SUPREME COURT OF INDIA

Associated Cement Companies Limited

Vs

Government of Andhra Pradesh

Civil Appeal Nos. 6122 of 2000

(Ashok Bhan and S. H. Kapadia, JJ)

04.01.2006

JUDGMENT

ASHOK BHAN, J.

1. This appeal by grant of special leave is directed against the judgment and final order dated 8.9.2000 passed by the High Court of judicature of Andhra Pradesh at Hyderabad dismissing the Writ Petition No. 19304 of 1996 filed by the appellants. In the aforesaid writ petition the appellants had challenged the constitutional validity of Entry 18 of the First Schedule to the A.P. General Sales Tax Act (for short "the Act") introduced by A.P.G.S.T. (Amendment) Act, 1996 (Act No. 27 of 1996) on the ground that it is vocative of Article 14 of the Constitution of India.

2. Appellants are inter alia engaged in the manufacture and sale of cement and have various factories in different locations in India, including a unit in the State of Andhra Pradesh for manufacturing cement. The appellants have their marketing division at Secunderabad from where sales of cement are carried on. It has its warehouses all over the State of Andhra Pradesh. Earlier the State was charging sales tax on the sale of cement at the rate of 16% as notified by the State

Government, which included the value of the packing material used for packing cement. The value of packing material is also charged to sales tax on the total sales turnover. As far as second sale is concerned Sales tax is not paid on the value of packing materials, as sales tax is livable only on the first sale of packing materials. Section 6-C was introduced by Andhra Pradesh General Sales Tax Act (Amendment Act No.11 of 1984) which reads as under:

"6-C Levy of tax on packing material:-- Notwithstanding anything in Sections 5 and 6-A, where goods packed in any materials are sold or purchased, the materials in which the gods are so packed shall be deemed to have been sold or purchased along with the goods and the tax shall be leviable on such sale or purchase of the materials at the rate of tax, if any, as applicable to the sale, or, as the case may be, purchase of goods themselves."

3. The validity of this provision was challenged and this Court in Raj Steel vs. State of Andhra Pradesh and others interpreted this Section to mean that "Section 6-C can at best be regarded as a provision by way of clarification of existing legal situation". The Court "Section 6-C merely clarifies and explains that the components which have entered into determining the price of the goods cannot be treated separately from the goods themselves, and that no account was in fact taken of the packing material when the transaction took place, and that if such account must be taken then the same rate must be applied to the packing material as is applicable to the goods themselves. We find it difficult to accept the contention of the appellants that a rate applicable to the packing material in the Schedule should be applied to the sale of such packing material in a case under Section 6-C, when in fact there was no such sale of packing material and it is only by legal fiction, and for a limited purpose, that such sale can be contemplated."

4. With these observations the matter was remanded to the High Court for fresh consideration and disposal in the light of the observations made in the Judgment. In the earlier part of this judgment the Court after referring to the various decisions summarized the legal position vis-à-vis sales tax on turnover relatable to packing material thus:

"It is, therefore, perfectly plain that the issue as to whether the packing material has been sold or merely transferred without consideration depends on the contract between the parties. The fact that the packing is of insignificant value in relation to the value of the contents may imply that there was no intention to sell the packing, but where any packing material is of significant value it may imply an intention to sell the packing material. In a case where the packing material is an independent commodity and the packing material as well as the contents is sold independently, the packing material is liable to tax on its own footing."

5. The deeming provision as introduced by Act No. 11 of 1984 by the legislature by this interpretation was reduced to mere insignificance. This interpretation put the Assessing and Appellate Authorities to the need of making elaborate enquiries on the question whether there was

an agreement express or implied for the sale of packing material and whether any artificial or colorable devices were adopted by the assessee to split up the transaction so as to take the plea that there was a separate contract for the sale of packing material. The State Legislature then introduced Section 6-C in a modified form. The following provision was substituted by Andhra Pradesh Amending Act 22 of 1995 with effect from 1.4.1995. The amended section 6-C reads as follows:

"6-C Levy of tax on packing material:--

Notwithstanding anything contained in Section 5, Section 5-F, Section 6 and Section 6-A, the rate of tax on packing material sold with the goods shall be the same as that of the goods packed or filled, whether or not there is separate sale or agreement for sale for the packing material and the goods packed or filled."

