

M/s. Hind Tobacco and Cigarette Co. Ltd.

Vs

The Union of India

Civil Appeal No. 1409 to 1969

(P. Jagmohan Reddy, I. D. Dua JJ)

01.11.1972

JUDGEMENT

DUA, J. -

1. This is plaintiff's appeal by certificate from the judgment and decree of the Andhra Pradesh High court reversing on appeal the judgment & decree dated February 23, 1963 of the First Additional Chief Judge. City Civil Court, Hyderabad, which had decreed the present appellant's suit for Rs. 1,14,960.86 ps. against the Union of India. The High Court allowed the appeal of the Union of India and dismissed the plaintiff's suit.

2. The defendant called for tenders for the supply of cigarettes on various occasions. The Plaintiff-company carrying on the business of manufacturing cigarette submitted its tenders which were accepted by the Chief Director of Purchases, Government of India, Ministry of Food and Agricultural, Department of Food, Army Purchase Organisation, New Delhi. After acceptance of the tenders several contracts were entered into between the parties beginning with December 23, 1954 and ending July 11, 1957. They were all subject to the terms and the Special Instructions and conditions of contract in Schedules A and B to the contracts. Clause 7 of Schedule relating to price (with the Note) reads as under :

# SCHEDULE B"..... ##

7. Price : The price quoted will be subject to clause 3 (b) of the General conditions of contract (supply Department Form W.S.B. 133).

The price quoted will be deemed to be inclusive of the case of packing, cigarettes excise duty, tobacco exercise duty, tobacco excise duty, Customs duty and all other charges (incidental to supply and incurred upto loading) but exclusive of sales tax which if payable should be shown as a separate item. Sales tax would be paid at the rates rescribed by the State Government concerned. But in the event of any rebate or refunded or sales tax allowed by the State Government (on purchases for the Defence Services) subsequent to supplies, a corresponding credit will be afforded by the supplier to the Government, Sales Tax where leviabale and intended to be claimed from the purchaser should be distinctly shown along with the price quoted, where this is not done, no claim for sales tax will be admitted at any later stage or on any ground whatsoever.

All claims for reimbursement of sales tax will be accompanied by the following certificate duly

signed by the contractors :-

'Certified that no rebate or exemption has so far been allowed by the Sales Tax authorities retrospectively in respect of the reimbursement of sales tax so far claimed by us from the Central Government and in it is subsequently allowed the same will be refunded to the Chief Director of Purchase, Ministry of Food & Agriculture at once.'

'Certified that the goods on which sales tax has been charged have not been exempted under the State Sales Tax Act or the rules made thereunder and the charges on the account of sales tax on these goods are correct under the provisions of that Act or the rules made thereunder.'

Note : Under article 286 (1) of the Constitution of India no sales tax is payable on supplies procured on Central Government and despatched outside the State of origin.

3. In Exhibit B-4 (Tender no. A/3636 dated December 11, 1954) the plaintiff-company inserted in the column pertaining to "Price Per Unit" that it was "subject to sales-tax at the rate of 1 anna per rupee" but noted in the "Remark" column No 'sales tax is leviable as per Schedule B.' The quotations in this tender were also stated to be subject to the terms and conditions given in the F&A Ministry's letter dated July 6, 1954. That was the letter (B-1) inviting tenders with which were enclosed Schedules A and B. Supplies were duly made by the plaintiff in accordance with the terms of the tender. Both the parties were apparently under the belief that these sales and levied a total tax of Rs. 1,14,960.86 ps. for the four assessment years 1954-55 to 1957-58. The plaintiff

took the matter on appeals but they were all rejected upto the Appellate Tribunal. Writ Petitions to the Andhra Pradesh High Court were also unsuccessful. The plaintiff demanded reimbursement by the central Government to the extent of the amount of sales-tax actually paid. On rejection of this demand. After giving the statutory notice under sec. 80 C.P.C., the plaintiff instituted the suit for the recovery of Rs. 1,14,960.86 which has given rise to the present appeal. The suit was resisted by the Union of India on various grounds, including even the bar of limitation. Defence on the merits was principally based on cl. 7 of the Special Instructions in schedule B of the tender invitation. It was also pleaded in para 5 of the written statement that the mention of no sales tax being leviable (made in the contract of December, 1954 and some others) was discontinued because it was considered redundant.

4. The pleadings of the parties gave rise to as many as 7 issues, those relevant for our present purpose being nos. 2,3,5 and 6. They are as follows :

"2. What is the effect of note to clauses 7 of the contract ?

3. Whether the plaintiff company is entitled to claim the amount of sales tax from the defendant when it has not mentioned the same in the tenders ?

