Supreme Court of India
State Of Maharashtra, Bombay And ... vs Britannia Biscuits Co. Ltd. And ... on 26 November, 1994
Equivalent citations: 1994 (5) SCALE 44, 1995 Supp (2) SCC 72, 1994 Supp 5 SCR 719, 1995 96 STC 642 SC
Author: B J Reddy
Bench: B J Reddy, S Majmudar
JUDGMENT B.P. Jeevan Reddy, J.

1. A common question arises in the Appeal and the special leave petitions. Leave granted in the Special leave petitions.

2. The assesses is common in all the appeals. For the sake of convenience we shall refer to the facts in the Civil Appeal 4734 of 1994 which pertains to the assessment year 1967-68 (1.4.1967) to 31.2.1968). The matter arises under the Bombay Sales Tax Act, 1959.

3. The assesses is a manufacturer of biscuits. It is a registered dealer both under the Bombay Sales Tax Act, 1959 and the Central Sales Tax Act, 1956. The biscuits manufactured by the respondent are sold in tins. In respect of the biscuits sold outside the city of Bombay and its suburbs, the price charged by the respondent includes the cost of tins in which the biscuits are sold but insofar as the city of Bombay and its suburbs are concerned, - with which sales alone we are concerned herein - the respondent followed a different practice. While selling the biscuits in tins, it collected the price of biscuits alone and so far as the tins in which biscuits were sold, it took a refundable deposit with the stipulation that if the tin is returned within three months in good condition, the deposit shall be returned. These deposits were credited to "Deposit account returnable Tins'. The tins so supplied to purchasers were shown as the stock of the respondent- assesses in its account books, but debited in the customer's account. When the tins were returned, a reversal entry was made in both the accounts. Sales Tax was charged only on the sale price of the biscuits but not on the deposit received in respect of the tins. Indeed in respect or city or Bombay and its suburbs, a separate price list was issued by the respondent The price list carried an endorsement: deposit of Rs. 5.50 for LB tins and Rs. 3.50 for LB tins (A) will be charged at the time of supply, which will be refunded on return of tins in goods condition within a months from date of supply" In the invoices issued by die respondent, there was a separate column showing the number of tins supplied to the purchaser and the amount of deposit received from him in that behalf. At the top of the invoice the following endorsement occurred; "(D) dealers are informed that the Company's liability to refund the value of returnable tins extends only up to three months from the date of the invoice". It has however been found by the High Court that notwithstanding the endorsement on the price list as well as on the inspite, he respondent was in fact receiving the tins returned even after the expiry of three months and refunding the deposit amount.

4. For the assessment year 1967-66, the respondent received a total deposit amount of Rs. 12,97,229.05 paise. Out of the said amount, Rs. 1129.202.00 paise was refunded to the customers on receiving back the tins. At the end of the accounting year, a balance of Rs. 1,68,027.05 paise was left outstanding. As per the accounting practice followed by the respondent in this behalf, the assessee wrote off 50 per cent of this amount viz., Rs. 84.013/reducing the corresponding tin stock account to

that extent. The said amount was treated as a trading receipt and was transferred to P & L account. This amount represented the value of the tins which the respondent thought were not likely to be returned. The balance amount of Rs. 84.013/- was shown as the value of the closing stock of tins (and was shown as the opening balance in the next year's account).

5. In the assessment proceedings relating to the said assessment year, the Assessing Authority included the sum of Rs. 84,013/- (the amount written off by the respondent in the tin-stock account and transferred to its P & L account) in its taxable turn-over. He treated the said amount as the sale price of tins not returned. The said inclusion was questioned by the respondent in appeal before the Assistant Commissioner of Sales Tax. The appeal was dismissed. The respondent carried the matter in Second Appeal to the Tribunal. The Bench which initially heard the appeal referred the following question to a larger bench:

Whether on the facts and in the circumstances of the case, the amount of Rs. 84,013/- represents the 'sale price' of tins supplied by the appellant - assessees and not returned by the customers during the period of assessment in question.

6. The Special Bench of the Tribunal answered the question in favour of the Revenue and against the Respondent following which the respondent's appeal was dismissed. At the instance of the respondent, the Tribunal referred the following question for the opinion of the High Court: "(W) whether on the facts and circumstances of the case,the Tribunal was justified in law in holding that the book entry of Rs. 84,013/- representing 50 per cent of the closing balance of the tin deposits left on 31.3.68 written of from the account stock of tins on the probable non-return of the tins by the customers constitutes "sale price"?"