6. In order to follow up the amendment from the revenue's point of view, the Entry in the First Schedule relating to cement was amended as follows by Act 27 of 1996 with effect from 1.8.1996:

"S. No.

Description of goods

Point of levy

Rate of tax

Effective from

18. Cement:-

(a)Where the sale price of cement includes the value of packing material

At the point of first sale

16 paisa in the rupee

1.8.1996

(b)Where the packing material and cement are sold separately and/ or the sale price of cement does not include the value of packing material".

-do

20 paisa in the rupee

1.8.1996

7. This amendment was put to challenge by the appellants before the High Court. By the impugned order the High Court has rejected the challenge and upheld the constitutional validity of the aforesaid provision.

8. Yet another step was taken by the Legislature in the year 1997 by substituting the Entry relating to containers by the following entry dealing with the packing material of various types. This was done by Act 30 of 1997 with effect from 12.5.1997 in order to invigorate the charging provision read with Section 6-C to the desired extent. The substituted Entry 19 reads as follows:

"S. No.

Description of goods

Point of levy

Rate of tax

Effective from

19. Packing material that is to say Bottles of all types whether made of Glass, Plastic or any fiber or any, other material.

At the point of first sale in the State

(A) When sold without contents?

-Do-

4 paisa in the rupee

12.5.1997

(B) When sold containing contents?

-Do-

The rate at which the content is liable to tax"

9. Simultaneously, the State Government, in order to see that the value of the packing materials is not taxed twice, exercised the power conferred under Section 9(1) of the Act and provided for set off of the tax paid on packing materials. It was provided that the tax levied and collected on packing materials in respect of sale or purchase of such materials inside the State shall be reduced from the tax payable on the packed goods.

10. By virtue of the amendments introduced in the Act and the Schedule the sale tax on cement is now levied at the rate of 16% where the sale price of cement includes the value of packing material and if the cement is sold along with separate sale of packing material for a separate price, sales tax is charged at the rate of 20%. According to the appellants, the same commodity i.e. the cement cannot be treated and made liable to pay differential duty of tax depending upon how the sale of cement is affected, i.e. by affecting the sale of cement and packing material separately.

11. The appellants have been showing the value of cement and the value of the packing material separately while preparing their bills. The appellants' case as set out in para 4 of the affidavit filed in support of the writ petition reads as under:

"The petitioner Company has been showing the value of cement and the value of packing material separately while preparing the bills. Copies of the bills are filed herewith. The purpose of showing separately the value of cement and the packing material which is used for packing cement is only for the purpose of claiming exemption for the packing material as sales tax is not levied on second sales of packing material as per the Act. By virtue of the Ordinance Cement for which tax is levied is 16% and when Cement is sold with packed material it is 16% when billed along with cement, and if the very same cement is billed separately, i.e. cement and packing material it will be 20%. That means the same cement is liable for differential levy of tax depending on how the bill is prepared."

12. According to the appellants, the appellants sell cement in bulk which is not packed at all. They are loaded into special type of wagons, and it is the loose cement which is sent without being packed to various companies such as Hyderabad Industries Limited who purchase large quantity of cement in bulk in unpacked condition for the manufacture of Asbestos Sheets and pipes. There is no packing material as the cement is not packed. According to the appellants the same cement cannot be made liable for differential levy of tax depending on how the bill is prepared. The same product cannot be classified differently and charged with different rates of sales tax. It was further averred that there was no distinction between the cement sold in packed condition or cement which is sold

in loose condition without being packed. That a distinction in the rate for charging sales tax could not be made dependent on the method and manner of preparation of bills as to whether the cement is sold along with packing material or the customer is billed separately for the value of cement and the packing material. The method of billing would not alter the character of cement which remains one and the same commodity. It was also submitted that there was no justification for making a distinction between the commodities in the same category. This was volatile of Article 14 of the Constitution and thus liable to be struck down. In support of its submissions the appellants relied upon two decisions of this Court in Ayurveda Pharmacy vs. State of Tamil Nadu, 1989 (2) SCC 285 and Vasavadatta Cement vs. State of Karnataka, 7.

