United Bleachers Ltd. vs The State Of Madras on 7 December, 1959

Equivalent citations: (1960)IIMLJ70, [1960]11STC278(MAD)

JUDGMENT

Ramachandra Iyer, J.

1. These cases are filed under Section 12-B (1) of the Madras General Sales Tax Act.

2. The assessee, the United Bleachers Ltd., owns a processing factory for textiles in Mettupalyam in the Coimbatore District. Several of the spinning and weaving mills at Coimbatore forward to the assessee unbleached yarn and cloth manufactured by their mills. They are then bleached or dyed, calendered, pressed and folded. They are thereafter packed and delivered back to the customer mills. The packing materials used, namely, brown kraft papers, hoop iron, hessian cloth, jute twine, palm mats etc., are purchased by the assessee. In making the charges for services, the assessee included in the bill the charge for packing and the packing materials; they were not however separately shown. The following is an example of a bill issued to the customer.

Description	Rate	Amount
To bleaching charges for L.M.C. variety cloth 43,240 yards.	21 2153 per yard	3,839-8-3
To stitching, folding, stamping, baling charges for above folded into 20 yards and fents.	21/4 pies per yard	401-4-0
		4,240-12-3
		or
		4,240-12-0

(Rupees four thousand two hundred and forty and annas twelve only) Rules Nos. 6541 to 6550, 6571, 6580 to 6591-23.

3. For the years 1953-54 and 1954-55, the assessee was assessed to sales tax on a turnover representing the price of the packing materials utilised by them in their business. The turnover for the former year was ascertained to be Rs. 20,117-4-2, while for the latter year it was Rs. 65,373-1-5. Both the Deputy Commercial Tax Officer, Mettu-palayam and, on appeal, the Commercial Tax Officer, Coimbatore North, held that the turnover was liable to assessment. On further appeal by the assessee, the Sales Tax Appellate Tribunal held that, although the assessee did not deal specifically

in packing materials, a portion of the profits, earned in the business of bleaching and calendering, could be legitimately attributed to the packing materials, as the transaction involved a sale thereof for consideration and that such a sale would attract a liability to sales tax. The appeals failed.

4. For the assessee it is contended that no sale is involved in the transfer of the packing materials to their customers, albeit it be one for consideration, as such transfer was incidental to and part of the service of packing which they had to do under the contract. It is not, however, their case that even if the transfer of packing materials involved in the transaction amounted to a sale, they would be entitled to claim a deduction of the charge for packing under Rule 5(i)(g)(ii) of the Madras General Sales Tax (Turnover and Assessment) Rules, 1939.

5. Section 3 of the Madras General Sales Tax Act levies a tax on every dealer on his total turnover for each year. A dealer is a person who carries on the business of buying and selling goods. It has been held that the term "business" should be understood in the commercial sense, namely, that there should be profit motive in the venture. Section 2 (h) defines a sale as a transfer of property in goods by one person to another in the course of trade or business for cash or for deferred payment or for other valuable consideration. It is the case of the assessee that no profit was made in the charges debited for the packing materials and that there was no motive even to make a profit therein. In our opinion, the contention is based on a fallacy. The profit motive necessary to render a business one contemplated by the Act would be one embracing the whole business and not in respect of each one of the component parts of the business. It is not necessary either that the dealer should deal specifically in that article. It is not disputed that the object with which the bleaching etc., was undertaken by the assessee was to earn a profit. That would be sufficient to attract the tax liability on the packing materials if they were sold, although no profits were made on them as such.

6. The question whether there has been a sale of the material would depend on the contract between the parties, expressed or implied. A mere contract of service, although a transfer of a movable property is involved therein, cannot by itself imply a sale. For example, in the case of a bleaching and dyeing contract, the use of the materials utilised for the purpose of bleaching or dyeing though charged for even at a profit, would not amount to a sale, for the transfer of materials would be necessary or incidental to the contract of service. But, if a person were to buy rice or salt in gunny bags, one could imply a contract to purchase the goods as packed, i.e., along with the packing materials. In such a case, even if the seller does not intend to make a profit on the gunnies as such, there would be a sale within the meaning of the Act, as there is a profit motive in the business of selling rice or salt. The question whether there has been a sale of packing materials would therefore depend not so much on the fact whether there was a profit motive in making the transfer of those materials, but whether there was an express or implied contract to sell them, it being sufficient that there was a profit motive for the entire business. In Varasukhi and Co. v. Province of Madras (1950) 2 M.L.J. 449, salt was sold in gunny bags. Salt, however, was exempt from sales tax. A question arose whether the exemption would extend to the gunny bags as well. The learned Judges held that the assessee in that case should be held to have carried on the business of buying and selling gunny bags as well, in addition to the business of buying and selling salt and that the exemption from sales tax in respect of salt would not extend to the gunny bags sold. In Indian Leaf Tobacco Development Co. Ltd. v. State of Madras [1954] 5 S.T.C. 354, the question of liability to sales tax for a turnover in

respect of packing materials utilised for sale of tobacco came up for consideration. Section 4 of the Act exempted tobacco from the operation of the taxing provisions. It was held that the packing materials would not come within the scope of the exemption granted to tobacco and the turnover in respect of them would be assessable to tax, unless the assessee had made out a case for exemption under Rule 5(i)(g)(ii) of the Madras General Sales Tax (Turnover and Assessment) Rules. A similar view was taken in Mohanlal Jogani Rice and Atta Mills v. State of Assam [1953] 4 S.T.C. 129 in regard to turnover in respect of gunny bags utilised in the sale of rice.

