescribed. There is no dispute that the authority which issued the impugned Notification dated 14.05.2001 by revising and including the royalties of Agarbati sticks as stated is competent to determine the royalties in respect of the forest produce but their authority cannot be extended to any produce which is not a forest produce.

3. Mr. S.M. Chakraborty, learned senior counsel appearing for the writ petitioners submitted that the royalty can be charged on the bamboo but the royalty cannot be charged on the bamboo sticks which has been referred to as the Agarbati sticks at serial No. 5 of the impugned Notification dated 14.05.2001.

To buttress his contention, Mr. S.M. Chakraborty, learned senior counsel appearing for the writ petitioners relied on a decision of Gujarat High Court in Fatesang Gimba Vasava and Others Vs. State of Gujarat and Others, where it is held that:

Now the expression "forest-produce" as defined by Section 2(4) of the Act includes trees and leaves, flowers and fruits and all other, parts or produce of trees. Section 2(7) which defines "tree" includes a bamboo. Therefore, bamboos are undoubtedly forest-produce. Toplas, palas and supdas are undoubtedly prepared from bamboo chips and can be described as bamboo-articles, but do such articles fall within the definition of "forest produce"? A careful look at the various clauses of the definition of forest-produce makes it clear that it takes within its fold all that is produced by nature but does not include man-made products such as topas, palas, supdas, etc., made from bamboo chips. True it is that if bamboo as a whole is forest-produce, every part thereof including chips

would fall within that definition but once the chips cease to be a "produce" of nature and get merged into a "product" brought about by human labour and if the product so made is commercially new and distinct, known to the business community as a totally different commodity having a distinct character, such an article or product ceases to be a forest-produce, i.e., furniture made from timber or paper produced from bamboo-pulp. Therefore, bamboo being a tree would certainly fall within Clause (b) of the definition of "forest-produce", but topas, supdas and palas made out of bamboo chips would not fall within the definition of forest-produce?

4. The law as enunciated in *Fatesang Gimba Vasava* (supra) as extracted, got approval of the Apex Court in *Suresh Lohiya Vs. State of Maharashtra and Another*, . The Apex Court held thus

the view taken by the Gujarat High Court in *Fatesang*'s case is correct, because though bamboo as a whole is forest-produce, if a product, commercially new and distinct, known to the business community as totally different is brought into existence by human labour, such an article and product would cease to be a forest-produce. The definition of this expression leaves nothing to doubt that it would not take within its fold an article or thing which is totally different from forest produce having a distinct character. May it be stated that where a word or an expression is defined by the legislature, Courts have to look to that definition; the general understanding of it can not be determinative. So, what has been stated in *Strouds*' Judicial Dictionary regarding a "produce" can not be decisive. Therefore, where a product from bamboo is commercially different from it and in common parlance taken as a distinct product, the same would not be encompassed within the expression "forest-produce" as defined in Section 2(4) of the Act. despite it being inclusive in nature. That bamboo mat is taken as a product distinct from bamboo in the commercial world, has not been disputed before us, and rightly.

5. While refuting the proposition as projected by Mr. S.M. Chakraborty, learned senior counsel appearing for the writ petitioners, Mr. S. Chakraborty, learned Additional Government Advocate appearing for the state-respondents submitted that the distinction as made by the Apex Court in *Suresh Lohiya* (supra) has to be considered in the context of that case. He placed reliance on *Commissioner of Sales Tax, UP Vs. M/s. Lal Kunwa Stone Crusher (P)Ltd.*, where the Apex Court held:

The view taken by the Tribunal as affirmed by the High Court is that the goods continue to be stone and they are not commercially different goods to be identified differently for the purposes of sales tax. The decision relied on by minority view in the Tribunal in *Reliable Rocks Builders and Suppliers Vs. The State of Karnataka and Another*, turned on the concept of consumption of goods for the purpose of bringing into existence new goods. In that case the Court was not concerned with an entry of the nature with which we are concerned in the present case. Where the dealer had brought into existence new commercial

goods by consuming the boulders to bring out small pieces of stone, it was held that such activity attracted purchase tax. In the present case, however, stone, as such, and gitti and articles of stones are all of similar nature though by size they may be different. Even if gitti, kankar, stone-ballast, etc. may all be looked upon as separate in commercial character from stone boulders offered for sale in the market, yet it cannot be presumed that Entry 40 of the notification is intended to describe the same as not stone at all. In fact the term "stone" is wide enough to include the various forms such as gitti, kankar, stone ballast. In that view of the matter, we think that the view taken by the majority of the Tribunal and affirmed by the High Court stands to reason. We are, therefore, not inclined to interfere with the same.

The principle as laid down in *M/s. Lal Kunwa Stone Crusher Pvt. Ltd. (supra)* according to Mr. S. Chakraborty, learned Additional Government Advocate appearing for the state-respondents will be found apposite in the context of this case. The bamboo and the bamboo sticks (Agarbati sticks) are different forms of bamboo and as such the royalty can be charged on the bamboo sticks (Agarbati sticks) as the forest produce. Mr. S. Chakraborty, learned Additional Government Advocate appearing for the state-respondents continued to submit that even though by some activity, a new commercial goods by converting the bamboo to bring out small pieces of bamboo has been taken up but the bamboo sticks would not change into a new character, not to be defined as bamboo, which is indisputably a forest produce.