13. The High Court negatives the contentions raised by the appellants and concluded that there was nothing anomalous or incongruous in prescribing the same rate of tax for the packing materials as well as the goods packed irrespective of the fact whether they are charged for and sold separately. There was no invidious discrimination and that the present case was not a case in which species of the genus was picked up for higher taxation without apparent justification. It was held that:- "The present case is not a case in which a specifies of the genus is picked up for higher taxation without apparent justification. The charge of discrimination was upheld in Ayurveda Pharmacy's case (supra) having regard to the inherent nature of the commodity and its similarity with others falling within the same category. In the present case, the rate of tax on cement is made dependant on whether the sale price of cement includes the cost of packing materials. If the packing material cost is shown as an integral part of the price at which the cement was sold, it would attract lesser rate of tax. However, if the packing material cost is excluded from the value of the cement, the turnover will be less and in such an event, the Legislature thought it fit to prescribe a higher rate of tax. It is left to the dealer to choose one of the courses. Different rates of tax for the same commodity are prescribed depending on whether the price includes packing material cost, obviously with a view to check tax avoidance. Such was not the situation in Ayurveda Pharmacy case (supra)."

14. Relying heavily on the decision in Ayurveda Pharmacy case (supra) Mr. Rajiv Shakdher, learned counsel for the appellants contended that the same commodity i.e. cement could not be subjected to different rates of taxation depending on whether the cement and packing material are sold separately. It was not permissible to the respondents to levy tax at the rate of 16% when the same is billed along with packing material and to tax the same commodity (cement) at the rate of 20% when the cement and its packing material are billed separately. It was submitted that Clause B of Entry 18 of the First Schedule of Andhra Pradesh Act is discriminatory and irrational. It levies differential tax rate higher than 16% on the same commodity i.e. cement depending on the fact that the appellants have been claiming a separate sale of packing material and thereby showing the value of cement and the value of packing material separately while preparing the bills. It was submitted that the discrimination is writ large on the face of the impugned Entry in the taxation schedule and such discriminatory treatment was not justified. As against this, Mr. Anoop Choudhary, learned senior advocate appearing for the respondent contended that the provision was not discriminatory. The object was to see that the tax revenue on packing material is not lost to the State by reason of adoption of artificial tax planning devices. According to him Ayurveda Pharmacy's case (supra) was distinguishable and the prescription of different rates of tax in the peculiar circumstances obtained in cement and liquor trade was not impermissible. He strongly relied upon the decision of this Court in Premier Breweries vs. State of Kerala, in which this Court considered the provisions of sub-

Sections (5) and (6) of Section 5 of the Kerala General Sales Tax Act which according to him are pari materia with Section 6-C of the Andhra Pradesh General Sales Tax Act introduced by Act No. 22 of 1995.

15. In the Twyford Tea Co. vs. State of Kerala, Hidayatullah, J. speaking for Constitution Bench spelt out the principles governing the application of Article 14 to the taxing statutes. It was held that the State does not have to tax everything in order to tax something. The state enjoys a wide discretion in the matters of taxation and enjoys more freedom for classifying the objects to be taxed and the rates of taxation. The burden for proving discrimination is always heavy on the person who alleges discrimination and heavier still when a taxing statute is under attack. That the State can validly pick and choose one commodity for taxation and the same is not open to attack under Article 14 on the ground that the same result must follow when the State picks out one category of goods and subjects it to the taxation. Relevant portions at para 15 of this judgment read as under:-

"15. We may now state the principles on which the present case must be decided. These principles have been stated earlier but are often ignored when the question of the application of Article 14 arises. One principle on which our Courts (as indeed the Supreme Court in the United States) have always acted, is no where better stated than by Willis is his "Constitutional Law" page 587. This is how the put it":

"A State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably ... The Supreme Court has been practical and has permitted a very wide latitude in classification for taxation." This principle was approved by this Court in East Indian Tobacco Co. vs. State of Andhra Pradesh at page 409. Applying it, the Court observed: "If a State can validly pick and choose one commodity for taxation and that is not open to attack under Article 14, the same result must follow when the State picks out one category of goods and subjects it to taxation."

This indicates a wide range of selection and freedom in appraisal not only in the objects of taxation and the manner of taxation but also in the determination of the rate or rates applicable. If production must always be taken into account there will have to be a settlement for every year and the tax would become a kind of income-tax.

