

Commissioner of Sales Tax, Madhya Pradesh, Indore

Vs

Madhya Pradesh Electricity Board, Jabalpur

Civil Appeals Nos. 1153 to 1160 & 1161 to 1168 of 1968

(J. C. Shah, V. Ramaswami-I, A.N. Grover JJ)

26.11.1968

JUDGMENT

GROVER, J. –

1. This judgment will dispose of two sets of cross appeals No. 1153-1160 and 1861-1168/68, which are from a common judgment of the Madhya Pradesh High Court and have been entertained by special leave.
2. The relevant assessment years for the purpose of levy of sales tax are from April 1, 1957 to March 31, 1958 and April 1, 1964 to March 31, 1965. For the assessment years prior to April 1, 1959, the enactment in force was the C.P. and Berar Sales Tax Act, 1947 (No. XXI of 1947) and for the subsequent two years, it is the Madhya Pradesh General Sales Tax Act (Act No. 2 of 1959) which would be applicable. The material facts may be shortly stated. The assessee - Madhya Pradesh Electricity Board - hereinafter called the "Electricity Board" is a body constituted under Section 5 of the Electricity Supply Act, 1948. Under Section 18 of that Act it was the general duty of the Electricity Board to promote co-ordinated development of the generation, supply and distribution of electric energy within the State of Madhya Pradesh in the most efficient and economical manner. In the assessment years in question the Electricity Board sold, supplied and distributed electric energy to various consumers. It also sold coal-ash, a waste product and supplied steam to Nepa Mills of Burhampur. It further supplied specification and tender forms on payment to persons desirous of submitting tenders for the works undertaken by the Electricity Board. It purchased articles like Gitti, Murram, sand, etc., from unregistered dealers. It is common ground that under the provisions of Act XXI of 1947 and II of 1959, read with the schedules contained therein sale of electricity is exempt from sales tax. For the purpose of determining the gross turnover, however, the sale of electric energy is to be taken into account.
3. The Assistant Commissioner of Sales Tax assessed the Electricity Board to tax on its turnover of sale of coal-ash and specification and tender forms and the supply of steam of Nepa Mills. The Board was further assessed to purchase tax on Gitti, Murram, etc., purchased from unregistered dealers. In appeal the Deputy Commissioner, Sales Tax, upheld the assessment orders. On second appeal, the Sales Tax Tribunal which was the Board of Revenue, Madhya Pradesh, held that the Electricity Board was not a "dealer" within the meaning of that term as defined in the two Acts and that the coal-ash was not produced for the purpose of sale with the result that sales of coal-ash could not be subjected to tax. As regards the supply of steam to Nepa Mills the tribunal, on examining the terms of the agreement under which the Electricity Board supplied the steam, came to the conclusion that such supply was an isolated transaction and that such activity which had been undertaken on no profit no loss basis could not be assessed to sales tax. The specification and tender

forms were held not to be marketable goods involving any profit element and for that reason could not be taxed. As regards the purchase tax the tribunal held that as the Electricity Board was not a dealer in respect of the sale and supply of electric energy, no purchase tax could be imposed on goods purchased by it and consumed "in furtherance of and in aid of the business activity of generating, supplying and distributing electricity".

4. Both the Electricity Board and the Commissioner of Sales Tax, Madhya Pradesh, filed applications requiring the tribunal to refer to the High Court certain questions of law arising out of its common order. The tribunal drew up a common statement of case and referred five questions of law. On the first question the High Court held that the Electricity Board could not be held to be a "dealer" as defined in Section 2(c) of Act XXI of 1947 or Section 2(d) of Act II of 1959 in respect of its activity of generation, distribution, sale and supply of electric energy. On the second question it was held that as the Electricity Board regularly and continuously produced coal-ash as a subsidiary product and sold it regularly, it was a "dealer" in regard to the sale of coal-ash and the sale transactions relating to this product were liable to be assessed to sales tax. The third question was answered in favour of the Electricity Board. It was found that steam was not being supplied to the Nepa Mills with profit motive although it fell within the definition of "goods" given in the two Acts. As regards the specification and tender forms, the High Court was of the view that the Electricity Board was not carrying on any business of selling such forms and therefore no sales tax could be levied in respect of them. The fifth question was answered by holding that as the Electricity Board was not a "dealer" in respect of sale and supply of electric energy, it was not entitled to purchase any taxable goods for consumption or use for producing such energy without paying sales tax to the selling dealer under Section 4(6) of Act XXI of 1947 and Section 7 of Act II of 1959 and therefore there was no liability to pay purchase tax.

