

CASE NO.:
Appeal (civil) 2635 of 2006

PETITIONER:
Dhampur Sugar Mills Ltd.

RESPONDENT:
Commissioner of Trade Tax, U.P.

DATE OF JUDGMENT: 12/05/2006

BENCH:
S.B. Sinha & P.K. Balasubramanyan

JUDGMENT:
J U D G M E N T
(Arising out of SLP(C)No.1811 of 2005)

S.B. SINHA, J :

Leave granted.

Whether the adjustment of price of molasses from the amount of licence fee would amount to sale within the meaning of Uttar Pradesh Trade Tax Act, 1948 ('the Act', for short), is the question involved in this appeal which arises out of the judgment and order dated 21.5.2004 passed by the High Court of Judicature at Allahabad in Trade Tax Revision No.1866 of 1993.

The basic facts are not in dispute. One M/s. Swaroop Vegetables Products Industries Ltd. ('the Company', for short) owned and possessed a sugar mill known as Sir Shadilal Sugar and General Mills situated at Mansurpur District, Muzaffarnagar in U.P. A Deed of Licence was executed by the said Company in favour of the appellant herein on 3.9.1987; pursuant thereto and in furtherance whereof, the appellant herein executed a performance guarantee to ensure performance of the said Deed of Licence dated 3.9.1987. In terms of the said agreement dated 3.9.1987, a performance guarantee was executed by the appellant herein, wherein it was agreed to by and between the parties that a major part of the licence fee would be paid in the shape of molasses. The contention of the appellant all along was and still is that it is in lieu of the consideration for the right to use the said sugar mill, i.e., the licence fee. The appellant was required to handover molasses to the said Company for an amount equivalent to the licence fee and such a transaction would not constitute a sale of molasses so as to attract the provisions of the Act.

It is not in dispute that for the assessment year 1987-88, the appellant was held to be liable to pay trade tax to the extent of Rs.3,19,699.12p. by an order of assessment dated 30.7.1991 passed by the Assistant Commissioner, Trade Tax, Najibabad. The Company, however, preferred an appeal thereagainst as it was said to be the person aggrieved by the said order of assessment dated 30.7.1991 on the premise that in the terms of the agreement between the parties, the Company would be ultimately held liable for reimbursing the appellant to the extent of the amount of tax paid. In appeal No.128/91, the Deputy Commissioner, Trade Tax, Moradabad held by order dated 9.1.1992, that molasses having been supplied in lieu of rent, the same would not fall within the definition of "sale" and it was a barter or exchange. However, it was directed that in the pending appeal preferred by the appellant, the amount assessed on molasses would be reduced.

In the meantime, the appellant also preferred an appeal against the said order of assessment and by an order dated 6.2.1992, the Deputy Commissioner granted the benefit of his earlier order dated 9.1.1992 to it,

but in other respects, the said appeal was dismissed. Aggrieved by and dissatisfied with the said order dated 9.1.1992, an appeal was preferred thereagainst by the respondent herein before the Trade Tax Tribunal. The said appeal was found to be barred by limitation and on the said ground alone it was dismissed by an order dated 26.8.1992. However, the respondent preferred another appeal before the Trade Tax Tribunal against the order dated 6.2.1992. An appeal was also preferred by the appellant herein before the said Tribunal questioning the order dated 6.2.1992 passed by the Deputy Commissioner (Appeal), Trade Tax in so far as it refused relief to the petitioner on various other grounds. Both the appeals were heard together. By an order dated 26/28.6.1993, the appeal preferred by the Revenue was dismissed on the premise that the issues stood concluded by the dismissal of the second appeal of the department against the order dated 9.1.1992. However, the Company was proceeded against by the Revenue for imposition of tax for the assessment year 1988-89 purported to be in terms of Section 3F of the Uttar Pradesh Trade Tax Act, 1948 on the licence fee of Rs.56 lakhs on the ground that the said sum was paid to it by the appellant herein by way of consideration for the right to use the goods. A writ petition was filed by the Company questioning the validity of the said order. The Revenue also filed a revision petition, being Sales Tax Revision No.1866/93, before the High Court against the order dated 26/28.6.93 in Second Appeal No.446/92 (87-88) U.P., Second Appeal No.447/92 (87-88) Centre and Second Appeal No.283/92. The writ petition filed by the Company was allowed by an order dated 17.2.1998 holding that 'sugar mill' was not 'goods' and hence 'licence fee' for its use was not exigible to trade tax.