16. The next principle is that the burden of proving discrimination is always heavy and heavier still when a taxing statute is under attack. This was also observed in the same case of this Court at page 411 approving the dictum of the Supreme Court of the United States in Madden vs. Kentucky 1940 (309) US 83: 84 L Ed.590)."In taxation even more than in other fields, Legislatures possess the greatest freedom in classification the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." In Khandige Sham Baht vs. Agricultural Income Tax Officer, a Constitution Bench of this Court while pointing out the taxation law is not an exception to the doctrine of equality, clarified:

"But in the application of the principles, the Courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the manner of classification; so long it adheres to the fundamental principles underlying the said doctrine. The power of the Legislature to classify is of 'wide range and flexibility' so that it can adjust its system of taxation in all proper and reasonable ways".

17. In Ganga Sugar Corporation vs. State of U.P., another decision the Constitution Bench of this Court observed:

"Even so, taxing statutes have enjoyed more judicial indulgence. This Court has uniformly held that classification for taxation and the application of Article 14, in that

Context must be viewed liberally, not meticulously."

18. Recently, in State of W.B. vs. Kesoram Industries Ltd. and others, 2004 (10) SCC 201, a Constitution Bench by a majority of 4:1 held that the measure / mode / machinery employed for assessing a tax must not be confused with the nature of the tax. A tax has two elements: first, the person, thing or activity on which the tax is imposed (the subject of tax), and second, the amount of tax. The subject of tax is different from the measure of levy. The amount of tax may be measured in many ways but the distinction between the subject-matter of a tax and the standard by which the amount of tax is measured must not be lost sight of. While the subject of tax is clear and well defined, the amount of tax is capable of being measured in many ways for the purpose of quantification. Devising the measure of taxation is a far more complex exercise than defining the subject of tax and therefore the legislature has to be given much more flexibility for devising the measure of taxation. It was observed in para 33 as under:--

"We now proceed to enter a deeper dimension in the field of tax legislation by considering the problem of devising the measure of taxation. This aspect has been dealt with in detail in Union of India vs. Bombay Tyre International Ltd. 1983 (4) SCC 210. Tracing the principles from the leading authority of A reference under the Government of Ireland Act, 1920 and Section 3 of the Finance Act (Northern Ireland) 1934, Re. 1936 AC 352, passing through Ralla Ram vs. Province of East Punjab, 1948 FCR 207, and treading through the law as it has developed through judicial pronouncements one after the other, this Court has made subtle observations therein. It has been long recognized that the measure employed for assessing a tax must not be confused with the nature of the tax. A tax has two elements: first, the person, thing or activity on which the tax is imposed, and second, the amount of tax. The amount may be measured in many ways; but a distinction between the subject matter of a tax and the standard by which the amount of tax is measured must not be lost sight of. These are described respectively as the subject of a tax and the measure of a tax. It is true that the standard adopted as a measure of the levy may be indicative of the nature of the tax, but it does not necessarily determine it. The nature of the mechanism by which the tax is to be

assessed is not decisive of the essential characteristic of the particular tax charged, though it may throw light on the general character of the taxes

(i) It was observed in para 126 as under:-

"(ii) The subject of tax is different from the measure of the levy;

(iii) Merely because a tax on land or building is imposed by reference to its income or yield, it does not cease to be a tax on land or building. The income or yield of the land/ building is taken merely as a measure of the tax; it does not alter the nature or character of the levy. It still remains a tax on land or building. No one can say that a tax under a particular entry must be levied only in a particular manner. The legislature is free to adopt such method of levy as it chooses. So long as the essential character of levy is not departed from within the four corners of the particular entry, the manner of levying the tax would not have any vitiating effect;xxx xxx xxx

(iv) It is permissible to classify land by reference to its user as a separate unit for the purpose of levy of cess. Tea estate, as a separate category of land, is a valid classification;" It was further observed in para 129, sub para 3 as under:

"(3) The nature of tax levied is different from the measure of tax. While the subject of tax is clear and well defined, the amount of tax is capable of being measured in many ways for the purpose of quantification. Defining the subject of tax is a simple task; devising the measure of taxation is a far more complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The mechanism and method chosen by Legislature for quantification of tax is not decisive of the nature of tax though it may constitute one relevant factor out of many for throwing light on determining the general character of the tax."

