

ORISSA HIGH COURT

M. and M.T. Corpn

Vs

State (Orissa)

S.J. Cs. Nos. 85 to 89 and 90 to 94 of 1971

(R.N. Misra, B.K. Ray and N.K. Das, JJ.)

11.05.1976

JUDGEMENT

B.K. Ray, J.

1. The State of Orissa and the assessee applied to the Sales Tax Tribunal under Section 24 (1) of the Orissa Sales Tax Act of 1947 (hereinafter referred to as the 'Act') to state cases and refer certain questions for opinion of the Court. After hearing both sides the Tribunal has stated these cases and referred the following questions for opinion of the Court:-

- "(1) Whether on the facts and in the circumstances of the case, the Tribunal is correct in holding that there has been no contravention of the declaration given under Rules 27 (2) of the Orissa Sales Tax Rules thus attracting the Proviso to Section 5 (2) (A) (a) (ii) of the Orissa Sales Tax Act?
- (2) Whether in the facts and circumstances of the case, the learned Tribunal having held that there was no contravention of Section 5 (2) (A) (a) (ii) of the Act acted within its jurisdiction in remanding the appeal?
- (3) Whether in the facts and circumstances of the case, the sale by the petitioner-Company to the Japanese Buyer comes within the ambit and scope of Article 286 (1) (b) of the Constitution of India read with Section 5 of the Central Sales Tax Act?"

References made at the instance of the assessee have been registered as S. J. Cs. 85 to 89 of 1971 while those made at the instance of the Revenue have been registered as S. J. Cs. 90 to 94 of 1971. These references came up for hearing before a Division bench consisting of two of us and by order dated 6-2-1976 these were asked to be placed before a larger Bench to examine the correctness of the several contentions raised and that is how these references are now being disposed of by us.

2. Assessee, the Minerals and Metals Trading Corporation of India Limited is a public sector Company of the Union Government and is a registered dealer under the Act within Cuttack III

Circle. During the years 1966-67 and 1967-68 and the quarters ending June, September and December, 1968, assessee purchased certain mineral ores from mine owners who are registered dealers under the Act upon furnishing declaration in terms of Rule 27 (2) of the Orissa Sales Tax Rules (hereinafter referred to as the 'Rules') undertaking to resale the same within the State of Orissa. These purchases were on the basis of contracts entered into by the assessee with the mine owners. Assessee carried the goods to Paradeep Port within the State and sold the same to Japanese Buyers with whom the assessee had pre-existing contracts. When assessments were taken up, assessee claimed that in terms of its undertaking and declarations furnished under Rule 27 (2), assessee had resold the goods to Japanese buyers at Paradeep within the State and, therefore, there was no violation of the undertaking and the application of the Proviso to Section 5 (2) (A) (a) (ii) of the Act was not attracted. It is further contended that the sale of goods by the assessee to Japanese buyers being in course of export came within the purview of exemption provided under Article 286 (1) (b) of the Constitution and, therefore, the same was not exigible to sales tax even if there be a local sale at Paradeep. A part of the ores purchased by the assessee from the mine owners on the basis of declarations were actually resold to M/s. Hindustan Steel Limited. In respect of those no dispute arose and we have not been called upon to deal with the same.

3. In respect of the materials sold to the foreign buyers, the Sales Tax Officer found that there had been a violation of the declarations inasmuch as the assessee violated the undertaking. He, therefore, applied the Proviso and raised demand of tax for the entire period.

4. In first appeals by the assessee, it raised two contentions, namely :-

- (i) Assessee's sales to foreign buyers were completed at Paradeep and, therefore, there was a resale within the State of Orissa and the relevant Proviso had no application; and
- (ii) The sale by the assessee to the Japanese buyers was in course of export and, therefore, was exempted from taxation.

Both the arguments were negated and assessments were sustained.