5. Whether the plaintiff is entitled to the reimbursement of sales-tax from the defendant.

6. Whether the central Government the plaintiff were under the bona fide belief that no sales tax would be leviable by the State of Hyderabad and then the State of Andhra Pradesh."

The trial court dealt with these four issues together. It did not agree with the contention of the

Government counsel that if the sales-tax was payable the plaintiffs should have claimed the same in their tenders as a separate item and having not done so they could not claim-reimbursement of the sales-tax paid by them and that the plaintiffs could have found out with reasonable diligence whether or not sales-tax was leviable on the sales in question. In the trial court's opinion the Note to cl. 7 in Schedule B could by no stretch of imagination be deemed to mere expression of opinion. In the presence of that Note the plaintiff was held entitled to assume that no sales-tax was leviable on the goods despatched outside the State. The goods, according to the trial court, were eventually despatched and consumed outside the State & the supplies were procured on the Central Government account. In the presence of cl. 7 in Schedule B the plaintiff could not have claimed the sales-tax in the tenders and the trial court also observed that the Note to this clause was very misleading and it indeed did mislead the plaintiff into the belief that no sales tax was leviable on the cigarettes procured for the Central Government and despatched outside the State Otherwise the plaintiff would have felt no difficulty in claiming sales tax in the tenders. Even in Ex.B. 5, the letter from the Government of India accepting the plaintiff's tender dated December 11, 1954, it was expressly noted that the sales tax was not payable as despatches would be made outside the State of origin. This Note was prominently added against the "N.B." In the opinion of the trial court even Art. 286 of the Constitution was also wrongly quoted in the Note to cl. 7. After taking into account all relevant circumstance the trial court felt that it would not be suggested with fairness that the plaintiff company was not free to assume that sales-tax was not payable on the despatches of cigarettes made outside the State. The plaintiff company was assed on the sales for the first time in December, 1957 with the result that the plaintiff could not have claimed sales-tax in the tenders, being unaware till assed, that sales-tax was payable on these sales. The trial court also took into account the fact that the plaintiff had registered the levy of sales-tax right upto the High Court but without success. The ultimate conclusion was expressed by that Court in these words :

"The circumstances of the case clearly reveal that not only the plaintiff but also the central government were under the bonafide belief that no sales tax would be levied by the state of Andhra Pradesh as it appears from the averments of the defendant that as the cigarettes were delivered outside the state of Andhra Pradesh for the purpose of consumption outside the despatching state could not tax the sales as they were inter-state sales. The plaintiff company in my opinion is therefore entitled to the reimbursement of the sales tax from the defendant as they were misled by the representation of the defendant that no sales tax is leviable on the goods despatched outside the state and, therefore, they did not claim the sales tax in the tenders. I, therefore, decide issues 2,3,5, and 6 in favour of the plaintiff firm."

The plaintiff's suit was decreed, as already noticed.

5. The High Court on appeal did not regard cl. 7 as constituting any misrepresentation on the part of the Government and treated that clause "at the most as an opinion on a point of law".

Reimbursement under cl. 7 according to the High Court, could only to be claimed if the plaintiff "included sales-tax as chargeable against the buyer in the first instance." On this reasoning the defendant's appeal was allowed and the plaintiff's suit dismissed.

6. In this Court Mr. Chagla, the learned counsel for the appellant, strongly contended that the High Court was in error in holding that cl. 7 merely contained an opinion on a point of law. It was really an assertion on a question of fact at any rate on a mixed question of fact and law. According to him in the very first tender (Ex. B4) the sales-tax was specified and it was stated in the Remarks Column that the same was not leviable as per Schedule B. In that Schedule as per cl. 7 the Government had

unequivocally stated the sales tax was not leviable. The plaintiff's tender was accepted by the Government. In subsequent tenders this mention was dropped as being redundant. That this was the reason for the subsequent omission is admitted and indeed in the defendant's written statement in para 5 a plea to this effect is taken in positive terms.

7. According to Mr. Chagla fixation and payment of the price as also payment of sales-tax at the rates prescribed by the State Government in the present case, was the core of one of the fundamental obligations undertaken by the defendant purchaser in lieu of the cigarettes purchased and this clearly signifies payment of sales-tax by the State Government, if leviable. The circumstances in which the seller-appellant could be deprived of the right of reimbursement was an exemption clause and therefore that had to be strictly construed. The exemption clause in the present circumstance, according to his submission, cannot be so construed as to deprive the plaintiff's right as seller to claim sales-tax from the defendant as buyer.