19. In State of U.P. vs. Sukhpal Singh Pal, 2005 (7) SCALE 106, this Court has laid down that the Courts must show judicial restraint while considering the scope of economic legislation as well as tax legislation and unless the provision is manifestly unjust or glaringly unconstitutional the same should not be interfered with. There is always a presumption in favour of the constitutional validity of any legislation unless the same is set aside for breach of the provisions of the Constitution. Citing with the approval the decision of this Court in R.K. Garg etc. vs. Union of India and Others, it was held that every legislation particularly in economic matters is essentially empiric and based on experimentation. It cannot be struck down merely because there is a possibility of abuse. The same can be set right by the legislature by passing amendments. The Courts therefore, should adjudge the constitutionality of such legislation by the generality of its provisions. Laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of

speech, religion etc.

20. In Premier Breweries's case (supra), a three-Judge Bench of this Court repelled the contention of the assessee that it was not open to the assessing authority to include the value of the containers in the price of the liquor for the purpose of calculating the rate of tax as the containers were separately billed and charged for. Interpreting sub-sections (5) and (6) of Section 5 of the Kerala General Sales Tax Act it was held that underlying idea behind these rules is that packed goods are to be taxed as composite units and therefore in calculating the turnover of the goods, the turnover of the containers will have to be included. The appropriate rate of tax will be the rate payable on the goods and it will not make any difference, if the containers are shown to have been sold and charged separately.

21. In the Premier Breweries's case (supra), the assessee sold Indian-made foreign liquor in bottles packed in cardboard cartons. As the assessee charged its customers separately for the liquor and the cartons the Assistant Collector held the cartons to be taxable @ 8% under Entry 7 to Schedule I of the Kerala General Sales Tax Act, 1963. The Deputy Collector under the Act exercising his revisional jurisdiction under Section 35 set aside the Assistant Collector's order and invoking Section 5(5) of the Kerala General Sales Tax Act held the cartons to be taxable at the rate the liquor was taxable. The view of the Deputy Commissioner was upheld by the Appellate Court and the High Court. Before this Court it was contended by the assessee that since the appellants had charged, and the customers paid, for the liquor and cartons separately, in the presence of Entry 97 in Schedule I to the Act prescribing a specific rate of tax for cartons, the value of the containers could not be included in the value of the liquor for the purpose of calculating the assessee turnover. It was further contended that the sales tax under the Kerala General Sales Tax Act being a single-point tax and tax having already paid on the cartons by the manufacturers thereof, the cartons could not be taxed again at the time of the sale of beer. Dismissing the appeal this Court pointed out in para 6 that:

The language of sub-sections (5) and (6) of Section 5 is clear and unambiguous. These two sub-sections deal with the method of valuation of packed goods and the rate of tax payable thereon. The rules laid down are: (1) where goods sold are contained in a container or packed in any packing material; the rate of tax payable on the containers shall be the same as that applicable to the goods contained or packed. (2) This will be the position even if price of the containers or packing materials is charged separately. (3) The turnover of the goods will include the turnover in respect of containers or packing materials in which the goods are contained or packed. (4) The point of levy of the tax on the containers or the packing materials will be the same as applicable to the goods contained or packed. (5) If the sale or purchase of goods contained in a container or packed in a packing material is exempted from tax, then, no tax shall be payable on the sale or purchase of the containers or packing materials in which the goods are sold." It was then observed at Para 7 thus:

"(a) "The underlying idea behind these rules is that packed goods are to be taxed as composite units. In calculating the turnover of the goods, the turnover of the containers will have to be included. The

appropriate rate of tax will be the rate payable on the goods. It will not make any difference, if the containers are shown to have been sold and charged separately. The logical corollary to this principle is that when the goods are exempted from tax, no tax is leviable on the containers. This will be the position even when the goods and the containers are sold and charged separately". Further in para 8 it was observed:

"Various rates of tax have been fixed by the Act for sale or purchase of various types of goods. If the goods are sold in packages or containers then for the purpose of imposition of tax, the turnover of goods will have to be calculated by the including therein the turnover of the packages or the containers. The rate of tax applicable to the turnover so calculated will be the rate payable on the goods contained in the containers. It follows that if bottled beer is sold in containers, the tax payable on beer will be the appropriate rate of tax payable on the turnover calculated in the manner stated hereinabove. It has not been found by any of the authorities who heard the case that the carton were specially provided for protection of the bottles and bottled beer usually was not delivered in cartons even in cases of bulk sales. The argument based on secondary packing is misconceived."