However, revision petition filed by the Revenue herein was allowed by the High Court by reason of the impugned order. The appellant is, thus, before us.

Mr. Dushyant Dave, learned Senior Counsel appearing on behalf of the appellant, submitted that an exchange or barter, in view of a large number of decisions of this Court cannot be said to be a sale within the meaning of the relevant provisions of the Act. Reliance in this behalf was placed on M/s. Gannon Dunkerley & Co. & Ors. vs. State of Rajasthan & Ors. [(1993) 1 SCC 364]. The learned counsel urged that the expression "price" would mean only cash or deferred payment. Reliance in this behalf has been placed on Devi Das Gopal Krishnan & Ors. vs. State of Punjab & Ors. [(1967) 3 SCR 557].

It was further submitted that in view of the decision of this Court in M/s. Gannon Dunkerley & Co. (supra) even after the Forty-sixth Constitution Amendment Act, for the purpose of Entry 54 List II of the Seventh Schedule of the Constitution, subject to the exception contained in Article 366(29-A), the meaning of the terms "goods" or "deemed sales" would remain the same. Reliance in this regard was placed on Bharat Sanchar Nigam Ltd. & Anr. vs. Union of India & Ors. [(2006) 3 SCC 1].

With regard to the essentials of a sale for the purpose of the Sales Tax Act, the word "sale" will have the same meaning as what is contained in the Sale of Goods Act, 1930, it was argued. Hence, the impugned judgment is wholly unsustainable. Learned counsel contended that the payment of "price" being an essential component of a sale, the arrangements entered into by and between the parties hereto, cannot be held to be a sale within the meaning of the said Act or otherwise.

Mr. Dinesh Dwivedi, learned Senior Counsel appearing on behalf of the respondent, on the other hand, submitted that the intention of the parties, as to whether the transaction in question would be a "sale" within the meaning of the Act must be gathered from the terms of the licence itself and upon a perusal of the relevant terms of the said deed, it is clear that the transaction would constitute a sale.

The U.P. Trade Tax Act, 1948 was enacted to provide for the levy of tax on the sale or purchase of the goods. "Sale" has been defined in Section

2(h) of the U.P. Trade Tax Act, 1948. The said provision reads as under:

"2(h) "sale" with its grammatical variations and cognate expression, means any transfer of property in goods (otherwise than by way of a mortgage, hypothecation, charge or pledge) for cash or deferred payment or other valuable consideration and includes-

(i) a transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(iii) the delivery of goods on hire purchase or any system of payment by instalments;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration; and

(vi) the supply, by way of or as part of any service or in any other manner whatsoever of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration."

The terms "Manufacturer" and "dealer" are defined in Sections 2 (ee) and 2(c) of the said Act, which are as under :

"2(ee) "manufacturer" in relation to any goods means the dealer who makes the first sale of such goods in the State after their manufacture and includes,
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(i)(a) a dealer who sells bicycles in completely knocked down form,

(ii)(a) a dealer who makes purchases from any other dealer not liable to tax on his sale under the Act other than sales exempted under section 4, 4-A and 4-AAA."