8. On behalf of the Union of India respondent in this Court, Shri Sanghi referred us to the plaintiff's letter dated December 11, 1954 (Ex.B 4). The first offer to supply cigarettes, and contended that this was the only contract in which in the column of Price, Sales-tax was mentioned and reference was made in the "Remarks" Column to Schedule B for excluding the sales-tax. In the subsequent contracts, according to the respondent's counsel, there was no such mention. He drew our attention to subsequent offer to support his submission. The learned counsel also relied on the *Tata Iron & Steel Co. Ltd. v. State of Bihar* (1) for the connection that the buyer is under no liability to pay sales-tax in addition to the agreed sales price : there could, therefore, be no question of any agreement of the part of the defendant to reimburse the plaintiff argued the counsel. Finally, it was submitted that the High Court had certified the case to be fit for appeal only because of its high valuation and because of the judgment of the High Court being one of reversal the grant of certificate by the High Court does not in the circumstances mean that the case involves any important question of law. This Court is, therefore, not obliged to interfere with the decision of the High Court, even if it is considered to be erroneous, contended Shri Sanghi.

9. Dealing with the last argument first, Art. 133(1) confers a right of appeal on an aggrieved party when the case satisfies the requirement of clause (a) and the judgment of the High Court is one of reversal. In such a case it is not necessary that a substantial or important question of law should also be involved. This, Court, therefore, cannot justifiably decline to go into the merits of the appeal on the ground that no substantial question of law is involved. But this apart, it cannot be said that this appeal does not involve any substantial question of law.

10. Turning to the merits it is clear, and indeed it is disputed, that cl. 7 in Schedule B governs the various contracts of sale between the parties. This clause expressly provides that the price quoted is exclusive of sales-tax. But sales-tax was expressly agreed to be paid at the rates prescribed by the State Government concerned. This liability appears to us to be the real case of one of the fundamental terms of the obligation undertaken by the purchaser. The term that the sales-tax, if payable, should be shown as a separate item is merely matter of procedure, and the condition, that, of the sales-tax intended to the claimed is not distinctly shown then no such claim would be admitted at a later stage, is more akin to exemption from this liability. In the case in hand in the very first tender, as already noticed, the plaintiff had actually separately shown in distinct terms that the price per unit stated in column no. 4 was subject to sales-tax at the rate of 1 anna per rupee. In the Remarks Column it was again expressly mentioned that no sales tax leviable as per Schedule B. This tender fully complies with clause 7 both in letter and in spirit, even though in our opinion in view of the Note to clause 7 this mention was scarcely necessary the sales tax not being leviable according

to the defendants representation. In subsequent tenders, if there is no mention of sales-tax or of the fact that it was not leviable as per Schedule B, this was due to the fact that it was considered redundant. This, as already noticed was also admitted by the defendant in the written statement. The separate mention of sales-tax which, in our opinion, does not relate to the fundamental term or core of the contract, cannot be considered to deprive the plaintiff of its right to realise the sales-tax actually held by the sales-tax department to be leviable, an which the defendant had in express terms undertaken to pay. The express and unqualified representation by the defendant in the Note to clause 7 in schedule B that sales-tax was not leviable on these sales was, in our opinion, sufficient to justify the omission on the part of the plaintiff to distinctly show it with the price quoted to be intended to be claimed. This omission would by no means deprive the plaintiff company of the right under the contract to claim from the defendant sales-tax at the prescribed rate actually paid.

11. A faint contention was raised on behalf of the defendant- respondent that there was no agreement by the defendant to pay sales- tax because the cigarettes supplied by the plaintiff were of an inferior quality and, therefore, the company must be deemed to have agreed not to charge sales-tax from the purchaser as is the normal practice in the market. In support of this submission reference was made to Ex. B.1, a letter dated July 6, 1954, written by the Deputy Director of Purchase, Government of India, Ministry of Food and Agriculture to the Plaintiff company. All that this letter suggests is that since none of the plaintiff's "Brands" had been approved, the plaintiff was requested to get its brands approved from the Director of supplies and Transfer so as to enable the company to quote against the Ministry's future tender enquiries. This letter does not support the counsels submission. Apparently after July, 1954 the plaintiff must have got their Brands approved which enabled them to quote against the Ministry's case that the Brand of cigarettes for which the tenders were actually accepted were of an inferior quality. This contention is an after-thought and is unacceptable. It is somewhat surprising that the State Government should have advanced this plea. Indeed even the main plea which was plainly contrary to the clear and explicit representation of the State Government does not reflect the expected fairness on the part of the defendant in their dealings with the citizens.

12. For the foregoing reasons, in our opinion, the High Court was in error in allowing the appeal and reversing the well-consered judgment of the trial Court. We accordingly allow the appeal and reversing the reversing the judgment and decree of the High Court, restore that of the trial court with costs throughout.

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