6. The controversy related to these writ petitions is well focused. If the bamboo sticks (Agarbati sticks) do not fall within the forest produce, the impugned Notification charging the royalties on the bamboo sticks (Agarbati sticks) vide the entry at serial No. 5 of the said Notification has to be held issued without competence.

7. In *Tumda Saw and Veneer Mills, Tumpa, Arunachal Pradesh and Another, Vs. State of Assam and Another, etc.*, while considering an identical controversy as regards the timber and the Veneer this Court held that that the timber even though is a forest produce but the sliced out wood (Veneer) which are manufactured for making block-board or any other products cannot be said to be a forest produce and therefore, it cannot be included in the definition of timber. It has been held in *Tumda Saw and Veneer Mills, Tumpa (supra)* that:

State legislature has no competence to make law to include "Veneer" in the definition of Timber as the same is not a "Forest Produce". Therefore I am of the opinion that the amendment made by incorporating "Veneer" in the definition of Timber is not within the legislative competence of the State Legislature under Entry 17A of the List III.

8. However, in *Hem Kanta Talukdar Vs. Sunil Sutradhar and Others, , Suresh Lohiya (supra)* this Court taking recourse to the definition held that:

when "fashioned wood" is, admittedly, tree, one cannot escape from the

conclusion that when "wood" is cut or fashioned, it becomes "fashioned wood", but it nevertheless still remains a "tree" and it will fall within the ambit of the definition of "forest produce", as given in Section 2(4)(a).

The said decision however, did not take notice of Tumda Saw and Veneer Mills, Tumpa (supra) and it was not necessary even.

9. In Hem Kanta Talulkdar (supra) the Tumda Saw and Veneer Mills, Tumpa has not been considered probably for the definition provided u/s 2(6) of the Indian Forest Act, 1927.

(6) "timber" includes trees when they have fallen or have been felled, and all wood whether cut up or fashioned or hollowed out for any purpose or not.

Definition of "timber" itself included the fashioned wood. Suresh Lohiya (supra) dwelled upon on a controversy set up in a different context similar to this in hand. At the cost of repetition what has been enunciated in Suresh Lohiya (supra) is again reproduced.

whether a product from a bamboo is commercially different from it and common parlance sated as a distinct product, the same would not encompassed within the expression "forest produce" as defined in Section 2(4) of the Act, despite it being inclusive in nature.

10. There cannot be any controversy that the definition of "tree" or "timber" does not include bamboo sticks or chips or the Agarbati sticks whereas in the definition of "timber", the various forms of the wood or timber including the fashioned wood has been included.

11. The Apex Court in C.I.T. Vs. N.C.B. Udharaja & Co. as reported in [1923] 204 ITR 412 (SC) while considering a similar point of law held that:

The test for determining whether manufacture can be said to have taken place is whether the commodity which is subjected to the process of manufacture can no longer be regarded as the original commodity but is recognised in the trade as a new and distinct commodity.

In Commissioner of Income Tax Vs. Sesa Goa Ltd., while dealing on the question of "production" it has been held by the Apex Court:

The reasoning given by the High Court, in the decisions noted by us earlier, is, in our opinion, unimpeachable. This Court had, as early as in 1961 in Chrestian Mica Industries Ltd. vs. State of Bihar [1961] 12 STC 150, defined the word "production", albeit, in connection with the Bihar Sales Tax Act, 1947. The definition was adopted from the meaning ascribed to the word in the Oxford English Dictionary as meaning amongst other things that which is produced; a product of human activity or effort". From the wide definition of the word "production", it has to follow hat mining activity for the purpose of production of mineral ores would come within the ambit of the word "production" since ore is "a thing", which is the result of human activity or effort. It is, therefore, not

necessary, as has been sought to be contended by learned counsel for the Revenue, that the mined ore must be a commercially new product.

Learned counsel appearing on behalf of the assessee, correctly submitted that the other provisions of the Act, particularly Section 33(1)(b)(B) read with item No. 3 of the Fifth Schedule to the Act, would show that mining of ore is treated as "production". Section 33B also speaks of production in the context of mining activity. The language of these sections is similar to the language of Section 32A(2). There is no reason for us to assume that the word "production" was used in a different sense in Section 32A.

12. In view of the decision in *Sesa Goa Ltd. (supra)* it is evident that the word "production" has been used in a very wide sense to mean, to bring out a new product, albeit not a commercially new product. The Apex Court approved the decision of the Karnataka High Court in *Commissioner of Income Tax Vs. Mysore Minerals Ltd.*, wherein activity of cutting granite blocks into slabs and sizes and polishing them was held to be manufacturing or production of goods.

