

M/S. Chhitter Mal Narain Das

Vs

Commissioner of Sales Tax

Civil Appeals Nos. 2483 and 2484 of 1969

(J. C. Shah, K. S. Hegde JJ)

21.07.1970

JUDGMENT

SHAH, J. -

1. The appellants who are dealers in food grains supplied to the Regional Food Controller diverse quantities of wheat in compliance with the provisions of the U.P. Wheat Procurement (Levy) Order, 1959. The Sales Tax Officer levied tax under the U.P. Sales Tax Act on the aggregate of the price of wheat by the appellants, rejecting the contention raised by the appellants that the wheat supplied was not sold by them to the Controller. In appeal the Assistant Commissioner (Judicial) Sales Tax held that the turnover resulting from supplies of wheat was not taxable since there was no "sale" within the meaning of the U.P. Sales Tax Act, 1948. The order was confirmed by the Additional Judge (Revisions) Sales Tax.

2. The Additional Judge (Revisions) Sales Tax referred the following question to the High Court of Allahabad for opinion :

"(1) Whether the sales made to the regional Food Controller under the U.P. Wheat Procurement (Levy) Order, 1959, are sales within the meaning of "sale under Section 2(h) of the U.P Sales Tax Act ?

(2) Whether in the circumstances of the case, the assesses are liable to lay sales tax on the sales made to the regional Food Controller under the provisions of the U.P. Wheat Procurement (Levy) Order, 1959 ?"

3. The question raised were defective in form. The word "sales" when it first occurs in Question No. (1) should be "supplies". The expression "sales made" in Question No. (2) should be "on the price for wheat supplied". We modify the questions accordingly.

4. The High Court of Allahabad, following their earlier judgment in Commr. of Sales tax, U. P. Lucknow v. Ram Bilas Ram Gopal, 1969 All LJ 424 : AIR 1970 All 518 answered the two questions in the affirmative. The appellants have appealed to this Court with special leave.

5. The expression "sale" is defined in Section 2(h) of the U.P. Sales Tax Act, 1948, as meaning any transferor property in goods for cash, deferred payment or other valuable consideration, but not including a mortgage, hypothecation, charge or pledge, Power of the Provincial Legislature by virtue of Entry 42, List II of the Government of India Act, 1935, was restricted. The Legislature was competent to legislate for levy of tax only on transactions which were "sales" within the meaning of

the Indian Sales of Goods Act, 1930, Sales of madras v. Gannon Dunkerley and Co. (Madras) Ltd., 1959 SCR 379 : AIR 1958 SC 560, M/s. New India Sugar Mills Ltd. v. Commissioner of Sales Tax, Bihar, 1963 Supp (2) SCR 459 : AIR 1963 SC 1207. It was observed in M/s. New India Sugar Mill's case, (1963) Supp (2) SCR 459 : AIR 1963 SC 1207 :

"In popular parlance 'sale' means transfer of property from one person to another in consideration of price paid or promised or other valuable consideration. But that is not the meaning of 'sale' in the Sale of Goods Act, 1930. Section 4 of the Sale of Goods Act provides by its first sub-section that a contract of sale of goods is a contract where the seller agrees to transfer the property in goods to the buyer for a price. 'Price' by clause (10) of Section 2 means the money consideration for sale of goods, and 'where under contract of sale properly in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property, in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell' [sub-section (3), section 4]. It is manifest that under the Sale of Goods Act a transaction is called sales only where for many consideration property in goods is transferred under the contract of sale. Section 4 of the Sale of Goods Act was borrowed almost verbatim from Section 1 of the English Sale of Goods Act 56 and 57 Vict. C. 71. As observed by Benjamin in the 8th Edn. of his work on 'Sale', "to constitute a valid sale there must be a concurrence of the following elements, 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."

It was also observed that the expression "Sale of good" in the Constitution must be understood in the same sense in which it is used in the Sale of Goods Act, 1930. The U.P. Legislature could therefore legislate for levy of sales-tax on a transaction which amounted to a sale within the meaning of the Sale of goods Act, 1930, and not on any other transaction which was deemed by fiction to be a sale.

