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Court : Orissa

Decided On : Nov-29-1960

Reported in : [1961]12STC205(Orissa)

Judge : R.L. Narasimham, C.J. and ;R.K. Das, J.

Appeal No. : S.J.C. No. 35 of 1959

Appellant : Cement Ltd.

Respondent : The State of Orissa

Advocate for Def. : The Adv.-General

Advocate for Pet/Ap. : S. Choudhury and ; R.N. Misra, Advs.

Judgement :

R.L. Narasimham, C.J.

1. The following question of law has been referred to this Court by the Sales Tax Tribunal, Orissa, under Section 24(1) of the Orissa Sales Tax Act, 1947 (hereinafter referred to as the Act).

Whether on the facts and circumstances of this case the sale of cement by the petitioner to the State Trading Corporation for a price of Rs. 30,39,017-25 nP. under the Cement Control Order, has been rightly taxed as sales under the Orissa Sales Tax Act.

2. The petitioner is a limited company manufacturing cement and other products, at a place known as Rajgangpur in the State of Orissa. The company has been registered as a dealer under the Act and holds registration certificate No. S. A. 1999. For the quarter ending 30th September, 1956, the total turnover on the sale of cement by the said firm amounted to Rs. 30,39,017-25 nP. The 'sale' was made and delivery of cement effected in favour of the State Trading Corporation (hereinafter referred to as the Corporation) under the provisions of the Cement Control Order. The Sales Tax Authorities assessed the petitioner to sales tax, holding that there was sale of cement by the firm to the Corporation within the meaning of the Act. The petitioner however contended that there was no 'sale' within meaning of the Act, and that under the provisions of the Cement Control Order, the firm was compelled to deliver all the cement produced and stocked in the premises of the firm and also cement that was manufactured later on to the Corporation, at the price fixed in the Order. According to the petitioner, therefore, this was an instance of compulsory acquisition of movable property and the money that was paid was, in essence, compensation for such acquisition. Hence, according to the petitioner, the firm was not liable to pay sales tax.

3. The Corporation is a private company incorporated under the Indian Companies Act. The memorandum of association of the said company was filed before this Court by the learned Advocate-General and, on a scrutiny of the same it is apparent that though nominally a private incorporated company, it is, for all practical purposes, an organization completely controlled by the Government of India. The capital of the company is one crore of rupees divided into one lakh shares of Rs. 100 each. The President of India holds 99,998 shares and the two Joint Secretaries to Government of India in the Ministry of Commerce and Industries hold the remaining two shares. Hence the Corporation may be treated as an organization of the Government of India though its separate entity as a private company has been carefully maintained.

4. In 1951 the Parliament passed an Act known as the Industries Regulation and Development Act, for the purpose of providing for the regulation and development of certain Industries in India. Section 18G of that Act conferred power on the Central Government, by a notified order, to provide for the equitable distribution

and availability, at fair prices, and for regulating the supply and distribution, of certain articles, which included cement. In exercise of the power conferred by this section, the Government of India made the Cement Control Order on the 26th June, 1956. The Order consists only of 6 clauses of which the most important clause is Clause 3 which may be quoted in full:-

3(1) Every producer shall sell--

(a) the entire quantity of cement held in stock by him, on the date of commencement of this Order, and

(b) the entire quantity of cement which may be produced by him during a period of two years, from the date of commencement of this Order,

to the Corporation, and deliver the same to such person or persons as may be specified by the Corporation in this behalf from time to time.

(2) Notwithstanding any contract to the contrary, every producer shall dispose of cement lying in stock with, or produced by him, in accordance with the provisions of sub-clause (1) and shall not dispose of any cement in contravention thereof.

Clauses 4 and 5 are not material. Clause 6(1) is to the effect that the price at which a producer may sell cement shall be as specified in the schedule.