5. Assessee appealed before the Tribunal and in second appeals, the Tribunal came to hold that there were actually sales within the State of Orissa by the assessee in favour of Japanese buyers and, therefore, there was no violation of the terms of the declarations. In respect of the other contention, namely that the transactions were in course of export and, therefore, not exigible to sales tax, the Tribunal found against the assessee. The net result of the second appeals, therefore, was that while assessee's liability was found not to arise on account of violation of the undertaking in the declarations, assessee's sales in favour of the Japanese Buyers were found liable to tax. As the accounts had to be reverified for ascertaining the correct figures, the Tribunal directed remand of the matters. Against this order both the Revenue as also the assessee felt aggrieved - assessee so far as its claim of total exemption was rejected by holding that there was a sale at Paradeep in favour of the foreign buyer which was exigible to Orissa Sales Tax and the Revenue so far as there was a finding that resale took place at Paradeep and, therefore, there was no application of the Proviso on the basis of violation of the declarations.

6. There is no dispute that assessee purchased mineral ores from the mine owners who are registered dealers under the Act and upon furnishing declarations as provided under Rule 27 (2),

assessee had not paid sales tax on these purchases. The declarations given by the assessee obliged it to effect resales within the State of the commodity so purchases Section 5 (2) (A) defines the expression 'taxable turnover' to mean-

"... .. that part of a dealer's gross turnover during any period which remains after deducting therefrom:

(a) his turnover during that period on-

(i) the sale of any goods notified from time to time as tax free under Section 6 and of the packing materials, if any, in respect of such goods.

(ii) sales to a registered dealer of goods specified in the purchasing dealer's certificate of registration as being intended for resale by him in Orissa and on sales to a registered dealer of containers or other materials for the packing of such goods."

The Act has adopted a single-point tax. Under the scheme, the taxable event is postponed until a registered dealer sells the goods to an unregistered dealer, a consumer or in breach of the undertaking in terms of clause (ii) diverts the goods for other purposes. The proviso appearing under Section 5 (2) of the Act operates when the purchasing dealer violates his undertaking and the tax liability which he had avoided on the basis of the declarations comes upon him. The Proviso is to the following effect:-

"Provided that when such goods are used by the registered dealer for purposes other than those specified in his certificate of registration, the price of goods so utilized shall be included in his taxable turnover"

7. Assessee claims that it effected sales in favour of the Japanese Buyers at Paradeep. The terms of the contract under which sales are said to have taken place are available on the record and it is stated that more or less the contracts are of a uniform pattern. At the time of hearing parties have, therefore, referred to us a contract dated 1st of June, 1965, which has been printed in the paper book. An analysis of the terms of the contract may now be made. Article 6 provides for analysis of the ore at the loading port. Article 10 provides that each shipment shall be deemed as delivered when it is loaded on board the vessel and trimmed. Under Article 12, Paradeep is a port of delivery. Insurance cover in terms of Article 9 after the ore is loaded on board the vessel is to be arranged by the Buyer at its expense. Under Article 13, risk with respect to the shipment passes from the seller to the buyer when ore has been loaded and trimmed on board the vessel. The heading of this article is "title and risk" and the obvious intention is that title passes to the Buyer with the contemplated activity being over. Under Article 14, in the event of loss of cargo in part or in full, the result of the loading port analysis is deemed to be final. Article 16 obliges the buyer to arrange ships for transport. Provision has also been made for payment by irrevocable, transferable, assignable, divisible and confirmed, without recourse to Drawer, Letters of Credit to cover 100 per cent value of each shipment. On the basis of these clauses which reflect the true intention of the contracting parties, it is claimed that title in the ores passed at Paradeep and thus these were local sales within the State. Learned Advocate General appearing on behalf of the State contended that the goods were finally appropriated in the Japanese ports and, therefore, there could be no sale within the State of Orissa. On the terms of the contract indicated above, we do not think, the Tribunal can be said to have been wrong in holding that sales took place at Paradeep.