7. The decisions referred to above were cases in which there had been a sale of the principal article and the question arose whether the packing materials used for the delivery of the principal articles could also be held to have been sold. In such cases the express agreement between the parties was to purchase the principal article, e.g., salt, tobacco or rice; there was no specific and separate agreement to purchase the packing materials alone. But, it could not be that the purchaser was agreeable to take the principal article alone; it is but reasonable to hold that the intention was to purchase the goods as packed, so that in the contract of sale of the principal item the sale of the packing material was implicit. To put it in other words, the intention of the parties being to deliver the goods as packed, a contract to purchase the packing materials could readily be inferred in the circumstances of those cases.

8. In the present case, the contract was one for service, viz., bleaching, dyeing, etc. But, as a part of the service, the goods bleached or the dyed articles had to be packed and delivered. But it cannot, however, follow that there can be no sale of packing material, whenever such material was used in connection with the performance of a contract of service. It may be that there is a distinct contract of sale in regard to the packing materials. The question whether there was in a particular, case two distinct contracts, one for service and another for sale of the packing materials would depend on the evidence. Where, however, there are no such distinct contracts, i.e., where the contract is one and indivisible and the essential portion of that contract is one for service or labour, the question whether the use of the packing materials also charged for in rendering the service would amount to a sale or not, would depend on the intention of the parties. Packing itself might be a part of the service stipulated and the fact that certain materials had to be utilised in rendering that service, might not always mean that there was a sale of the packing materials. It may be that packing was incidental to a service.

9. In Krishna and Co., Ltd. v. State of Andhra [1956] 7 S.T.C. 26, the assessees had a plant for drying raw tobacco. Certain customers delivered raw tobacco to them for redrying in the machinery. After the process of redrying, the assessees packed the tobacco with the necessary packing materials, purchased by them and delivered the same to the respective customers. The assessees collected from each customer a consolidated charge for redrying as well as packing. A question arose whether the assessee would be liable to sales tax on the turnover of the packing materials. The learned Judges of the Andhra High Court held that, as the packing materials were goods which could not be said to become an integral part of the drying process, like the parchment and ink of an artist, in respect of which there was a transfer of property and that, notwithstanding the fact that the drying was only a contract of service, there was a sale in regard to them, the turnover in respect of which would attract the levy of sales tax. The decision was followed by the same court in a later case in Hanumantha Rao

v. State of Andhra [1956] 7 S.T.C. 486. The basis of the liability to tax in such a case is contained in the judgment of the learned Chief Justice at page 34 in Krishna and Co., Ltd. v. State of Andhra [1956] 7 S.T.C. 26:

> Every person, who carries on the business of transferring property in any kind of movable property including materials, commodities and articles in the fitting out, improvement or repair of, movable property to another for valuable consideration would be liable to tax on the turnover. It cannot be said that packing material is not ' goods ' as defined under the Act. They are clearly movable property within the wide meaning of the word ' goods ' in the Act. The assessee had property in these goods, for, it is conceded that he purchased the material. It cannot also be disputed that he transferred the property in the goods to his customer for consideration. The amounts clearly show that he charged for the material in addition to his remuneration for drying the tobacco, though the price shown in the accounts is the inclusive one. All the ingredients of the charging section, read with definition, are satisfied. Unless we can hold that the materials, after being packed, have been transformed into some other commodity not covered by the definition of goods, it is not possible to hold that there was no sale of that material.

10. With great respect to the learned Chief Justice, we cannot subscribe to the proposition, that a mere transfer of property for consideration by a person carrying on business would necessarily involve an element of sale, so as to attract the liability to tax. In Gannon Dunkerley and Co. v. State of Madras [1954] 5 S.T.C. 216 (a decision to which one of us was a party) a question arose whether in a contract for supply of labour and work there was an element of sale of the materials used in the building. It was held that, unless there was an intention in the contract specifically to pass the property in the materials as and when they were brought to the site, the property in the materials passed only when they were fixed in the building and the contract for building being one and entire, there would be no element of sale of the materials as such.

11. What distinguishes then a mere contract of labour in which certain materials are used from a contract when such materials could be held to be sold, is the existence of an intention in the latter to sell the materials as such. Such an intention might be expressed or implied; but in the absence of such an intention, there could be no sale.