2(c) "dealer" means any person who carries on in Uttar Pradesh (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods directly or indirectly, for cash or deferred payment or for commission, remuneration or other valuable consideration and includes \026

(i) a local authority, body corporate, company, any co-operative society or other society,

club, firm, Hindu undivided family or other association of persons which carries on such business;

(ii) a factor, broker, arhati, commission agent, del credere agent, or any other mercantile agent, by whatever name called, and whether of the same description as hereinbefore mentioned or not, who carries on the business of buying, selling, supplying or distributing goods belonging to any principal, whether disclosed or not;

(iii) an auctioneer who carries on the business of selling or auctioning goods belonging to any principal, whether disclosed or not, and whether the offer of the intending purchaser is accepted by him or by the principal or nominee of the principal;

(iv) a government which, whether in the course of business or otherwise, buys, sells, supplies or distributes goods, directly or otherwise for cash or for deferred payment or for commission, remuneration or other valuable consideration;

(v) every person who acts within the State as an agent of a dealer residing outside the State, and buys, sells, supplies or distributes goods in the State or acts on behalf of such dealer as \026

(A) a mercantile agent as defined in the Sale of Goods Act, 1930; or

(B) an agent for handling of goods or documents of title relating to goods; or

(C) an agent for the collection or the payment of the sale price of goods or as a guarantor for such collection or such payment;

(vi) a firm or a company or other body corporate, the principal office or headquarter whereof is outside the State, having a branch or office in the State, in respect of purchases or sales, supplies or distribution of goods through such branch or office:

PROVIDED that a person who sells agricultural or horticultural produce grown by himself or grown on any land in which he has an interest, whether as owner, usufructuary mortgagee, tenant, or otherwise, or who sells poultry or dairy products from fowls or animals kept by him shall not, in respect of such goods, be treated as a dealer.

(vii) every person who carries on the business of transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(viii) every person who carries on business of

transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash deferred payment or other valuable consideration;"

The question, which arises for our consideration, is whether the transaction involves a transfer of property or a transfer of a right to use any goods or not.

The appellant herein, indisputably, carried on the business of manufacture of sugar and molasses. It does not use the molasses itself. The stock of molasses has not been transferred by the Appellant. The stock of molasses, indisputably, used to be transferred to a company. The Company was the owner of the mill. The premises of the mill had been taken on lease, although, termed as a licence for a period of 10 years. By reason of the purported Deed of Licence, the appellant has been allowed exclusive use of the sugar mill along with its plant, machinery, fixtures and fittings, etc. The appellant had taken over the whole sugar mill. The Company has not retained any control over the operation of the said mill. In terms of the said Deed, the appellant was to pay a sum of Rs.56 lakhs per annum by way of licence fee for the use of the entire sugar mill complex. Such licence fee was payable at the end of every year of the licence, i.e., from 1st July to 30th June of the succeeding year. The licensee was to pay during the period of the licence, all rates and taxes leviable by the Government or local authorities on the factory. Clause 8 of the said Deed of Licence, inter alia, is as under:

"8. That the Licensee shall be entitled to claim and utilize all quotas/permits/licenses/rights /permission/amenities and other facilities and entitlements that were available to the Sugar Mills hereto before."

By reason of the provisions of the said licence, the ultimate control over the affairs of the sugar mill vested with the appellant. Clause 11 provides that the licensee was granted full liberty to repair/replace the plant and machinery, if necessary, for the proper running of the sugar mill and to carry out the civil construction work, wherever considered necessary. In terms of Clause 18 of the purported Deed of Licence, the licensee was required to execute a performance guarantee in favour of the owner to ensure performance on its part and the Company was required to assure the appellant that it would not in any manner put any hindrance to the running of the mill during the period of the licence and the Company would also ensure that none of its creditors as on date including its Bankers, take any steps to hinder the working of the mill.

