Collector Of Commercial Taxes Cuttack vs Bharat Sabai Grass Ltd on 19 February, 1958

Equivalent citations: AIR 1958 SUPREME COURT 764

Bench: S.K. Das, A.K. Sarkar

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           CASE NO.:
Appeal (civil)  193 of 1956

PETITIONER:
COLLECTOR OF COMMERCIAL TAXES CUTTACK

RESPONDENT:
BHARAT SABAI GRASS LTD.

DATE OF JUDGMENT: 19/02/1958

BENCH:
S.R. DAS (CJ) & T.L.V. AIYYAR & S.K. DAS & A.K. SARKAR & V. BOSE

JUDGMENT:
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JUDGMENT 1958 AIR (SC) 764 Appeal by Special Leave from the Judgment and Order dated the 15th November, 1954, of the Orissa High Court in S J C No. 174 of 1951. (Civil Appeal No. 193 of 1956), decided on February 19, 1958.

The Judgment was delivered by S. K. DAS, J. :

> S. K. DAS, J. - This is an appeal by special leave. The Collector of Commercial Taxes, Orissa, is the appellant, and Messrs Bharat Sabai Grass Ltd. are the respondents. The respondents entered appearance and filed a statement of their case; but later they withdrew appearance and at the final hearing of the appeal, we have had the assistance of the learned Solicitor-General alone, who appeared in support of the appeal.
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> The facts relating to the appeal lie within a very narrow compass. Messrs Bharat Sabai Grass Ltd., a limited company incorporated under the Indian Companies Act, 1913, had their head office in Calcutta. They carried on the business of collection of bamboo and sabai grass in Orissa and sold the same to certain mills which manufacture paper, namely, the Orient Paper Mill, which is situate in Orissa, and Titagarh Paper Mill and Bengal Paper Mill, situate in Bengal. Sometime in June, 1948, a notice under section 12(5) of the Orissa Sales Tax Act, XIV of 1947, (hereinafter referred to as the Act) was issued to the respondents to which the latter sent a reply to the effect that they were not selling any goods in Orissa. A

correspondence then ensued between the assessing authorities on one side and the respondents on the other, and on September 22, 1948, the appellant informed the respondents that the sales of bamboo and sabai grass which the respondents made to different mills both in Orissa and Bengal were sales in Orissa within the meaning of the provisions of the Act. Then, on September 28, 1948, the respondents were asked to submit returns, get themselves registered under the Act, and pay the requisite tax on their sales. The respondents sent no reply to this letter and after about a year, that is, in November, 1949, another notice under section 12(5) was issued asking the respondents to submit returns and to produce their books of account before the assessing assessing authority at Sambalpur on or before December 20, 1949. The respondents neither submitted any returns nor filed any books of account, and on December 16, 1949, the Sales Tax Officer, Sambalpur, who was the relevant assessing authority, made a best of judgment assessment on the respondents for eight quarters beginning from October 1, 1947, and ending on September 30, 1949. The estimated turnover of the respondents for the period in question was divided into two parts : one related to the first six quarters during which the respondents carried on business in bamboo and sabai grass in Sambalpur which was part of Orissa from before; and the second to the last two quarters during which the respondents carried on business also in Bamra and Gangpur, two of the Orissa States, which were integrated into Orissa after certain merger agreements. The Act came into force in Bamra and Gangpur areas on April 1, 1949; therefore for the first six quarters the Sales Tax Officer estimated the gross turnover at Rs. 15, 000 for each quarter, and for the remaining period, he estimated the turnover at Rs. 30, 000 per quarter. In this way the Sales Tax Officer, Sambalpur, estimated the total gross turnover to be Rs. 1, 50, 000 and making the usual deductions, determined the taxable turnover at Rs. 1, 47,