In paragraph 9 of its decision, the Tribunal summarized its finding on the point thus:-

"The appellant has furnished copies of certain contracts, viz. No. 1/62-Jap., No. 1/67/Jap., Contract No. 8/65 and Contract of the M. M. T. C. with M/s. Radheshyam Bhanj Deo, Samanta Nivas, Sheik Bazar, Cuttack (Contract No. Exp. 18/67 Ex-plot deliveries) and contract No. Jap FE/Exp./26/63. It is obvious that the contracts are not tripartite contracts. One set of contracts is between the M. M. T. C. with foreign buyers and in this case Steel Mills of Japan and the other set is between the M. M. T. C. with M/s. Radheshyam Bhanja Deo. In the first contract between M. M. T. C. and the Japan Buyer (Contract No. 1/68/Jap) the condition is a phased delivery at Paradeep (so far as these cases are concerned). The price as per Col. 3 is on FOBT (Free on board trim) basis and as per clause 6 payments are to be made in favour of the seller to cover 100% of the value of its shipment at least 30 days (or 22 days under unavoidable circumstances) prior to the declared respective shipments. The cost of sampling and analysis would be at the seller's account and the weighing would be at the loading port. The three vital clauses are 9, 10 and 12. Under clause 9 of the contract, the ores are to be loaded on board the vessel and insurance covering the same would be at the buyer's expense; under clause 10 delivery of each shipment shall be deemed as delivery when it has been loaded on board the vessel on trim (FOBT) basis. Regarding place of delivery, it may be effected in several ports, one of which is Paradeep. What is most significant is Article 13 captioned Title and Risk. It is said that risk with respect to each shipment shall pass from the seller to the buyer when ore has been loaded and trimmed on board the vessel. Under Article 14, 'in case of loss of cargo', it would be to the buyer's accounts. The seller is to furnish a shipping programme and the buyer will notify the seller the supply thereof. The vessels to carry ores under the contract shall be chartered and allocated by the buyer and that after acceptance of the vessels, if the seller makes default in shipment, the buyer will have to be indemnified. In short, under the conditions of this contract (and others also which are conceded to be similar) the property in goods passes from the buyer to the seller at Paradeep and the seller M. M. T. C.'s responsibility ceases after putting the ores on the vessel on FOBT basis. Thereafter it becomes the property of the buyer who takes all risks and so gets it insured. Even there is no rejection clause at the other end. From this there is no escape from the conclusion that sales have been effected at Port Paradeep. Consequently, it cannot be said that there has been any violation of the declaration furnished by M. M. T. C. viz., to resell the goods in Orissa."

We concur with the finding of the learned Tribunal that the assessee effected resales at Paradeep within the State of Orissa. As pointed out by the Supreme Court in the case of *State of Madras v. Gannon Dunkerley and Co^l.*, in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title to goods, which pre-supposes capacity to contract, that it must be supported by money consideration, and that as a result of the transaction property must actually pass in the goods. Unless all these elements are present, there can be no sale. On an analysis of the contract, as indicated above, it is clear that both parties has

capacity to contract; assessee had title to the goods and title in the property has passed to the Japanese Buyers for good consideration. Once these ingredients are satisfied, a sale takes place. It is open to parties for convenience to make certain special provisions but those features are not to be taken as providing the guideline for determining the value of the transaction nor should they deter a sale being complete once the ingredients of sale are found to have existed.

8. Are these sales at Paradeep exigible to Orissa sales tax is the next aspect for consideration. Assessee maintains that these very sales have occasioned export of the ores out of the territory of India and as such the same would not be exigible to tax. Reliance is placed on the provisions of Article 286 (1) (b) of the Constitution and Section 5 of the Central Sales Tax Act. Those provisions are as follows:-

"Article 286. (1). No law of a State shall impose, or authorize the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place-

(a) *** **

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India."

" Section 5. (1). A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India."

In Section 5 of the Central Sales Tax Act, the principle envisaged in sub-article (2) of Article 286 is formulated. The position of law with reference to Section 5 of the Central Sales Tax Act has been with great clarity and lucidity indicated by a recent decision of the Constitution Bench of the Supreme Court in the case of *Mod. Serajuddin v. State of Orissa*², The learned Chief Justice after giving a review of all the important decisions of the Court on the point summarized the position thus:-