5. Mr. Shroff, who has argued the appeals of the Commissioner of Sales Tax, has not quite properly and rightly pressed the matter relating to imposition of sales tax on supply of specification and tender forms. Mr. S. T. Desai, who has appeared for the Electricity Board, after a certain amount of argument, has submitted that he had nothing much to say on the question relating to coal-ash except that it should be held to be exempt from payment of sales tax because electric energy is exempt from such tax as stated before. As regards the fifth question relating to the imposition of purchase tax, Mr. Desai has not pressed for any decision being given by us. Arguments which have been addressed by both sides have therefore centred on question Nos. 1 and 3 which are as follows :

"(1) On the facts and circumstances of the case whether or not the Madhya Pradesh Electricity Board is a dealer within the meaning of Section 2(c) of the C.P. and Berar Sales Tax Act, and Section 2(d) of the Madhya Pradesh General Sales Tax Act, 1958, in respect of its activity of generation, distribution, sale and supply of electrical energy ?

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(3) On the facts and circumstances of the case, whether or not steam is saleable goods and if they are saleable goods is the turnover representing the supply thereof liable to be assessed to sales tax in the hands of the assessee ?"

It is somewhat curious that both sides are almost agreed that the decision of the High Court on the first question is not correct. Since enunciation of the true position is involved, we proceed to give our opinion in the matter. The definition of a "dealer" is given in the two Acts substantially is that

any person who carried on the business of buying, selling, supplying or distributing the goods, is a "dealer" and "goods" are defined by Section 2(d) by Act XXI of 1947, as meaning all kinds of movable property other than actionable claims and includes all material articles and commodities whether or not to be used in the construction, fitting out, improvement or repair of immovable property. The definition contained in Section 2(g) of Act II of 1959, is almost in similar terms except that certain additions are there with which we are not concerned. Reference may be made, at this stage, to the definition, of "movable property" which has not been defined in the two Acts given in Section 2(24) of the Madhya Pradesh General Clauses Act. It has been defined to mean "property of every description, except immovable property". Section 2(18) of that Act says that "immovable property" includes land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth".

6. The High Court went into a discussion from the point of view of mechanics relating to transmission of electric energy. It was of the view that electricity could not be regarded as an article or matter which could be possessed or moved or delivered. It relied on certain decisions which will be presently noticed and referred to Entries Nos. 53 and 54 in List II of Seventh Schedule to the Constitution and held that electricity did not fall within the meaning of "goods" in the two Acts and therefore the Electricity Board could not be held to be a "dealer" in respect of its activity of generation, distribution, sale and supply of electric energy.