000. On this amount, the tax payable was found to be Rs. 3, 215-10-0 and the Sales Tax Officer further imposed a penalty of Rs. 500 under the provisions of section 12(5) of the Act. Against the aforesaid order of assessment and penalty, the respondents preferred an appeal which was heard by the Assistant Collector of Sales Tax, Cuttack. This appeal was dismissed on June 30, 1950. An application in revision was then made to the Collector of Sales Tax, Orissa, and another to the Commissioner, Northern Division, Sambalpur. Both these applications were dismissed. The respondents then moved the Commissioner for a reference to the High Court under the provisions of section 24 of the Act. This application was also rejected by the Commissioner.Then the respondents moved the High Court of Orissa and by an order dated July 29, 1952, the High Court directed the Commissioner, Northern Division, Sambalpur, to state a case on the following question of law :

"Whether in the circumstances of the case the assessment is legal being based on the position that mere contract for sale within the State of Orissa and the export of goods from Orissa is sufficient for taxation under the Orissa Sales Tax Act, 1947."

In pursuance of the order of the High Court, a statement of the case was submitted on the question formulated and by its judgment, dated November 15, 1954, the High Court answered the question in the negative and held that the assessment on the respondents was not legal. The present appellant then moved the High Court for a certificate and, this having been refused, the appellant moved this Court and obtained special leave to appeal.

It is necessary to explain here, in somewhat greater detail, the reasons why the learned Judges of the High Court of Orissa thought that the particular question of law arose on the facts of the case and called for a reference of that question. The Act received the assent of the Governor- General on April 26, 1947, and was published in the Orissa Gazette on May 14, 1947. Section 1 of the Act came into force at once and the rest of the Act came into force on August 1, 1947. On August 30, 1947, a notification under section 4(1) of the Act was made imposing a tax, with effect from October 1, 1947, on dealers whose turnover exceeded Rs. 5, 000 in the year ending March 31, 1947. We have already stated that sometime in June 1948, a notice was issued to the respondents under section 12(5) of the Act. Section 2(g) of the Act defines what is a "sale" under the Act. We are concerned in this case with the main definition of the word "sale" and the second proviso thereto, which are set out below :Section 2(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, including a transfer of property involved in the execution of contract but does not include a mortgage, hypothecation, charge or pledge :
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> Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930, the sale of any goods which are actually in Orissa at the time when, in respect thereof, the contract of sale as defined in section 4 of that Act is made, shall wherever the said contract of sale is made, be deemed for the purpose of this Act to have taken place in Orissa."

In their order dated July 29, 1952, the learned Judges of the High Court of Orissa thus expressed the contention urged before them on behalf of the assessee :

> "Now, coming to the merits of the case, the main contention of the learned advocate, appearing for the petitioners is that the assessment is illegal inasmuch as the assessment is based upon the legal position that mere contract for sale in the State of Orissa is sufficient to make it taxable under the provisions of the Orissa Sales Tax Act as a contract for sale is deemed to be a sale under the second proviso to section 2(g). The whole basis of assessment is the order of the Sales Tax Officer, Sambalpur, dated December 16, 1949, and the Collector's letter dated September 22, 1948. From the letter of the Collector as we have quoted above, we find that, according to him, mere export of bamboo is sufficient to constitute a sale in Orissa. There seems to be enough force in the contention that a mere contract for sale cannot constitute a sale."

Taking the view that under the second proviso to the definition of "sale" a power was given to impose tax on a transaction which was a mere agreement to sell, the learned Judges of the High Court held that the question whether the second proviso was ultra vires or not arose, and when the reference was finally heard, the learned Judges referred to the decision of this court in The Sales Tax Officer, Pilibhit v. Messrs Budh Prakash Jai Prakash 1955 (1) SCR 243; 1954 (5) STC 193) and answered the question by holding that the assessment was illegal as Entry 48 of List II of the Seventh Schedule of the Government of India Act, 1935, did not empower a State Legislature to impose a tax on a a mere agreement to sell.The learned Solicitor-General appearing for the appellant has submitted before us that no such question as was formulated by the learned Judges of the High Court actually arose on the facts found in this case, and he has further submitted that the order calling for the reference and the answer which the High Court ultimately gave are based on a complete misapprehension of the decision in The Sales Tax Officer, Pilibhit v. Messrs Budh Prakash Jai Prakash 1955 (1) SCR 243; 1954 (5) STC 193).