"The contention on behalf of the appellant that the contract between the appellant and the Corporation and the contract between the Corporation and the foreign buyer formed integrated activities in the course of export is unsound. The crucial words in the section are that a sale or purchase of goods shall be deemed to take place in the course of the export of the goods only if the sale or purchase occasions such export. The various decisions to which reference has been made illustrate the ascertainment of the pre-eminent question as to which is the sale or purchase which occasions the export. The Coffee Board case (AIR 1971 Supreme Court 870) as well as the case of Binani Bros. (AIR 1974 Supreme Court 1510) clearly indicates that the distinction between sales for export and sales in the course of export is never to be lost sight of. The features which point with unerring accuracy to the contract between the appellant and the Corporation on the one hand and the contract between the Corporation and the foreign buyer on the other as two separate and independent contracts sale within the ruling in the Coffee Board case and the Binani

Brothers case, are these: The Corporation entered on the scene and entered into a direct contract with the foreign buyer to export the goods. The Corporation alone agreed to sell the goods to the foreign buyer. The Corporation was the exporter of the goods. There no was privity of contract between the appellant and the foreign buyer. The privity of contract is between the Corporation and the foreign buyer. The immediate cause of the movement of goods and export was the contract between the foreign buyer who was the importer and the Corporation who was the exporter and shipper of the goods. All relevant documents were in the name of the Corporation whose contract of sale was the occasion of the export. The expression 'occasions' in Section 5 of the Act means the immediate and direct cause. But for the contract between the Corporation and the foreign buyer, there was no occasion for export. Therefore, the export was occasioned by the contract of sale between the Corporation and the foreign buyer and not by the contract of sale between the Corporation and the appellant."

In Md. Serajuddin's case, assessee was the mine owner. The State Trading Corporation (predecessor of the assessee before us so far as dealings in metals and minerals are concerned) was the exporter. Serajuddin was claiming exemption from sales tax on the basis of Article 286 (1) (b) of the Constitution. The Supreme Court held that there were two transactions independent of each other - one by the assessee with the Corporation and the other by the Corporation with the foreign buyer. The Court found that the Corporation had entered into back to back contract with the mine owners like the assessee in this case. Yet string contracts or chain contracts are separate transactions even when there is similarity relating to quantity, quality of goods, shipments, sampling and analysis, weight and force majeure or other similar terms. The analysis of the legal position given in paragraph 25 of the judgment of the Court makes it clear that the sales effected by the assessee in favour of the foreign buyer must be held to have been in course of export and is thus squarely covered by Article 286 (1) (b) of the Constitution read with Section 5 of the Central Sales Tax Act. Thus the sale by the assessee in favour of the Japanese Buyers though completed at Paradeep is yet not exigible to Orissa sales tax in view of the restriction imposed by Article 286 (1) (b) of the Constitution.

9. Now we must consider the applicability of the Proviso to Section 5 (2) (A) (a) (ii) of the Act. We have already recorded a finding agreeing with the Tribunal that there was a resale within the State of Orissa. We have also found that in spite of the fact that there were resales within the State, which answer the ingredients of an intra-State sale, the same is not exigible to Orissa sales tax being in the course of export. There is no doubt that if the restriction imposed under the Constitution did not operate, the sales would have been subjected to tax.

10. Examining the very aspect which is now for consideration, a Bench of this Court consisting of two of us in the case of *State of Orissa v. Joharimal Gajananda*³, has said :-

"... .. Its declarations contemplated that it would resell the goods so purchased in Orissa. As we have already found, the goods purchased by the assessee were as a fact resold in Orissa, but these sales, by application of the provisions of the Central Act,

became the first sales under the Central Act. It is true that the scheme under the Act collecting Orissa sales tax at the deferred point has not worked out, but in the facts of the case, it cannot be said that the assessee used the goods purchased by it for a purpose other than that specified in its certificate of registration which alone would attract the application of the proviso under which the additional demand has been raised. If the assessee as a fact resold the goods in Orissa, but on account of some supervening law that transaction is made taxable under some other Act and tax under the Orissa Sales Tax Act was not imposable, it would not amount to any violation of the declarations by the assessee... .."