6. It is necessary then to determine whether the stocks of wheat supplied by the appellants in compliance with the provisions of the U.P. What Procurement (Levy) Order, 1959, to the Regional Food Controller were sold to that Officer within the meaning of the definition of the word 'sale' in Section 2(h) of the U.P. Sales Tax Act, 1948. The relevant provisions of the U. P. Wheat procurement (Levy) Order, 1959, may first be read :

The preamble to the Order states :

"Whereas the State Government is of the opinion that it is necessary and expedient so to do for maintaining the supplies of what and for securing its equitable distribution and availability at fair prices :

Now, therefore, in exercise of the powers conferred by clauses (e), (f), (h), (i) and (j) of sub-section (2) of Section 3 of the Essential Commodities Act, 1955 (10 of 1955), * * * the Governor of the State of Uttar Pradesh is pleased to make the following order * * *."

Clause 3 provides :

"(1) Every Licensed dealer shall sell to the State Government at the controlled prices
:

(a) Fifty (50) per cent. of wheat held in stock by him at the commencement of this Order; and

(b) Fifty (50) per cent. of wheat procured or purchased by him every day beginning with the date of commencement of this Order and until such time as the State Government otherwise directs.

(2) The wheat required to be sold to the State Government under sub-clause (1) shall be delivered by the licensed dealer to the Controller or to such other person as may be authorised by the Controller to take delivery on his behalf."

Clause 4 confers powers of entry, search, seizure upon Enforcement offices; insofar as it is material it provides :

"(1) Any Enforcement Officer may, with a view to securing compliance with this Order or to satisfying himself that this Order has been complied with -

(i) enter with such assistance as may be necessary any premises where he has reason to believe that wheat is procured, purchased or stocked;

(ii) ask of any person all necessary questions;

(iii) examine any books or documents;

(iv) search any premises, vehicles, vessels and air-craft and seize wheat in respect of which he has reasons to believe that a contravention of the order has been, is being, or is about to be committed and thereafter take or authorise the taking of all measures necessary for securing the production of stocks so seized in a court and for their sales, custody, pending such production.

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By Clause 3 of the Order every licensed dealer is directed to "sell" to the State Government 50 per cent. of the wheat held in stock by him on the date of the Commencement of the Order at the "controlled prices". Against out of the stock of wheat procured or purchased by him every day beginning with the date of commencement of the Order he is directed to "sell" 50 per cent. of that stock. The Order enjoins the licensed dealer to deliver the quantities specified in sub-clause(1) of Clause 3 either to the Controller or to such other person as may be authorised by the Controller to take delivery on his behalf. To ensure that the licensed dealer carried out his obligation the Enforcement. Officers any enter any premises where they have reason be believe that wheat it procedure, purchased or stocks, and may make necessary enquiries, examine any books or documents and search any premises, vehicles, vessels and aircraft and seize wheat in respect of which that have reason to believe that a contravention of the Order has been, is being, or is about to be committed.

7. Obligation to deliver wheat of the quantity specified arises out of the statute. The Order takes no account of the volition of the licensed dealers and until the State Government directs otherwise, of the Controller of the authorised officer. The Order imposes an obligation upon the licensed dealer who is defined in Clause 2(d) as meaning a person holding a valid licence under the U.P. Foodgrains Dealers Licensing Order, 1959, to deliver the quantities of wheat specified in the Order. The Stated

Government is directed by the Order to pay for the wheat supplied at the controlled rate. The source of the obligations to delivered the specified quantities of wheat and to pay for them is not in any contract, but in the statutory order. In out judgment Clause 3 set up a machinery for compulsory acquisition by the State Government of stocks of wheat belonging to the licensed dealers. The Order, it is true, makes no provision in respect of the place and manner of supply of wheat and payment of the controlled price. It contains a bald injection to supply wheat of the specified quantity day after day, and enacts that in default of compliance the dealer is liable to be punished; it does not envisage any consensual arrangement. It does not require the State Government to enter into even an informal contract. A sale predicates a contract of sale of good between person competent to contract for a price paid or promised : a transaction in which an obligation to supply goods is imposed, and which a dose not involve an obligation to enter into a contract, cannot be called a 'sale', even if the person supplying goods is declared entitled to the value of good, which is determined or determinable in the manner prescribed. Assuming that between the licensed dealer and the Controller, there may be some arrangements about the place and manner of delivery of wheat, and the payment of "controlled price". The operation of Clause 3 does to on that account become contractual.