7. Mr. I. N. Shroff has relied on certain decisions in which the same point was involved as in the present case, namely, whether electricity is "goods" for the purpose of imposition of sales tax. In *Kumbakonam Electric Supply Corporation Ltd. v. Joint Commercial Tax Officer, Esplanade Division, Madras*, (14 STC 600) the Madras High Court was called upon to decide whether electricity is "goods" for the purposes of the Madras General Sales Tax Act, 1959, and the Central Sales Tax Act, 1956. After referring to the definition of "goods" as given in the Sale of Goods Act, 1930, it was observed that under that definition goods must be property and it must be movable. According to the learned Madras Judge any kind of property which is movable would fall within the definition of "goods", provided it was transmissible or transferable from hand to hand or capable of delivery which need not necessarily be in a tangible or a physical sense. Reference was also made to the definition given in the General Clauses Act which was quite wide and it was held that if electricity was property and it was movable it would be "goods". The learned Judge found little difference between electricity and gas or water which would be property and could be subjected to a particular process, bottled up and sold for consumption. It was observed that electricity was capable of sale as property as it was sold, purchased and consumed every where. A "dealer" was defined by the Central Sales Tax Act practically in the same way as in the Madras General Sales Tax Act and it meant a person who carried on business of buying and selling goods. In the opinion of the learned Judge the concept of dealer, goods and sale comprehended all kinds of movable property. He further, relied on certain decisions which have been cited before and which will be presently noticed. A similar view was expressed by Tek Chand, J. of the Punjab and Haryana High Court in *Malerkotla Power Supply Company v. The Excise and Taxation Officer, Sangrur and Ors.* (22 STC 325) It was held that electric energy fell within the definition of "goods" in both the Punjab sales Tax Act, 1948, and the Central Sales Tax Act, 1956. According to the learned Judge electric energy has the commonly accepted attributes of movable property. It can be stored and transmitted. It is also capable of theft. It may not be tangible in the sense that it cannot be touched without considerable danger of destruction or injury but it was perceptible both as an illuminant and a fuel and also in other energy giving forms. Electric energy may not be property in the sense of the term "movable property" as used in the Punjab and Central General Clauses Acts in contra-distinction to "immovable property" but it must fall within the ambit of "goods" even if in a sense it was

intangible or invisible". As pointed out in the Madras Case the statement contained in 18 Am. Jur. 407 (18 AJ 407 (2 Electy)) recognises that electricity is property capable of sale and it may be the subject of larceny. In *Naini Tal Hotel v. Municipal Board* (AIR 1946 All 502) it was held that for the purpose of Article 52 of the Indian Limitation Act, electricity was property and goods. In *Erie County Natural Gas and Fuel Co. Ltd. v. Carroll* ((1911) AC 105), a question arose as to the measure of damages for a breach of contract to supply gas. Lord Atkinson delivering the judgment of the Privy Council applied the same rule which is applicable where the contract is one for sale of goods. In other words gas was treated to be "goods".

8. The High Court, in the present case, appears to have relied on *Rash Behari v. Emperor* (AIR 1936 Cal 753), in which approval was accorded to the statement in *Pollock and Mulla's Commentary on Sale Goods Act, 1913* that it was doubtful whether that Act was applicable to such "goods" as gas, water and electricity. The context in which this matter is discussed in the Calcutta case is altogether different and distinguishable and what was being decided there was the scope and ambit of Section 39 of the Electricity Act, 1910. As regards the entries in List II of the Seventh Schedule to the Constitution, the relevant ones may be produced :

"53. Taxes on the consumption of sale of electricity.

54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of list I."

9. The reasoning which prevailed with the High Court was that a well-defined distinction existed between the sale or purchase of "goods" and consumption or sale of electricity otherwise there was no necessity of having Entry No. 53 but under Entry 53 taxes can be levied not only on sale of electricity but also on its consumption which could not probably have been done under Entry 54. It is difficult to derive much assistance from the aforesaid entries. What has essentially to be seen is whether electric energy is "goods" within the meaning of the relevant provisions of the two Acts. The definition in terms is very wide according to which "goods" means all kinds of movable property. Then certain items are specifically excluded or included and electric energy or electricity is not one of them. The term "movable property" when considered with reference to "goods" as defined for the purposes of sales tax cannot be taken in a narrow sense and merely because electric energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be movable property when it has all the attributes of such property. It is needless to repeat that it is capable of abstraction, consumption and use which, if done dishonestly, would attract punishment under Section 39 of the Indian Electricity Act, 1910. It can be transmitted, transferred, delivered, stored, possessed etc., in the same way as any other movable property. Even in *Benjamin on Sale*, 8th Ed. reference has been made at p. 171 to *County of Durham Electrical, etc. Co. v. Inland Revenue* ((1909) 2 KB 604), in which electric energy was assumed to be "goods". If there can be sale and purchase of electric energy like any other movable object, we see no difficulty in holding that electric energy was intended to be covered by the definition of "goods" in the two Acts. If that had not been the case there was no necessity of specifically exempting sale of electric energy from the payment of sales tax by making a provision for it in the schedules to the two Acts. It cannot be denied that the Electricity Board carried on principally the business of selling, supplying or distributing electric energy. It would therefore clearly fall within the meaning of the expression "dealer" in the two Acts.