It is beyond any controversy that the mode and manner in which the licence fee was to be paid, is not the subject matter of the said Deed. In other words, the Deed of Licence does not contain any provision that the appellant was required to transfer to the company, the molasses produced by it, by exercising its exclusive right to use the sugar mill, in lieu of the licence fee or otherwise. The Performance Guarantee Deed entered into by the appellant herein was a mechanism to pay the licence fee. By reason of the said performance guarantee, only a provision has been made in terms whereof the appellant was required to handover the entire quantity of molasses to the Company and the appellant had no right to sell it to any other person. Clause 1 of the said Performance Guarantee Deed speaks of furnishing of the security of Rs.50 lakhs to the Company as an interest free deposit. Out of the said sum, a sum of Rs.6 lakhs was to adjusted towards payment of the licence fee of Rs.56 lakhs, as a result whereof, the security amount would be reduced proportionately on completion of each year of licence. Only the unadjusted amount of security, in terms of the said Deed, was required to be refunded by the Company to the appellant at the time of handing over possession of the mill. Clauses 4 and 5 of the said Performance Guarantee Deed read as under:

"4. That Licence Fee in question will be paid in shape of Molasses and the quantity thereof shall depend upon the working of the Sugar Mill.

5. That at the end of every Licence Year i.e. 30th June the value of Molasses will be ascertained on the basis of rates notified by the Government for the relevant year. In case there is any excess or shortage towards the amount of Licence Fee, the same will be made good by either of the parties as the case may be."

The said provisions are required to be read conjointly. For the purpose of supply of molasses, the rates notified by the Government was required to be taken into consideration. The quantity of supply was not fixed and would depend upon the working of the sugar mill. If there was to be any excess or shortage in molasses to be delivered towards the amount of licence fee, the same was required to be made good by either of the parties. A dispute resolution mechanism between the parties is contained in Clause 6 of the said Deed of Performance Guarantee. It is, therefore, not a case where molasses were required to be supplied, in terms of the provisions of the licence. Both molasses and sugar, were controlled commodities in the year 1988. The appellant, as also the Company, were required to sell molasses and sugar at the price notified by the Appropriate Government. In terms of the Act, the manufacturer would be a dealer. The appellant, therefore, was a dealer. It was, therefore, not correct to contend that the licence fees were being paid by the appellant by way of supply of molasses. In terms of the Deed of Licence, the appellant is responsible to manufacture in the same capacity as that of the owner. It has to pay the licence fee in the manner laid down in the deed of licence. The performance guarantee is not a part of the Deed of Licence in the sense that by reason thereof the terms and conditions for grant of the licence including that of payment of the licence fee, are not controlled by it. The definition of "sale" has undergone a change after coming into force of the Forty Sixth Constitution Amendment Act. Clause 29-A of Article 366 of the Constitution of India defines "sale" to mean:

"366.(29-A) "tax on the sale or purchase of goods" includes \026

(a) a tax on the transfer, otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

(b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(c) a tax on the delivery of goods on hire-purchase or any system of payment of instalments;

(d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

(f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of

goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration,

and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;"

The State of Uttar Pradesh has amended the definition of sale in consonance with Clause 29-A of Article 366 of the Constitution.

The definition of 'sale', thus, is different from the provisions of the Sale of Goods Act, 1930, as in terms thereof a contract of sale of goods would be deemed to be a contract of sale or transfer of property in the goods to the buyer for a price. However, in terms of Section 2(h) of the U.P. Trade Tax Act, 1948, a sale would mean a transfer of property in goods in any way otherwise than by way of a mortgage, hypothecation, charge or pledge for cash or deferred payment or other valuable consideration. The definition being an inclusive one must be given a broad meaning. A transfer of the right to use any goods for any purpose either for cash or deferred payment or other valuable consideration, would come within the purview of the said definition.

The performance clause contained in Clause 18 of the Deed of Licence does not govern the other terms and conditions of the licence. The amount of licence fee is fixed. Only a sum of Rs.6 lakhs is to be adjusted from the amount of security deposit. In each year, having regard to the said term, different amount of licence fee was payable. Supply of molasses would depend upon the production in the mill. The price payable therefor was also variable. In a given situation, having regard to the extent of production, the appellant, at the end of the licence year, may become entitled to some amount from the Company as it is possible, having regard to the agreed terms, that the appellant was required to transfer the entire quantity of molasses produced in the said sugar mill, the amount of molasses supplied would exceed the amount of licence fee found to be payable for a particular year. If, in respect of such excess molasses, the Company was required to pay any amount to the appellant, in our opinion, it cannot be said that the parties have entered into a contract for supply of molasses produced in the sugar mill by the appellant herein in favour of the Company by way of a barter or exchange.