8. The High Court relied upon the following observation in Ram Bilas Ram Gopal's case, 1969 All LJ 424 : AIR 1970 All 518 :

"Analysing Clause 3 of the Levy Order it is clear that a licensed dealer is obliged to sell to the State Government fifty per cent. of the wheat held in stock by him at the commencement of the Order, and there after fifty per cent. of the wheat daily pressured or purchased by him beginning with the date of commencement of the Order until such time as the State Government otherwise directs. The price at which the wheat is sold is that maximum price fixed in the Wheat (Uttar Pradesh) Price Control Order, 1959, as notified by the Government of India. Delivery of the wheat has to be given by the dealers to the Regional Food Controller or a person authorised by him in that behalf. The dealer has no option but to sell the specified percentage of wheat to the State Government. The State Government has also no option but to purchase fifty per cent. of the wheat held in stock by the dealer at the commencement of the Levy Order. As regards the wheat procured or purchased daily by the dealer thereafter, it open to the State Government to say that from any particular date it will not purchase any or all of the specified percentage of wheat. Therefore, as regards that wheat the Levy Order leaves it open to one of he parties, namely the State Government to decided when it will stop purchasing wheat from the dealer. That in substance is Clause 3 of the Levy Order and it embodies the total sum of obligations imposed on the dealer and the State Government. All other details of the transaction are left open to negotiation. It leaves it open to the parties to negotiate in respect of the time and the mode of payment of the price, the time and mode of delivery of wheat, and other conditions of the contract."

Clause 3 of the Order compels the licensed dealer to deliver to the Controller or his authorised agent every day 50 percent. of the wheat procured or purchased by him. There is no scope for negotiations there. Assuming that the Controller may designate the place of delivery and the place of payment of price at the controlled rate, and the licensed dealer acquiesces therein, or even when in respect of those two matters there is some consensual arrangement, in our judgment, supply of wheat pursuant to Clause 3 of the Order and acceptance thereof of not result in a contract of sale. The High Court observed that :

"..... Whatever compulsive or coercive force is used to bring about a transaction under Clause 3 of the Levy Order, it must be traced to legislation. It cannot be attributed to the State Government as a party to the transaction. This, then is clear. There is nothing in the Levy Order which can be accused of vitiating the free consent of the parties as defined under Section 14 of the Indian Contract Act, when entering into the contract of sale."

But these observations assume a contract of sale which the Order does not contemplate. If there be a contract, the restriction imposed by statute may not vitiate the consent. But the contract cannot be assumed.

9. We may refer to certain decisions of this Court on which reliance was placed at the Bar. In *M/s. New India Sugar Mills' case*, 1963 Supp (2) SCR 459 : AIR 1963 SC 1207 under the Sugar and Sugar products Control Order, 1946, a scheme as devised for equitable distribution of sugar. The consuming States intimates to the Sugar Controller of India their requirements of sugar and the factory owners sent statements of stocks of sugar held by them. The Controller made allotments to various States and addressed orders to the factory owners directing them to supply sugar to the States in question in accordance with the despatch instructions from the State Government. Under the allotment orders, *M/s. New India Sugar Mills Ltd.*, in Bihar, despatched stocks of sugar to the State of Madras. The State of Bihar treated the transaction as a sale and levied tax thereon under the Bihar Sales Tax Act, 1947. The tax-payer contended that the supplies of sugar, pursuant to the directions of the Controller, did not result in sales, and that no tax was exigible on such transaction. A majority of the Court observed that dispatches of sugar pursuant to the direction of the Controller were not made in pursuance of any contract of sale. There was no offer by the tax-payer to the State of Madras, and no acceptance by the latter; the tax-payer was under the Control order compelled to carry out the direction of the Controller and it had no volition in the matter. Intimation by the State of its requirements of sugar to the Controller or communication of the allotment order to the assessee did not amount to an offer. Nor did the mere compliance with despatch instructions issued by the Controller, which the assessee had not the option to refuse to comply with, amount to acceptance of an offer or to making of an offer. A contract of sale of goods postulates a voluntary arrangement regarding goods between the contracting parties. It was held that in the case before the Court was no such voluntary arrangement.