10. As regards steam there has been a good deal of argument on the question whether it is liable to be assessed to sales tax in the hands of the Electricity Board. According to Mr. Shroff, the

Electricity Board carried on the business of selling steam to the Nepa Mills and that this has lasted for a number of years. It has been submitted that simply because the Electricity Board does not have any profit motive in supplying steam, it cannot escape payment of sales tax because the steam is nevertheless being sold as "goods". The High Court was of the view that the water which the Nepa Mills supplied free to the Electricity Board became the property of the Board and in return for this free supply the Board agreed to give steam to Nepa Mills at a rate based solely on the coal consumed in producing steam. The mills had also agreed to reimburse the Electricity Board for the loss sustained on account of the mills not taking the "full demand of steam". According to the High Court there was no contract for the sale of steam as such and it was only for the labour and cost involved in its supply to the mills. The High Court relied on the findings of the Tribunal on this point and held that the turnover in respect of steam was not taxable. The tribunal in its order, dated June 16, 1966, referred to certain conditions of working arrangement which was reduced to writing but which had not been properly executed as a contract which showed that the mills was supplying water free and the Electricity Board was making a prorata charge of conversion of water into steam. It seems to us that the High Court was right in coming to the conclusion, on the finding of the tribunal, that the real arrangement was for supplying steam on actual cost basis and in that sense it was more akin to a labour contract than to sale.

11. Mr. Shroff has argued that the document which was relied upon by the tribunal could not be looked at as it was neither admissible in evidence nor had it been properly executed as a contract between the Electricity Board and the mills and it happened to be a mere draft of an agreement which was proposed to be entered into. It is too late for Mr. Shroff to take these objections because these should have been raised before the Tribunal and the High Court.

12. It is stated in Halsbury's Laws of England, III Edn., Vol. 34, p. 6, that "a contract of sale of goods must be distinguished from a contract for work and labour. The distinction is often a fine one. A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of possession of, a chattel as a chattel to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel quo chattel the contract is one for work and labour. It has been laid down by this court in *The Government of Andhra Pradesh v. Guntur Tobaccos Ltd.*, (16 STC 240) that in business transactions the works contract are frequently not recorded in writing setting out all the covenants and conditions thereof, and the terms and incidents of the contracts have to be gathered from the evidence and attendant circumstances. The question in each case is one about the true agreement between the parties and the terms of the agreement must be deduced from a review of all the attendant circumstances. On the findings of the tribunal and the High Court, we are of the opinion that the arrangement relating to supply of steam in return for the water supplied by the mills on payment of actual cost was not one of sale but was more in the nature of a works contract.

13. In the result, the answer of the High Court to the first question is discharged and it is held that the Electricity Board is a "dealer" within the meaning of the relevant provisions of the two Acts in respect of its activities of generation, distribution, sale and supply of electric energy. The answers to the second, third and fourth questions are affirmed. The answer given by the High Court to the fifth question is discharged. It is unnecessary to express any opinion on that question, because Mr. Desai has not pressed for any decision being given by us and has accepted the liability in respect of the purchase tax as determined by the assessing authorities for the assessment orders in question. The appeals are allowed to the extent indicated above. In view of all the circumstances the parties are left to bear their own costs.

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