22. After referring to Raj Steel case (supra), it was observed that the difficulty arising out of the restricted meaning given to a deeming clause in Section 6-C of the A.P. Act had been obviated by specific provisions of Section 5(5) of the Kerala Act by providing that the turnover of the goods shall include the turnover in respect of packing materials or containers. It was observed in para 16:

"This difficulty arising out of the restricted meaning given to the deeming clause in Section 6-C of the Andhra Act has been obviated by specific provisions of Section 5(5) of the Kerala Act by providing that the turnover of the goods will include the turnover in respect of the packing materials or the containers. The containers or the packing materials will be taxed at the same point and at the same rate at which the goods are to be taxed. This rule will apply "whether the price of the containers or the packing materials is charged separately or not." Therefore, even in a case where the containers are separately sold, the turnover of the goods will include the turnover of the containers and the appropriate rate of tax on such turnover will be the rate of tax payable on the goods."

23. Referring to the decision in Vasavadatta Cements v. State of Karnataka, 7, wherein this Court had followed the principle laid down in Raj Steel case (supra) it was pointed out that:

"...in Vasavadatta case (supra) this Court overlooked the marked dissimilarity between Section 6-C of the Andhra Act and Section 5(3-D) of the Karnataka General Sales Tax Act. We are also of the view that sub-sections (5) and (6) of the Kerala General Sales Tax Act will have to be construed uninfluenced by the decision of the Court in Raj Steel's case where Pathak, C.J. construed the deeming provisions in Section 6-C of the Andhra Act in a narrow sense. Section 6-C did not contain any specific provisions for including the turnover of the containers of the packing materials in the turnover of the goods."

24. Section 6-C as amended by Act 22 of 1995 is almost in pari materia to sub-sections (5) and (6) of Section 5 of the Kerala General Sales Tax Act. Sub-sections (5) and (6) of Section 5 of the Kerala Act reads as under: "5. (5) Notwithstanding anything contained in sub-section (1) or sub-section (2), but subject to sub-section (6), where goods sold are contained in containers or are packed in any packing materials, the rate of tax and the point of levy applicable to the containers or packing materials, as the case may be, shall, whether the price of the containers or packing materials is charged separately or not, be the same as those applicable to goods contained or packed, and in determining turnover of the goods, the turnover in respect of the containers or packing materials shall be included therein. (6) Where the sale or purchase of goods contained in any containers or packed in any packing materials is exempt from tax, then, the sale or purchase of such containers or packing materials shall also be exempt from tax".

25. In Premier Breweries' case (supra), which is a three-Judge Bench case, the distinction in Raj Steel's case (supra) as well as in Vasavadatta's case (supra), which are two-Judge Bench cases, has been pointed out. We are in respectful agreement with the view taken by three-Judge Bench in Premier Breweries' case (supra), which was interpreted sub-sections (5) and (6) of Section 5 of the Kerala General Sales Tax Act, 1963 which is in pari materia with the Section 6-C as introduced by amendment Act 22 of 1995.

26. In Ayurveda Pharmacy vs. State of Tamil Nadu, 1989 (2) SCC 285, which is the sheet anchor of the appellants' submission the facts were: that the appellants were manufacturers of Ayurvedic drugs and medicines, including Arishtams and Asavas. Arishtams and Asavas contain alcohol, which according to the assessee was essential for the effective and easy absorption of the medicine by the human system and also because it acted as a preservative. While all other patent or proprietary medicinal preparations belonging to the different system of medicines were taxed at the rate of 7% only, Arishtams prepared under the Ayurvedic system were made subject to a levy of 30%. The appellants filed the writ petitions in the High Court of Madras challenging the levy at 30% on Arishtams and Asavas, being violative of Article 14 as well as Article 19(1)(g) of the Constitution of India. High Court dismissed the writ petition by observing that the imposition of the rate of 30% on the sale of Arishtams and Asavas must be regarded principally as a measure for raising revenue, and repelled the argument that the rate of tax was discriminatory or that Article 19(1)(g) was infringed. Reversing the decision it was held by this Court that the two preparations, Arishtams and Asavas, were medicinal preparations, and even though they contained a high alcohol content, so long as they continue to be identified as medicinal preparations they must be treated, for the purposes of the Sales Tax Law, in like manner as medicinal preparations generally, including those containing a lower percentage of alcohol. In the said case the charge of discrimination was upheld having regard to the inherent nature of the commodity and its similarity with others falling within the same category. But in the present case, the rate of tax on cement is made dependant on whether the sale price of cement includes the cost of packing materials.