7. The High Court was of the opinion that the arrangement between the respondent and the purchasers (from the city of Bombay and its suburbs) was one of bailment insofar as tins were concerned and not a transaction of sale. It held that according to the said arrangement "there is an obligation on the assessees (respondent) to accept the tins returned and a corresponding obligation on the customer to return the tins". Accordingly it held that "the amount of deposit in the hangs of the assessee company at the end of the assessment year which is written off by the assesses on a notional basis cannot be treated as price of tins sold and is not exigible to Sales Tax. The High Court did observe that the manner in which accounts are maintained by the assessee or entries are made in their account books is not conclusive of the matter and that the true nature of the transaction has to be determined on the basis of the precise arrangement between the parties. It referred to various decisions of the High Courts cited by both the sides and distinguished them holding that the decision in each of those cases turned upon the precise terms of arrangement/agreement between the parties. In particular it distinguished the decision of that very Court (Goa Bench) in M/s. Arlem Breweries Ltd. v. The Assistant Commissioner of Sales Tax, Panaji (reported in 53 S.T.C. 172) on the ground that in that case "the terms of the sale did not contain any obligation on the purchaser to return bottles nor was there any time prescribed for such return. The payment of deposit for bottle in advance was a term of the sale. The petitioners had also no control over the return of the bottles which would be sold by the whole sellers to retailers and by the retailers to consumers." Inasmuch as the Bench found in the present cease that the purchaser was under an obligation to return the tins

within three months, it held the situation was different from the one considered in Arlem Breweries.

8. Mr. K. Madhava Reddy, learned Counsel for the appellant-State submitted that the High Court was not right in holding that in this case, there was an obligation upon the purchaser to return the tins within three months. From the endorsements on the price list and invoice, no such obligation can be inferred. The return of the time lay within the discretion and pleasure of the purchaser. Even the time limit of three months was not observed in practice, inasmuch as the tins returned even after the expiry of three months were taken back and deposit amount refunded. Learned counsel submitted that in fact there was a sale of the tins alongwith the biscuits and when the tins were returned and the deposit amount refunded by the respondent, it was a case of a purchase of tins by the respondent. In short, the learned Counsel commended the approach and reasoning of the Tribunal for our acceptance. On the other hand Shri Joseph Vellapally, learned Counsel for the respondent assessee submitted that the transaction between the appellant and the purchaser was one of bailment and not of sale. There was no sale of tins. The tins supplied to the purchasers continued to be the property of the assessee and they were shown as the stock of the assessee in their account books. At the and of the accounting year, half the amount of deposit representing the un contoured tins was written off and transferred to P & L account. The amount written off did not represent the sale price of tins inasmuch as there was no sale of tins. At the most ii can be treated as a compensation or damages for breach of the obligation lying on the purchaser to return the tins. Whatever may be the nature of the said amount appropriated, it certainly was not the sale price of tins. If so, no Sales Tax, can be levied upon the said amount. Learned counsel also pointed out that the approach and reasoning adopted by the Assessing Authority and the First Appellate Authority is different from the approach and reasoning adopted by the Tribunal. According to the former, the sale of tins took place when the assessee made the entries at the end of the accounting year debiting the sum of Rs. 84.013/- from "deposit account returnable tins." According to the said authorities ; the said writing off and transferring of the said amount to the P & L account as a trading receipt constituted the sale of tins, which the assessee concluded would not be returned. They did not proceed on the basis that there was a sale of tins in the first instance followed by a buy-back of the same by the respondent when the tins were returned. However, when the matter reached the Tribunal, it adopted a different approach. According to the Tribunal, it was a case of sale; of tins in the first instance and when the tins were returned by the purchaser it was a case of purchase of tins by the respondent. The difference between the two figures, to the extent written off by the appellant, was treated as a trading receipt and as part of the respondent's turnover of sales.