The schedule gives a list of the various firms manufacturing cement in India, and the prices at which such firms were required to sell cement to the Corporation. Sub-clause (2) of Clause 6 fixes the price at which the Corporation may sell cement to any person at Rs. 102-8-0 per ton. Sub-clause (3) of the same clause says that the price at which cement may be sold in a State by a dealer other than the Corporation, shall be such as may be fixed by the State Government. Thus the scheme of the Order is clear. The entire cement produced in the country by the various manufacturing concerns (described as 'producers' in the Act) was pooled under one central organization, namely the Corporation, controlled by the Government of India. The distribution of cement to the various dealers was made by the Corporation at the prices fixed in the Order, and the dealers were further required to sell cement within each State at the price fixed by the State

Governments. Thus the manufacturing concerns were given no discretion either as regards the person to whom they were required to sell or the price at which they may sell cement. They were compelled to sell the entire cement to the Corporation at the price fixed in the Order notwithstanding any contract to the contrary which they might have entered into with third parties. Sub-clause (2) of Clause 3 expressly prohibits them from disposing of cement in contravention of the main provisions of that clause. It is true that Clause 3 contains the word 'sale' and similarly sub-clause (1) of Clause 6 refers to the 'price' at which the purchaser may 'sell' cement. But these words have no special significance when the entire scheme of the Order is fully understood. The producers have absolutely no discretion, and have to deliver the cement to the Corporation and receive from the Corporation the money equivalent of the cement so delivered, as fixed in the Order.

5. The true meaning of the word 'sale' occurring in the various Sales Tax Acts in India has been authoritatively laid down by their Lordships of the Supreme Court in the well known case of *The State of Madras v. Messrs Gannon Dunkerley & Co.* A.I.R. 1958 S.C. 560. There, a distinction was drawn between the popular meaning of the expression 'sale' which includes transfer of property in the goods, on payment of a sum of money, and the legal meaning given to that expression not only in the Sale of Goods Act, but also in Entry 48 of List II of the 7th Schedule to the Government of India Act, 1935, (corresponding to entry 54 of List II in the 7th Schedule to the Constitution) under which the State Legislatures derived the power to legislate in respect of taxes on sale of goods. Their Lordships observed at page 567 :-

Thus, according to the law both of England and of India, 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 of course presupposes 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. Thus, if merely title to the goods passes, but not as a result of any contract between the parties, express or implied, there is no sale.

Again in paragraphs 29 to 32 their Lordships repelled the argument that compulsory sale may also amount to 'sale' for the purpose of levying sales tax. Further, in paragraph 33 their Lordships pointed out at page 573 that:-

To constitute a transaction of sale there must first be an agreement to sell and secondly, the sale should relate to the same subject-matter. Where the goods delivered under the contract are not 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 the property passed.

6. The aforesaid decision of the Supreme Court is directly applicable here. There is no possibility of any contract, express or implied, being entered into between the petitioner (producer) on the one hand and the Corporation on the other. Neither of them has any discretion to act for himself in the matter. By virtue of the Cement Control Order the firm is directed to hand over all the cement produced by it to the Corporation at the price fixed in the Order. The element of bargaining ;which is essential for the purpose of sale is completely absent. Some reliance was placed by the Advocate-General on the use of the expression 'the price at which the producer may sell the cement shall be specified in the statute' in Clause 6(1) of the Order, and he urged that the use of the word 'may' would indicate that some discretion was left with the producer. But if this clause is read with the other clauses it will be found that there is absolutely no discretion as regards the quantity of cement that the producer is required to sell to the Corporation. There may be some justification for the view that the price fixed in the schedule is the maximum price and the producer may possibly sell at a price lower than that fixed in the schedule. Clause (a) of Sub-section (3) of Section 18G of the Act seems to contemplate that consistent with the controlled price, the parties may agree upon any other price. Apparently the controlled price is the maximum price, but it will be academic to consider this question because when a producer is compelled to deliver his entire stock of cement to the Corporation he is not likely to agree to a

price lower than that fixed in the schedule to the Order. Thus, for all practical purposes, there is no possibility of either party entering into any contract and, in substance, the Order has the effect of transferring title to the cement, from the producer (petitioner) to the Corporation on payment of the price specified in the schedule. Moreover, it was not alleged by either party that prior to the delivery of the cement by the petitioners to the Corporation, there was any negotiation between the two parties for delivery of cement at a price less than the controlled price.