27. The Legislature distinguished between two categories of sale of cement recorded by the dealer

as in these two categories there is considerable variation in the turnover base. In the category of transactions falling in Clause (a) Entry 18 taxable turnover includes the value of the cement and the value of the packing material. The category of transactions falling under clause (b) the taxable turnover includes the value of the cement only. It does not include the value of the packing material. So the turnover base under Clause (a) and Clause (b) differs. The turnover base under Clause (b) is inevitably higher than the turnover base would be equivalent to the value of the packing material. The discrimination does not arise for any dealer because the dealer can avail any one of the option available in Clauses (a) and (b). If the dealer sells cement along with the packing material and the sale price includes value of packing material he continues to pay tax at the previous rate, i.e. 16%. If the dealer opts to sell the packing material and cement separately he has to pay tax at higher rate i.e., 20% on cement only. The dealer is not left without any option. He can exercise one of the two options and pay the tax accordingly.

28. Moreover, as per G.O. Ms. No. 374 Rev dated 25.04.1987, tax levied in the State on the packing material used for packing the goods shall be reduced from the tax payable by a dealer at the rate applicable to cements under Section 6C on the turnover of sale of such goods and packing material. If the appellants purchased the packing material from any dealer within the State and paid tax at 16% on cement under Clause (a) he would be entitled to claim set off of the tax paid by him on such packing material at the time of its purchase inside the State. High Court rightly pointed out that the imposition of higher rate of tax in the case falling under clause (b) of Entry 18 is to check the tax avoidance measures which are said to be rampant. That contrary to the normal business practices and modalities of sale of cement, the manufacturers had started bifurcating the price of cement and packing material to make it to appear that there was separate sale of each of them, so that they need not have to pay the higher tax on the component of packing material. It is common knowledge that the cement, barring some bulk supplies, is ordinarily sold in packed condition, i.e, either gunny bags or HDPE bags. Going by ordinary business practice and common sense, one does not think of purchasing the cement and bag separately. The agreement and the bargain would be for sale and purchase of cement in packed condition, that is to say, together with the container.

29. In Hyderabad Deccan Cigarette Factory v. State of A.P., (SC), it was observed:

"In the instant case, it is not disputed that there were no express contracts of sale of the packing materials between the assessee and its customers. On the facts, could such contracts be inferred? The authority concerned should ask and answer the question whether the parties in the instant case, having regard to the circumstances of the case, intended to sell or buy the packing materials, or whether the subject-matter of the contracts of sale was only the cigarettes and that the packing materials did not form part of the bargain at all, but were used by the seller as a convenient and cheap vehicle of transport."

It was further held: "...Many cases may be visualized where the container is comparatively of high value and sometimes even higher than that contained in it. Scent or whisky may be sold in costly containers. Even cigarettes may be sold in silver or gold caskets. It may be that in such cases the agreement to pay an extra price for the container may be more readily implied..."

30. Going by what has been held in the aforesaid case the gunny bag or the HDPE bag is used to facilitate the transporting and marketing. The value of bag would normally be a minor percentage of the value of cement. In such a situation, it would be difficult to infer a separate agreement for the sale of bags used for packing the cement. High Court was right in observing that the manufacturers, in order to claim the tax benefit had resorted to the modus operandi of the sale of containers (bags) by bifurcating the price. That when evidence is created prima facie supporting the plea of separate sale of packing material, it would be difficult for the taxing authorities to establish otherwise even though the design and purpose of creating such evidence by the process of billing etc., is quite evident. That in every case, elaborate enquiry will have to be made to decide on which side the transaction falls. To obviate such uncertainties and long drawn enquiries, the Legislature has laid down a straight formula prescribing the rate of tax on cement dependent on the two categories envisaged in Clauses (a) and (b) of Entry 18. It is rationalization of the entries and is regulatory in nature.

31. If that be the situation, we do not find any basis to hold that such classification of the same commodity is impermissible and would amount to discrimination being violative of Article 14 of the Constitution of India.

32. For the reasons stated above, we do not find any merit in the appeal and dismiss the same leaving the parties to bear their own costs.