9. The true nature of the transaction has to be decided in this case on the following material: the endorsements on the price lists as well as the invoices issued by the respondent; the fact that in respect of sales to dealers in the city of Bombay and its suburbs, invoices showed sales of biscuits only and not of tins, that sales tax was charged only on the sale price of biscuits and that a refundable deposit was collected, for the tins supplied. The manner in which entries were made by the respondent in its account books including the tin-stock deposit account are also send to be relevant facts, there is also the finding that the appellant used to refund the deposit even in cases where the tins were returned after the expiry of three months. Yet another relevant fact is that in respect of bulk of sales, tins were also sold along with the biscuits and that only in case of sales in Bombay and its suburbs that this different practice was being followed. It is on the above material

that we have to determine the question at issue. But before we do that, it would be appropriate to refer to a few relevant provisions in the Bombay Sales Tax Act The expression "sale" is defined in Clause (28) of Section 2 in the following words:

(28) "sale" means of sale of goods made within the State for cash or deferred payment or other valuable consideration, and includes any supply by a society or club or an association to its members on payment of a price of fees or subscription, but does not include a mortgage, hypothecation, charge or pledge; and the words "sell' buy" and purchase' with all these grammatical variations, and cognate expressions, shall be construed accordingly;

(The remaining portion of the definition is omitted as unnecessary).

10. The expression "sale price" is defined in Clause (29) in the following words; "(29) "Sale price" means the amount of valuable consideration paid or payable to a dealer for any sale made including any sum charged for anything done by the dealer in respect of goods at the time of or before delivery thereof, other than the cost of insurance for transit or of installation] When such cost is separately charged; Explanation - For the purposes of this clause, the amount of duties levied or leviable on goods under the Central Excise and Salt Act. 1944 or the Customs Act, 1962 or the Bombay Prohibition Act, 1949 shall be deemed to be part of the sale price of such goods, whether such duties are paid or payable by or on behalf of the seller or the purchaser or any other person."

11. The expression "turnover of sales" is defined in Clause (36) which runs thus: "(36) "Turnover of sales" means the aggregate of the amounts of sale price received and receivable by a dealer in respect of any sale of goods made during a given period after deducting the amount of sale price, if any, refunded by the dealer to a purchaser, in respect of any goods purchased and returned by die purchaser within the prescribed period and includes,-

(i) the amounts received or receivable during the given period, in respect of goods delivered on or after the commencement of the Bombay Sales Tax (Amendment and Validating Provisions) Act, 1985 on hire-pin chase or any system of payment by instalments; and

(ii) Where the registration certificate is cancelled, the amounts, in respect of sales made before the date on which the cancellation becomes effective, received or receivable after such date; and

12. Section 6 is the main charging section. According to Sub-section (1) thereof, the liability to pay tax under the Act is on the turnover of sales and turnover of purchases of a dealer.

13. We agree with Mr. Vellapally, learned Counsel for the respondent that there is a difference in the approach adopted by the Assessing and the First appellate authorities and the approach adopted by the Tribunal. While the former held that the sale of tins took place when the respondent made the entries in its account books at the end of the accounting year writing off half the balance amount outstanding in the tin-stock account, the Tribunal has understood the transaction between the parties as involved a sale of tins alongwith the biscuits and held that when the tins were returned and the deposit refunded by the respondent, it was a case of purchase of tins by the respondent. But

what is of interest to note is that the question which was referred by the Tribunal for the opinion of the High Court seems to reflect the approach adopted by the assessing and the first appellate authorities rather than the approach adopted y the Tribunal. In fact, if the approach and reasoning of the Tribunal is accepted, the question referred by the Tribunal for the opinion of the High Court cannot be said to arise from the order of the Tribunal within the meaning of Section 51 of the Bombay Act and need not be answered. The proper course - which is indeed the course, adopted by the High Court - is to take the question as stated and to answer it, keeping aside the interpretation placed by the Tribunal upon the transaction. In other words, we have to and we do proceed to answer the question accepting the approach and reasoning adopted by the assessing authority and the first appellate authority. A reading of the Judge of the High Court establishes beyond doubt that it has proceeded on this basis alone. Indeed, it may not have been open to the Tribunal to make out a new case not put forward either by the Assessee or by the Assessing Authorities. , We shall, therefore, take the basis adopted by the assessing and the first appellate authorities for determining the question arisen herein.

14. We also agree with the High Court that the question whether there has been a sale of tins at the end of the accounting year - or along with the biscuits themselves - has to be determined on the precise terms of the transaction between the respondent and its customers and that on this aspect the manner in which the respondent maintained its accounts or made entries therein is not very much relevant.