7. An argument was advanced to the effect that the Corporation was not bound to accept all the cement manufactured by the producer and had some discretion in the matter. In my opinion, on a fair construction of all the provisions of this Order, the Corporation is also equally bound to accept all the cement manufactured by the producer. When sub-clause (2) of Clause 3 prohibits the purchaser from disposing of the cement in any manner other than that prescribed in sub-clause (1) of that clause, it necessarily follows that the person to whom the cement is so delivered, namely the Corporation, is bound to accept delivery. Bearing in mind that the main scheme of the Act is to pool the entire cement resources of the country under one central organization and to authorise that organization to distribute the same to various dealers, it will be idle to contend that the organization may refuse to buy the cement even though the producer is compelled by law to deliver the same to that organization.

8. The learned Advocate-General thereupon contended, relying on the decision of a majority of Judges of the Andhra High Court in *Bangaru Rama Rao Brothers v. Tadavarthi Punayya* (1958) An. W.R. 671 that notwithstanding the provisions of the Cement Control Order there was still some contractual nexus between the producer and the Corporation and that, to that limited extent, there was an implied contract preceding the transfer of title to the goods, so as to make the transaction a 'sale' within the meaning of the Sales Tax Act. The judgment of the Andhra High Court was delivered prior to the judgment of the Supreme Court in *Gannon Dunkerley's case*, [1958] 9 S.T.C. 353 and some of the wide observations contained therein may require modification in view of the decision of the Supreme Court. Moreover, the judgment of the Andhra High Court may be distinguished on

facts. There the limited question for consideration was whether there was a contractual relationship between the representative dealer on the one hand and quota holder on the other who were both creatures of a scheme drawn up by the Provincial Textile Commissioner under the provisions of the Cloth Control Order, 1946. The scheme of that Order appears to be that every manufacturer of cloth was required to sell the manufactured goods to certain persons known as representative dealers appointed by the Textile Commissioner under the Act. These persons in their turn, were directed to sell the goods to some wholesale dealers known as quota holders, who subsequently sold them to retailers nominated by the Textile Controller. At every stage the price was regulated by the Textile Commissioner for allowing a reasonable margin of profit to the intermediary between the manufacturer and the consumer. But though there were severe restrictions on the right of the parties to enter into contracts, nevertheless, as pointed out by Viswanatha Sastri, J., no dealer was compelled to buy or sell cloth against his wishes. Nor was he under any obligation to part with the goods to the quota holders, without receiving the price thereof. The law did not compel the parties either to become representative dealers or quota holders and it was left entirely to their discretion to apply to the Commissioner and get themselves appointed in those capacities. Under such circumstances the majority of the Judges held that though the freedom of contract was seriously restricted by the Control Order, nevertheless the ordinary law relating to contracts for Sale of Goods was not wholly abrogated and that the parties voluntarily applied for and agreed to become representative dealers or quota holders, as the case may be, being fully aware of the existence of the Cloth Control Order, and hence the law of contract would apply subject of course to the restrictions contained in the Order. Applying the same reasoning by way of analogy the learned Advocate-General contended that when the producer (petitioner) and the Corporation being aware of the provisions of the Cement Control Order agreed to carry on their respective businesses, namely, the production of cement on the one hand and the acceptance of cement from the producer by the Corporation at the price fixed in the Order and its distribution to various dealers on the other, it must be held that there was an implied contractual nexus between the two. In my opinion, this argument by analogical reasoning will not hold good so far as the transaction

between the petitioner and the Corporation is concerned. Here neither party has any choice in the matter. The concerns were manufacturing cement long before the Cement Control Order came into force. All of a sudden the Order directed that notwithstanding any contract to the contrary they must deliver all their cement to the Corporation. The Corporation also had no choice in the matter except to accept the cement so delivered at the price fixed. As between the two there is no room for any negotiation. We are not here concerned with contracts arising out of other Control Orders where there might possibly be some room left within the scope of those Orders, to enter into contracts, as in the Andhra case. That question may be left open. As between the petitioner and the Corporation the entire transaction is in the nature of a compulsory transfer of title to the goods from one person to another on payment of the stipulated price. In my opinion, such a transaction will be directly covered by the aforesaid Supreme Court decision and would not amount to a 'sale' within the meaning of the Orissa Sales Tax Act.

9. The question is therefore answered in the negative. We hold that there was no sale of cement to the Corporation and no sales tax was leviable under the provisions of the Orissa Sales Tax Act. There will be no order as to costs of this reference.

R.K. Das, J.

10. I agree.