The Tribunal is also right in law in holding that extracting granite from quarry and cutting it to various sizes and polishing should be considered as manufacture or production of any article or thing and the assessee's business activity must be considered as an industrial undertaking for the purpose of granting reliefs under Sections 32A and 80-I of the Income Tax Act, 1961.

Following the decisions of *Sesa Goa Ltd. (supra)*, *Mysore Minerals Ltd. (supra)* and another decision of the Apex Court in *Kores India Ltd., Chennai Vs. Commissioner of Central Excise, Chennai*, , the Rajasthan High Court in *Arihant Tiles and Marbles Pvt. Ltd. Vs. Income Tax Officer*, held as under:

Apparently, the principle applied by the Supreme Court was that if without applying the process a thing in its raw form cannot be usable and "it is made usable for particular purpose, it amounts to manufacture.

13. The Apex Court in *M/s. Saraswati Sugar Mills Vs. Haryana State Board and others*, held that;

essence of manufacture is a change of one object to another for the purpose of making it marketable.

On this principle, the Apex Court accepted the contention that by cutting jumbo rolls into smaller sizes, a different commodity has come into existence and the commodity which was already in existence serves no purpose and no commercial use, after the process, a new name and character has come into existence. The original commodity after processing does not process original identity. Obviously, so far as physical characteristic of jumbo rolls and its shorter version in the form of typewriter and telex roll may have the same physical properties, nonetheless on the basis of their different use as a marketable commodity and after being cut, the same cannot be used for the purpose for which it could be used in original shape, the activity was held to be manufacture.

This principle applies to the case in hand. Here the original commodity, namely, the bamboo could not be used for the same purpose until it is processed to be used as Agarbati sticks. It is only by the process of cutting the bamboo into chips or sticks, it is made marketable. The bamboo cannot be used for the same purpose as the bamboo chips or sticks have been cut into specified sizes to render it marketable.

14. The principle in *Kores India Ltd. (supra)* supports such contention. The said principle has also been followed by the Bombay High Court in *Commissioner of Income Tax Vs. Fateh Granite (P) Ltd.*, , the Delhi High Court in *Commissioner of Income Tax Vs. Sophisticated Marbles and Granite Industries*, .

15. In *Union of India (UOI) and Others Vs. J.G. Glass Industries Ltd. and Others*, , the Apex Court laid down a two-fold test for determining whether a particular process amounts to "manufacture" or not? First, whether by the said process a different commercial commodity comes into existence or whether the identity of the original commodity ceases to exist. Secondly, whether the commodity which was already in existence would not serve the desired purpose but for the said process.

16. Due consideration of *M/s. Lal Kunwa Stone Crusher Pvt. Ltd. (supra)* has been taken to and it is found that the definition of stone has been expanded for including forest chips such as gitti, kankar, stone ballast. But the aspect of the manufacturing process did not find consideration in *M/s. Lal Kunwa Stone Crusher Pvt. Ltd.* In this regard the Apex Court observed in *Padmasundara Rao and Others Vs. State of Tamil Nadu and Others*, , which would be of the some relevance as regards how to understand a decision as rendered by a Court;

Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating of the judgment as though they are words in a legislative enactment and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morrin in *Herrington vs. British Railways Board* [1972] 2 WLR 537 (HL). Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.

17. It cannot be disputed that by the process a different commercial commodity namely, the bamboo sticks (Agarbati sticks) comes into existence and the identity of the original commodity namely bamboo ceases to exist. The original commodity (the bamboo) which was in existence since did not serve the purpose, a process of manufacturing was adopted for a different commercial commodity called Agarbati sticks. Thus applying the two fold-test as expounded in *J.G. Glass Industries Ltd. (supra)*, irresistibly it is to be held that the process undertaken by the writ petitioners amount to "manufacture" and for that manufacture the bamboo sticks (Agarbati sticks) can no more be stated to be forest produce within the definition of Section 2(4) of the Indian Forest Act, 1927 inasmuch as

the original commodity (the bamboo) ceases to exist. Thus the impugned Notification dated 14.05.2001 (Annexure-2 to the writ petitions) so far its entry at serial No. 5 is concerned, is held without competence and ultravires as the said Notification is not within the legislative competence under Entry 17(A) of the list III, the seventh Schedule, Constitution of India for enactment called Indian Forest Act, 1927.

18. In pith and substance, the Indian Forest Act, 1927 wherein the "forest produces" is well defined in Section 2(4) of the said Act has effects of repugnancy on the entry in serial No. 5 of the Notification No. F. 7(179)/FOR-FP/2001/3426-49 dated 14.05.2001 and as such, the said entry No. 5 of the Notification No. F.7(179)/FOR-FP/2001/3426-49 dated 14.05.2001 is struck down. In case the royalty has been realized, the respondents shall refund the royalty in terms of the order dated 03.08.2001 as passed in C.M. Appl. No. 348 of 2001 in W.P.(C) 395/2001 and CM Appl. No. 345 of 2001 in W.P.(C) 390 of 2001 within 3(three) months from today. In the result, the writ petitions stand allowed.

However, there shall be no order as to costs.