15. The first question to be answered in this case is whether there was an obligation upon the purchaser to return the tins or was it a case where the return or non-return of the tins lay within the discretion and pleasure of the purchaser/customer. In our opinion, neither the; endorsement on the price list nor the endorsement on the invoice can be said to create an obligation to return. All that the endorsement on the price list says is that the deposit will be refunded on the return of the tins in good condition within three months. Similarly the endorsement on the invoice stated that the company's liability to return the value (note the word 'value') of returnable tins extends only upto three months. Of course a finding has been 2 recorded that in practice the respondent was not adhering to the said time limit. But it cannot be said that either the aforesaid endorsements or the said practice of the respondent created an obligation upon the customer to return the tins. It was left to his choice. If he thought, it would be more advantageous to him to return the tins and get back the deposit amount, he could do so. On the other hand, if he found it more advantageous to retain the tins and forego?, the deposit, it was equally open to him not to return the tins. (It is probably in view of this situation that the Tribunal understood and interpreted the transaction as involving a sale of tins alongwith the biscuits themselves, and a case of purchase of tins by the respondent when it received back the tins and refunded the deposit). It must be remembered that sales of the respondent were spread all over the country and the normal practice was to sell the tin along with the biscuits contained therein and that it was also the most convenient and cheap method of selling the biscuits by the respondent. The sales within the city of Bombay and its suburbs represented only a small portion of its total volume of sales. It is only in the case of this small portion of its sales that the respondent followed a different practice aforesaid. Another circumstance to be kept in mind in this behalf is that the deposit amount stipulated, received and kept by the respondent was always a little higher (by 20% A as we shall indicate later) then the value of the tin. May be, this was done to

induce the customer to return the tin. or may be the respondent was careful enough to provide for the consequences of non-return, including the possibility of the transaction being treated as a sale and taxed as such. The fact remains that when the tin was not returned, the said deposit was treated as a trading receipt 45 (by making necessary entries in its books) treating 20 % of the deposit amount as profit. In all these circumstances, we are unable to agree with the High Court that the transaction/arrangement/understanding between the parties created an obligation upon the purchaser/customer to return the tins. Mr. Joseph Vellapally submitted that inasmuch as all the tins supplied to the purchasers were treated as the stock of the respondent in its account books, it must be presumed that the purchasers were in custody on the respondent's property which they were obliged in law to return. Acceptance of this contention, in our opinion, amounts to attaching undue importance to the entries in the account books of the respondent and to ignoring the true nature of the transaction.

16. It may also be noticed that theory of bailment put forward by the respondent is in our opinion, not very accurate. Once it is held that there was no obligation to return the tins, the theory of bailment falls to the ground. It would then not be a case where some property of the respondent was entrusted to the purchasers/customers with stipulation that they should be returned or otherwise disposed of according to the directions of the respondent, within the meaning of Section 148 of the Contract Act, which defines the expression "bailment". The definition reads:

A bailment' is the delivery of goods by one person to another for some purposes, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the bailor'. The person to whom they are delivered is called the 'bailee'.

17. In our opinion, the transaction in question is neither a bailment nor a pledge. It was a composite transaction. It was to start with an entrustment which could result in a sale of tins in case or non-return of the tins. While entrusting the tins, the respondent took care to stipulate and receive the value of the tins and a little more - to be precise 20%. If the tin was returned, well and good the transaction remained one of entrustment. But if not returned within 3 months, it became a sale as per the terms of the transaction. The fact that the respondent was receiving beck the tine even after the expiry of three months and returning the deposits was more by way of grace - probably a business decision - rather than a matter of right or an obligation.

18. We must at this stage refer to Section 24 of the Sale of Goods Act, 1930. It reads: "24. Goods sent on approval or "on sale or return". When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer -

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

19. Section 24 has to be read along with Sub-section (3) of Section 17 which says that unless a different intention appears, the rules contained in Sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer" Section 24 appears to be practically in the same terms as Section 18 of the English Sale of Goods Act, 1979 which itself is but a repetition of the cardamom law rule to that effect. The law in this behalf is stated in Halsbury's Laws of England IVth Edn. Vol. 41 Para 727 in the following words:

727. When property passes. Unless a different intention appears, when goods arc delivered to the buyer on approval, or on sale or return, or other similar terms, the property in the goods passes to the buyer when he signifies his approval or acceptance to the seller or does any other act adopting the transaction; and if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time end, if no time has been fixed, on the expiration of a reasonable time What is a reasonable time is a question of fact." In para 728, it is stated:

728. Similar terms. A delivery of goods is not made on terms similar to a delivery on approval or on sale or return unless the effect of the transaction is that the bailee has the option of becoming the owner of the goods and on terms substantially the same as those already mentioned....