It is inconceivable in law that a licence fee can be a subject matter of barter or exchange. A barter or exchange indisputably is distinct and different from a sale. A contract of sale denotes a transfer of property in goods by mutual consent. Such a transfer of ownership must be in relation to transfer from one person to another. The consideration would be a price in the form of money. Only when the consideration for transfer consists of other goods, it may be an exchange or barter. Such is not the position here.

In State of Madras vs. Gannon Dunkerley & Co. [(1958) SCR 379], relied upon by Mr. Dave, this Court was concerned with a question as to whether any transfer of property in goods was involved in the execution of a works contract.

By reason of Clause 29-A of Article 366, the ratio in Gannon Dunkerley & Co. (supra) has been overcome, as title to the goods, although, may remain with the transferee, a transfer of right to use the goods would also be a sale. Even a lease of goods would be a sale. Thus, by reason of the said definition, though an essential ingredient of a sale as defined in the Sale of Goods Act, 1930, may be absent, the transaction may amount to a sale for the purpose of levy of Sales Tax under the Act. What has not been

altered by reason of the said provision is the meaning of the word "goods". In this case, the concept of goods is not in dispute. Molasses is indisputably goods. It can be transferred for a definite price.

An adjustment of price in a case of this nature, in our opinion, therefore, would come within the purview of the term "other valuable consideration", inasmuch as both the appellant and the Company, were aware that they have to fulfil their respective terms of obligations, i.e., (i) payment of licence fee on monetary terms; and (ii) payment of price of molasses supplied by the appellant to the Company, which is again on monetary terms. Parties, therefore, by mutual consent only have agreed to adjust the price of molasses supplied with the amount of licence fee. The rate for supply of molasses was to be determined by the Central Government. In that view of the matter, presumably one party or the other shall make good the shortfall or the excess upon taking into consideration the price of molasses fixed by the Central government. The transaction, in our opinion does not constitute an exchange or barter. It was not a transaction by way of transfer of stock. It was also not a transfer by way of a mortgage or lease.

In *Bharat Sanchar Nigam Ltd. & Anr. vs. Union of India & Ors.* [(2006) 3 SCC 1], whereupon Mr. Dave placed strong reliance, this Court has clearly held that the content of a concept would not remain static and an interpretation of the Constitution vis-à-vis the statute framed in view of the amendments in the Constitution, may be given different meanings. But, what had been held therein was that an incorporeal right involved in the said decision was not "goods" for the purpose of imposition of Sales Tax, as Electromagnetic waves being not capable of being abstracted or consumed in the sense that they are not extinguished by the user or otherwise, they are not marketable and/or a subscriber to a telephone service may not have intended to purchase or obtain any right to use electromagnetic waves. It was held that the transaction by which mobile phone connection is given, is a service and not a sale of goods. It is, however, interesting to note the following observations:

"We cannot anticipate what may be achieved by scientific and technological advances in future. No one has argued that at present electromagnetic waves are abstractable or are capable of delivery. It would, therefore, appear that an electromagnetic wave (or radio frequency as contended by one of the counsel for the respondents), does not fulfil the parameters applied by the Supreme Court in *Tata Consultancy* for determining whether they are goods, right to use of which would be a sale for the purpose of Article 366(29-A)(d)."

The subject matter involved in the said decision of *Bharat Sanchar Nigam Ltd. & Anr.* (supra) primarily was held not to be within the purview of definition of "goods" as the contract between the telecom service provider and the subscriber was merely to receive, transmit and deliver messages of the subscriber through a complex system of fibre optics, satellite and cables.

This Court, it may be noticed, in a recent Constitution Bench judgment in *M/s. Sunrise Associates vs. Govt. of NCT of Delhi & Ors.* (pronounced on 28th April, 2006), has opined that the sale of lottery ticket or a railway ticket may not be a sale of goods.