Let us first see what were the facts found in this case. The Sales Tax Officer who made the assessment on December 16, 1949, proceeded on the footing that there were completed sales (as distinguished from mere agreements to sell) of bamboo and sabai grass in Orissa, and the respondents in spite of sufficient time having been given to them did not produce any account books or any other evidence to prove that the sales took place elsewhere. No question was raised before the Sales Tax Officer that the transactions on which assessment was sought to be made were not "sales" but mere "agreements to sell". The same view was again reiterated by the Assistant Collector of Sales Tax, who was the appellate authority and before whom also the contention was that the sales did not take place in Orissa. He repelled the contention and said that there was no evidence to show that the sales did not take place in Orissa. It may be stated here that admittedly the Orient Paper Mill was situated in Orissa and a sale of bamboo and sabai grass to that paper mill was a sale in Orissa. The respondents tried to make out a case that the Orient Paper Mill was a registered dealer, and therefore they were entitled to exemption under rule 27(2); it was pointed out that it was for the respondents to adduce evidence that a portion of their gross turnover represented sales of non-taxable goods and unless and until they did so, the assessing authority was entitled to construe the total turnover as taxable. Even before the Commissioner, Northern Division, Sambalpur, the position taken was that the sales to the Bengal Mills did not take place in Orissa; this plea was met by pointing out that though the respondents were given an opportunity, they failed to produce evidence to show that the sales took place elsewhere. Therefore, it appears to us that on the facts found no such question of law as was formulated by the High Court actually arose for decision in the present case. There was no finding by any of the assessing authorities that a tax was imposed on "mere agreements to sell" or that the sales of bamboo and sabai grass made by the respondents to different mills in Bengal and Orissa did not involve a transfer of property in goods for cash or deferred payment.The case of Budh Prakash Jai Prakash 1955 (1) SCR 243; 1954 (5) STC

193) dealt with the definition of "sale" in the Uttar Pradesh Sales Tax Act, XV of 1948, which definition included forward contracts and the point for decision was whether the power to impose tax on the sale of goods under Entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935, included the power to impose a tax on forward contracts. In that context the distinction between a "sale of goods" and an "agreement for a sale of goods" was pointed out, and

the legal position was thus summarised :

> "The position therefore is that the liability to be assessed to sales tax can arise only if there is a completed sale under which price is paid or is payable and not when there is only agreement to sell, which can only result in a claim for damages; the power conferred under Entry 48 to impose tax on the sale of goods can therefore be exercised only when there is a sale under which there is a transfer of property in the goods and not when there is a mere agreement to sell"

. In the case under our consideration, on the facts found, no question arose of the imposition of a tax on a mere agreement to sell. The definition of "sale" in the Act, unlike the definition in the Uttar Pradesh Sales Tax Act, 1948, did not purport to tax a mere agreement to sell nor did the second proviso thereto purport to do so. What the second proviso did was to fix the situs of the sale in Orissa when the goods were actually in Orissa at the time the contract of sale was made. This is altogether different from imposing a tax on a mere agreement to sell. It is worthy of note that the assessment in this case relates to a pre-Constitution period and we are not concerned in this case with the vexed question of the effect of the second proviso with reference to transactions in inter-State commerce referred to in Article 286 of the Constitution. The proviso has, however, a bearing on the question whether the doctrine of nexus is applicable to sales tax law. That question has been exhaustively dealt with by this Court in Tata Iron & Steel Co., Ltd. v. The State of Bihar (Civil Appeals Nos. 412 and 413 of 1955 decided today) (Since reported at page 267 supra) with regard to a similar proviso in the Bihar Act. So far as the facts of the present case are concerned, we are clearly of the view that the decision in Budh Prakash Jai Prakash 1955 SCR 243; 1954 (5) STC 193) has no application and the learned Judges of the High Court were in error in thinking that the principle of that decision was attracted to the facts of this case.Therefore, we have come to the conclusion that the reference directed by the Orissa High Court was itself incompetent, because no such question of law as was formulated by that Court arose on the facts of the case and it was quite unnecessary to answer such a question in the present case.

In the result, we allow the appeal with costs, and set aside the judgment and order of the High Court of Orissa dated November 15, 1954.