10. In two later decisions of this Court the true character of transactions in which supplies of commodities were made pursuant to Control Orders was examined. In *Indian Steel and Wire Products Ltd. v. State of Madras*, (1968) 1 SCR 479 : AIR 1968 SC 478 the tax-payer supplied certain steel products to various persons in the State of Madras pursuant to the directions given by the Steel Controller exercising powers under the Iron and Steel (Control of Production and Distribution) Order, 1941. The authorities of the State of Madras assessed the turnover of the tax-payer resulting from those transactions to sales-tax under the Madras General Sales Tax Act. The tax-payer contended that the transactions of supply did not result in sales and were on that account not exposed to sales-tax, because steel products were supplied pursuant to the directions of the Iron and Steel Controller made under Clause 10-B of the Order there being no mutual assent between the parties to the transaction. This Court held that the supplies were made pursuant to the directions issued under Clause 5 of the Order and not pursuant to the direction issued under Clause 10-B of the Order. It was observed that the Order was in respect of goods not yet manufactured, whereas under Clause 1-B directions could be given only in respect of goods already in stock, and since Clause 5 did not require the Controller to regulate or control every facet of a transaction between a producer and the person to whom the tax-payer supplied iron and steel produced the transactions

were consensual. Clause 5 of the Order read as follows :

"No producer or stock-holder shall dispose of or agree to dispose of or export or agree to export from British India any iron or steel, except in accordance with the conditions contained or incorporated in a general or special written order of the Controller."

Clause 10-B provided :

"The Controller may, by a written order require any person holding stock of iron and steel, acquired by him otherwise than in accordance with the provisions of Clause 4 to sell, the whole or any part of the stock to such person or class of persons and on such terms and conditions as may be specified in the Order."

Comparing the terms of Clause 5 with the terms of Clause 10, the Court observed that liberty of contract in large measure was reserved to the producer or stockholder and to the purchaser in the matter of disposal of iron and steel. The obligation imposed by Clause 5 was, it was said, not to dispose of or agree to dispose of or export or agree to export any iron or steel except in accordance with the conditions contained or incorporated in the order of the Controller and that since there was liberty of contract between the parties but subject to restrictions, the transaction could be regarded as a sale. It was observed at page 489 (of SCR) = (at page 484 of AIR) :

"But under Clause 5 he can authorise a producer or a stockholder to dispose of any iron or steel whether the same is in stock or not in accordance with the conditions contained or incorporated in a special or general written order issued by him. In the instant case, as can be gathered from the correspondence already referred to, the order issued by the Controller could be complied with only after manufacturing the required material. Hence, the order issued by the Controller could not have been issued under Clause 10-B."

The Court then observed :

"..... 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 of the Controller prescribed by the Controller."

The Court also observed :

"It would be incorrect to contend that because law imposes some restriction 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 reason 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."

The Court in that case distinguished the case of *M/s. New Indian Sugar Mills' case*, 1963 Supp (2) SCR 459 : AIR 1963 SC 1207 and expressly reserved their opinion on the question whether goods supplied pursuant to the direction issued under Clause 10-B of the Order may be regarded

as sales. The decision in Indian Steel and Wire Products Ltd.'s case, (1968) 1 SCR 479 : AIR 1968 SC 478 does not justify the view that even if the liberty of contract in relation to the fundamentals of the transaction is completely excluded a transaction of supply of goods pursuant to directions issued under a control Order may be regarded as a sale.