In *Tata Consultancy Services vs. State of A.P.* [(2005) 1 SCC 308], a CD containing software was held to be goods within the meaning of the A.P. General Sales Tax Act, 1957.

Devi Das Gopal Krishnan & Ors. vs. State of Punjab & Anr. [(1967) 3 SCR 557] and *CIT, A.P. vs. Motor & General Stores (P) Ltd.* [(1967) 3 SCR 876 : AIR 1968 SC 200] were relied upon by Mr. Dave for

the proposition that the expression "valuable consideration" takes colour from the preceding expression "cash or deferred payment". The said decision is not an authority for the proposition that cash or deferred payment cannot be by way of adjustment. If the parties intended to adjust their own dues, having regard to different transactions in terms whereof both the parties to the said transaction were required to pay in cash or by way of deferred payment, the same would not militate against the interpretation of the expression "valuable consideration", although, the term "valuable consideration" in the changed context (in view of the Constitution amendment) may be viewed differently. But, having regard to the fact situation obtaining in this case, we may not have to go into the said question.

Molasses manufactured in the sugar mills, was the property of the appellant and it answers the description of "goods". In view of the terms and conditions of the Deed of Licence, the appellant was the owner thereof. The Company was to use the molasses for the purpose of manufacture of sugar in its factory. Transfer of such molasses by the appellant to the Company, would not be a transfer by way of transfer of stock. It is transfer of the ownership in goods wherefor the Company was to pay the price to the appellant. The transaction, therefore, beyond any doubt, answers the description of "sale" within the meaning of the provisions of the U.P. Trade Tax Act, 1948. For each supply of molasses the appellant would be entitled to the price thereof. The amount towards the price of the goods could be paid either by way of cash or deferred payment. Instead of cash, the price of molasses was to be adjusted from the amount payable by the appellant to the owner by way of consideration for use of the mill. Such a mutual arrangement is merely one for the purpose of adjusting the accounts. The transactions between the parties are in effect and substance involve passing of monetary consideration. It would, thus, come within the purview of the expression "any other valuable consideration", which expression would take colour from deferred payment being a monetary payment, but does not lose its character of some other monetary payment by way of mutual arrangement. The parties are not bartering or exchanging any goods so that the element of monetary consideration is absent. Money is a legal tender. Cash is, however, narrower than money. The words "deferred payment" and "other valuable consideration" enlarge the ambit of consideration beyond cash only. Entry 54 of List II of the Seventh Schedule to the Constitution of India provides for "sale of goods". Once a sale of goods takes place, the State becomes entitled to impose tax on sale or purchase of goods. For construction of the words "sale of goods", now the Court is not necessarily required to fall upon the definition of sale of goods, as contained in the Sale of Goods Act, 1930. It has to be governed by its enlarged definition under Clause (29-A) to Article 366 of the Constitution of India. Once an essential component of sale takes place, Sales tax would, indisputably, be payable. By reason of such an arrangement by the parties, the State is not creating a new taxable event nor imposing a new tax which was unknown in law.

In fact, the transaction entered into by the parties even does not provide for any camouflage to evade tax. They are clear and unambiguous.

We, therefore, are of the opinion that the High Court cannot be said to have committed any error in passing the impugned judgment.

In regard to the submissions of the learned counsel for the parties that as no appeal was preferred from the order dated 30.7.1991, wherein the Company was the appellant, the respondent must be held to have accepted the order, is not acceptable to us, as, admittedly, the appellant itself is liable to pay the tax. The contentions of the appellant that having regard to the transaction entered into by and between the parties and no sale having taken place, they are not liable to pay any tax, will not be correct. Non-filing of the appeal against the said order dated 30.7.1991, would not take away the effect of order of assessment passed as against the appellant by the Assessing Authority. Therefore, for the reasons aforementioned, we do not find any merit in the contentions of the appellant. Consequently, the appeal is dismissed.

No costs.

JUDIS