The principle underlined in the decision of the Constitution Bench of the Supreme Court in the case of *Instalment Supply Ltd. v. Sales Tax Officer*⁴, was found to support the conclusion of the Division Bench. The Madras High Court in the case of *Bengal Corporation Pvt. Ltd. v. State of Madras*⁵, dealt with a case of this type and at page 70 of the Reporter observed:-

"It must be noticed that Section 4 which fixes the situs or locale of a sale inside the State is made expressly subject to the provisions of Section 3, the consequence being that if a sale was a local sale within the meaning of Section 4 (1), at the same time it had taken place in the course of inter-State trade or commerce coming under Section 3 the latter provision would prevail and the State cannot levy sales tax merely because the situs of the sale was within the State. Though there is no similar express reference to Section 5 (in the opening words of Section 4) the same principles would apply in the case of a sale which takes place in the course of import or export. This must be so, is clear from the embargo in Article 286. If therefore Section 5 applies to a sale as an import or export sale the State will have no power to levy sales tax though the conditions of Section 4 (2) (a) or (b) may be present. This view of the relative operation of Sections 4 and 5 has been taken in a Bench decision of the Andhra Pradesh High Court in *Guduthur Thimappa and Son v. State of Andhra Pradesh*⁶, It was held that Section 4 will not have any independent or overriding operation when either Section 3 or Section 5 comes into play but that Section 4 would yield to Section 5."

We are also shown a decision of the Bombay High Court in the case of *Georgopoulos v. State of Maharashtra*⁷, There too goods were found to have been resold within the State of Maharashtra though and yet the sale was not exigible to tax.

11. Learned Advocate General tried to distinguish these cases by adopting an ingenious argument. He contended that 'sale' as defined under the Orissa Act and the

Explanation of the definition is relevant. We proceed to quote the same.

"Section 2. Definitions:-

In this Act, unless there is anything repugnant in the subject or context-

xx xx xx

(g) 'Sale' means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, but does not include a mortgage, hypothecation, charge or pledge and the words 'buy' and 'purchase' shall be construed accordingly;

Explanation :- (a) A sale or purchase of goods shall be deemed to take place inside the State if the goods are within the State-

(i) in the case of specific or ascertained goods at the time the contract of sale is made; and
(ii) in the case of unascertained or future goods at the time of their appropriation to the contract of sale by the seller or by the buyer, whether assent of the other party is prior or subsequent to such appropriation;

(b) *** **"

According to learned Advocate General, the contracts in these cases were for 'unascertained or future goods at the time the contracts of sale were made'. Therefore, clause (i) of the Explanation has no application and clause (ii) does not apply, it is submitted, because there is no appropriation. As we have already found, the sale is complete within the State and in fact there is appropriation. Thus, even if under the contract what is sold was unascertained or future goods when the contract was entered into, sale is complete when there is appropriation to the contract of sale. The distinction sought to be drawn by learned Advocate General, therefore, is of no consequence.

12. Our answers to the questions referred to us, therefore, are:-

(1) On the facts and in the circumstances of the case, the Tribunal was correct in holding that there was no contravention of the declarations given under Rule 27 (2) of the Orissa Sales Tax Rules and, therefore, the Proviso to Section 5 (2) (A) (a) (ii) of the Orissa Sales Tax Act was not attracted.

(2) In the facts and circumstances of the case, the sales by the assessee to the Japanese buyer are covered by the emgargo under Article 286 (1) (b) of the Constitution of India read with Section 5 of the Central Sales Tax Act and, therefore, are not exigible to sales tax under the Orissa Act.

The remaining question, in view of what we have already stated, does not survive for answer. When the matter was referred, it involved questions of contentious nature which have been directly solved by the Supreme Court in Mod. Serajuddin's case and by this Court in Joharimal Gajanand's case during the pendency of these references. We do not think, it would be appropriate that we would give any direction for costs.

R. N. Misra, J.

13. I agree.

Das, J.

14. I agree.

Answered accordingly.

Cases Referred.

¹(1958) 9 STC 353

²(1975) 36 STC 136

³(1976) 37 STC 157 (Ori)

⁴(1974) 34 STC 65

⁵(1965) 16 STC 62 (Mad)

⁶(1964) 15 STC 299 (Andh Pra)

⁷(1976) 37 STC 187 (Bom)