11. In *Andhra Sugars Ltd. v. State of Andhra Pradesh*, (1968) 1 SCR 705 : AIR 1968 SC 599 again, in the view of the Court liberty of contract between parties to transactions relating to supply of sugarcane was ruled out. Under the Andhra Pradesh Sugarcane (Regulations of Supply and Purchase) Act, 1961, the occupier of a sugar factory had to buy sugar cane from cane-growers in conformity with the directions of the Cane Commissioner. Under Section 21 of the Act the State Government had power to tax purchases of sugar cane for use, consumption or sale in a sugar factory. Certain owners of sugar factories contended that "Section 21 was invalid". They contended that they were compelled by the law to buy cane from the cane-growers, and since purchases made by them were not under agreements, the price paid for sugar cane could not be taxed under a statute enacted in exercise of the power in Entry 54, List II of the Seventh Schedule to the Constitution. This Court held that under Act 45 of 1961 and the rules framed thereunder, the cane-grower in the factory zone was free to make or not to make an offer of sale of cane to the occupier of the factory : if the cane grower made an offer, the occupier of the factory was bound to accept it and the agreement resulting therefrom was recorded in writing and was signed by the parties. The consent of the occupier of the factory was free as defined in Section 14 of the Indian Contract Act. The compulsion of law is it was said not coercion as defined in Section 15 of the Act. The agreements were enforceable by law and were regarded as contracts of sale as defined in Section 4 of the Indian Sale of Goods Act.

12. In a later decisions of this Court, *State of Rajasthan v. M/s. Karam Chand Thappar and Bros. Ltd.*, (1969) 1 SCR 861 : AIR 1969 SC 343, the assessee who (sic) had acquired monopoly rights to supply coal in Rajasthan and sold coal to the State of Rajasthan. The Sales Tax Officer sought to tax the turnover from supplies of coal made to the State of Rajasthan. It was held by this Court that the Colliery Control Order superimposed upon the agreement between the parties the rate fixed by the Control Order and by reason of such superimposition of the rate fixed by the Control the mutual assent of the parties and the voluntary character of the transactions were not affected. The decision of this Court in *M/s. New India Sugar Mills*, case, 1963 Supp (2) SCR 459 : AIR 1963 SC 1207 was distinguished on the ground that there was in the case then in hand mutual assent between the parties, to the transaction of supply of coal.

13. The decision of the House of Lords in *Kirkness (Inspector of Taxes) v. John Hudson and Co. Ltd.*, 1955 AC 696 is instructive. In that case liability to pay Income-tax on the difference between the compensation received for requisition of certain wagons by the Minister of Transport was in issue. A majority of the House held that there was no sale of the wagons and no income-tax was payable. Viscount Simonds observed :

".... The taxpayers' wagons were not sold, and it would be a grave misuse of language to say that they were sold. To say of a man who has had his property taken from him against his will and been awarded compensation in the settlement of which he has had no voice, to say of such a man that he has sold his property appears to me to be as far from the truth as to say of a man who has been deprived of this property without compensation that he has given it away. Alike in the ordinary use of language and in its legal concept, a sale connotes the mutual assent of two parties. So far as the ordinary use of language is concerned, it is difficult to avoid being

dogmatic but, for my part, I can only echo what Singleton, L.J., said in his admirably clear judgment (1954) 1 All ER 29 at page 32 :

"What would any one accustomed to the use of the words 'sale' or 'sold' answer ? It seems to me that every one must say 'the tax-payer did not sell'."

14. On the date of the commencement of the U.P. Wheat Procurement (Levy) Order, upon the licensed dealer was imposed a liability to deliver half the quantity of wheat on hand, and he had also to supply to the State Government 50 per cent. of the quantity of wheat procured or purchased by him every day beginning with the date of commencement of the Order. If he failed to carry out the obligation his premises were liable to be searched and his property sequestered. The order ignored the volition of the dealer.

15. We are unable to hold that there was any contract between the assessee and the State pursuant to which the goods were sold within the meaning of the U.P. Sales Tax Act.

16. The appeals are allowed. The order passed by the High Court is a set aside. The answer to the two questions as reformed by us will be in the negative. The appellants will be entitled to their costs in this Court and in the High Court. One hearing fee.

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