20. The principle of Section 24 inter alia is that where the goods are delivered to the buyer on terms similar to the delivery of goods on approval or "on sale or return", the property in the goods therein passes to the buyer, if he does not signify his approval or acceptance and also does not return the goods within the time prescribed therefore. According to the said principle, the position of the purchaser, until he returns the goods within the prescribed period, is that of a bailee and on the expiry of the said period, he becomes a purchaser. Where, however, the person to whom the goods are delivered is under an obligation to return the goods, there is no question of sale ever coming into being and the person to whom the goods are delivered remains a bailee. The transaction herein is in its nature nearer to the situation contemplated by and to the principle of Section 24 - inasmuch as the tins were delivered to the buyer with the stipulation that if he returns the tins in which the biscuits were sold in good condition within three months, he will get back the deposit kept by him in that behalf. It meant that after the expiry of the said period, he had no right to claim the refund on return of goods The transaction then became a sale. As stated above, the customer was under no obligation to return, as explained hereinbefore; he had a right to return the tins in good condition within three months. Correspondingly, the respondent-assessee was under an obligation to refund the deposit amount if the tins were returned within three months in good condition; after the expiry of three months, the respondent was under no such colligation though it may be that for his own business or other reasons, he may yet accept the return of the tins and refund the deposii

21. Mr. Vellapally, learned Counsel for the Respondent submitted that for constituting the "sale price" as defined by the Act, there must be a specific sale of goods to a specific buyer and that on the approach adopted by the Assessing authority and the first appellate authority (whereunder, sale of tins is held to have taken place at the end of the accounting year, when the Respondent made the entries in his books, no such specificity is identifiable In the absence of such identification of the sale and the purchaser, the learned Counsel submitted, the "sale price" cannot be ascertained. The said

contention is unacceptable in the facts of this case. From the facts set out in the Judgment of the High Court, it appears that each customer/purchaser (evidently all of them were wholesalers) had an account with the respondent and when a particular number of tins were supplied to a customer, an entry was made to that effect in that. customer's account in the account books of the respondent besides making an entry in the other relevant account books of the respondent. It is further recorded in the judgment that when the customer returned the tins, a reverse entry was made in the customer's account as well as in the relevant account books of the assessees. If so there could be no difficulty in identifying the customer who failed to return the tins. The submission of Mr. Vellapally is thus without a factual foundation.

22. To test the validity of the contention urged by Mr. Vellapally, we put him a straight question viz., if the deposit amount appropriated by the respondent to its P & L account, treating it as a trading receipt, is not a sale price, then what is its nature? The answer of the learned Counsel was that it is compensation or damages for breach of obligation to return the tins by the purchaser/customer. But once we hold that there was no such obligation, then the said trading receipt cannot be anything out sale price. No other label could be suggested for it.

23. Mr. Vellapally relied upon the decision of this Court in Raj Sheet & Others, etc. etc. v. State of A.P. and Anr. etc. etc. (1969(3) SCR 305) in support of his propositions. The said decision lays down, following the earlier decision of this Court in Hyderabad Deccan Cigarette Factory v. The State of Andhra Pradesh (17 S.T.C. 624) that the question whether there was a sale of container alongwith the contents is not a question of law but one of fact and that said question has to be decided in each case having regard to the facts of that particular case. But while determining this question the Court should not be led away by the manner in which the assessee has made entries in its own account books but must look to the substance of the transaction and decide what in truth and in reality it amounts to. This is the approach and opinion both of the High Court as well as the Special Bench of the Tribunal. As held by us hereinbefore, this was a composite transaction; in case of non-return of the tins within three months it became a sale of the unreturned tins.

24. We may mention in this connection that the decision of the Bombay High Court (Goa Bench) in Arlem Breweries referred to and distinguished in the Judgment under appeal has been noticed by this Court in Raj Sheel. In our opinion, just as in Arlem Breweries, in this case too, payment of an amount for the bottles in advance (called deposit) was a term of the sale.

25. We do not think it necessary to refer to various decisions of the High Court referred to in the Judgment under appeal or to other decisions brought to our notice for the reason that each of those cases turned upon the terms and the language of the arrangement/transaction between the parties. We reiterate that the question arising herein is not a pure question of law: it is a mixed question of law and fact.

26. For the above reasons the appeals are allowed and the judgment of the High Court is set aside. The question referred to the High Court is answered in the affirmative i.e., in favour of the revenue and against the assessee. There shall be no orders as to costs.