12. Although the decision of this Court in Gannon Dunkerley and Co.'s case [1954] 5 S.T.C. 216 was referred to in Krishna and Co. v. State of Madras [1956] 7 S.T.C. 26 the learned Judges did not consider it necessary to base their conclusion on the principle of that decision. Since the decision of the Andhra High Court in the two cases mentioned above, the Supreme Court has rendered its judgment in the appeal from the decision of this Court. The Judgment of the Supreme Court is reported in State of Madras v. Gannon Dunkerley and Co. [1958] 9 S.T.C. 353. The Supreme Court, analysing the essential elements in the legal concept of a sale of goods held that in order that a transaction might amount to a sale, it was necessary that there should be an agreement between the parties for the purpose of transferring title to goods, which implied a capacity to contract, the money consideration therefor and the property in the goods passing as a result of the transaction from the

seller to the buyer and that, unless all these elements were present, there could be no sale. Venkatarama Aiyar, J., observed at page 377 :-

> It is of the essence of this concept that both the agreement' and the sale should relate to the same subject-matter. Where the goods delivered under the contract are not the goods contracted for, the purchaser has got a right to reject them, or to accept them and claim damages for breach of warranty. Under the law, therefore,,there cannot be an agreement relating to one kind of property and a sale as regards another. We are accordingly of opinion that on the true interpretation of the expression ' sale of goods ' there must be an agreement between the parties for the sale of the very goods in which eventually property passes.

13. Therefore, a mere passing of title to the goods, but not as a result of any contract between the parties to sell either express or implied, cannot amount to a sale. The principle laid down by the Supreme Court in State of Madras v. Gannon Dunkerley and Co., Ltd. [1958] 9 S.T.C. 353, was applied by us recently to the case of repairs to motor cars effected by a company carrying on business in reconditioning and repairing motor vehicles, where incidentally parts had to be supplied in effecting the repairs. Vide Sundaram Motors (Private) Ltd. v. State of Madras [1958] 9 S.T.C. 687. The following observations were made at page 695 :-

> It has been pointed out that a mere passing of the property in the particular chattel is not decisive of the question whether the component parts of that chattel were sold or not. That is to say if a particular motor part, e.g., king pin bushes, is put in the car while reconditioning and repairing it, it is undoubted that title to that motor accessory passes when the repairer delivers the car to its owner; but to constitute sale of that part it is necessary that there should have been an agreement between the parties for the sale of that accessory. In the Gannon Dunkerley case [1954] 5 S.T.C. 216, this Court held that in the case of a chattel which has to be produced by the supply of labour and work of the contractor and also by the supply of materials necessary for producing the thing, when the. property in the larger corpus passes to the other party, the contract is one for the supply of the larger chattel and that there is no contract for sale or purchase of the component materials separatim. In the instant case there is no question of the transfer of property in the larger corpus., viz., car, as the car belonged to the customer. The contract was to execute works on the car of the customer and in the course of such repairs certain new accessories or parts had to be put in. There is no doubt that the property in those materials would eventually pass to the customer, but the question would be whether the agreement between the parties was that such parts should be treated as sold separatim or where they merely supplied in the course of carrying out a works contract of repair and charged as such.
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> Therefore whether in a particular case there is a contract of sale of materials as distinct from a pure works contract would depend upon the agreement between the parties and on proof of an intention to sell the materials as such.

14. The learned Judges of the Andhra High Court, in their decisions in Krishna and Co., Ltd. v. State of Andhra [1956] 7 S.T.C. 26 and Hanumantha Rao v. State of Andhra [1956] 7 S.T.C. 486 did not consider in the cases before them, whether the principal contract being one for service and not for sale of any goods, there had been any agreement between the parties, express or implied, for the sale of packing materials as such. The observations of the learned Judges would appear to imply that in their opinion what was necessary or sufficient to constitute a sale would be a transfer of movable property for consideration by a person carrying on business. That view is not in consonance with the principle that a mere passing of title to goods would not amount to a sale, except when such passing of title was the result of contract, express or implied, between the parties.

15. Thus, in order that there could be a levy of sales tax, there should be a sale. Whether in regard to packing materials utilised in the performance of a contract between the parties there was a sale, would depend on the agreement between the parties. Such an agreement could be express or implied. Where the main contract was one of sale of goods as packed, such an agreement to sell the packing materials could, having regard to the nature of the contract, be readily implied; but where the main contract was merely one of service, the fact that in the performance of such service packing materials are used and charged for, would not lead to a necessary inference that a sale of the materials was intended. In such a case the onus would be on the taxing authority to prove that there was an agreement to sell the packing materials and a sale by the passing of property therein.

16. It is not suggested in the present case that there had been any express contract for the sale of packing materials as such between the assessees and their customers. The question then is whether a contract can be implied in the circumstances of the case. As we said before, the principal contract between the parties was one for service. The packing materials were necessary as an incident to that service. Therefore, although the property in the packing materials might have passed to the customers and the price therefor had also been included in the charges for service, there being no agreement to purchase the packing materials as such which could be implied in the case, there would be no sale of the packing materials.

17. The revision cases are allowed with costs in T.R.C. No. 79 of 1957. Advocate's fee Rs. 100.