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HINDUSTAN STEEL LTD.

v.

STATE OF ORISSA

August 4, 1969

B [J. C. SHAH, ACTING C.J., V. RAMASWAMI AND A. N. GROVER, JJ.]

Orissa Sales Tax Act (Orissa 14 of 1947), ss. 2(c) and (g), 9 and 25(1)(a)—Penalty, when may be imposed—'Dealer'—Supply of one's building material to building contractor at agreed price—Sale price including storage charges—Transaction if constitutes sale under the Act—Whether business in building material, can be inferred.

C Between the years 1954 and 1959 the appellant-company was erecting its factory buildings and other ancillary constructions through buildings contractors. The appellant arranged for the manufacture of bricks and sold those bricks to the building contractors for the purpose of the appellant's constructions. The appellant also supplied for the same purpose steel, cement and other materials which it procured and stored. The difference between the sale price and the appellant's cost price was a flat percentage of the cost price varying with the material. The sale price was D agreed to be adjusted against the dues under the contract between the appellant and the building contractors. Treating the appellant as a dealer in the building materials the sales tax authorities under the Orissa Sales Tax Act, 1947, directed the appellant to pay sales tax for ten quarters ending with December 31, 1958, and a penalty, in addition to the tax, for failure to register itself as a dealer. The Tribunal agreed on the liability to pay tax, reduced the penalty, and the High Court, on reference, E confirmed the Tribunal's order.

In appeal to this Court on the questions : (1) Whether the appellant *sold* building materials to the building contractors; (2) Whether the imposition of penalty for failure to register as a 'dealer' was justified; and (3) Whether the appellant was a '*dealer*' in respect of the building material supplied by it,

F HELD : (1) The supply of building material belonging to the appellant for an agreed price constituted a 'sale' as defined in s. 2(g) of the Act as the definition stood at the relevant time. [756 E]

(2) Under ss. 9(1) and 25(1)(a) of the Act a penalty may be imposed for failure to register as a dealer. But the discretion to impose a penalty must be exercised judicially. A penalty will ordinarily be imposed in cases where the party acts deliberately in defiance of law, or is G guilty of contumacious or dishonest conduct, or acts in conscious disregard of its obligation; but not, in cases where there is a technical or venial breach of the provisions of the Act or where the breach flows from a *bona fide* belief that the offender is not liable to act in the manner prescribed by the statute. [756 E-H]

In the present case, those in charge of the affairs of the appellant, in failing to register it as a dealer, acted in the honest and genuine belief that H the company was not a dealer; and therefore, assuming the appellant to be a 'dealer' no case for imposing penalty was made out. [757 A]

(3) Under the terms of the tender submitted by the building contractors and the schedule annexed thereto, the appellant was to charge

certain rates for the materials supplied by it. The excess percentage over the specified rate in the case of building materials other than bricks was agreed to be paid by the contractors as storage charges. There was nothing to show that the excess price charged by the appellant to its contractors for bricks was also for storage charges. But neither the Tribunal nor the High Court had referred to this aspect of the sale price namely whether the excess price was for storage or for profit with respect to any of the building materials. Therefore, merely because the price charged to the contractors exceeded the price paid by the appellant for procuring the building materials it cannot be inferred that *the motive of the appellant was to carry on business in building materials for profit.* [761 B-E]

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 883 to 892 of 1966.

Appeals by special leave from the judgment and order dated December 3, 1964 of the Orissa High Court in Special Jurisdiction Cases Nos. 44 and 53 of 1963.

C. K. Daphtary and *D. N. Mukherjee*, for the appellant (in all the appeals).

D. Narsaraju and *R. N. Sachthey*, for the respondent (in all the appeals).

The Judgment of the Court was delivered by

Shah, Ag. C.J. M/s Hindustan Steel Ltd., a Company incorporated under the Indian Companies Act, 1913 is a Government of India undertaking in the public sector. The Company is registered as a dealer under the Orissa Sales Tax Act 14 of 1947, from the last quarter ending March 1959.

Between 1954 and 1959 Company was erecting factory buildings for the steel plant, residential buildings for its employees and ancillary works such as roads, water supply, drainage. Some constructions were done departmentally and the rest through contractors. The Company supplied to the contractors for use in construction, bricks, coal, cement, steel etc. for consideration and adjusted the value of the goods supplied at the rates specified in the tender.

In proceedings for assessment of tax under the Orissa Sales Tax Act, 1947, the Sales Tax Officer held that the Company was a dealer in building material, and had sold the material to contractors and was on that account liable to pay tax at the appropriate rates under the Orissa Sales Tax Act. The Sales Tax Officer directed the Company to pay tax due for ten quarters ending December 31, 1958 and penalty in addition to the tax for failure to register itself as a dealer. The Appellate Assistant Commissioner confirmed the order of the Sales Tax Officer. In second appeal the Tribunal agreed with the tax authorities and held that the Company was liable to pay tax on its turnover from

A bricks, cement and steel supplied to the contractors. The Tribunal however substantially reduced the penalty imposed upon the Company.

At the instance of the Company the Tribunal referred six questions to the High Court of Orissa under s. 24(1) of the B Orissa Sales Tax Act, 1947. The questions were :

"A. Whether in the facts and circumstances of the case Messrs. Hindustan Steel Ltd. can be held to be a 'dealer' within the meaning of s. 2(c) of the Orissa Sales Tax Act ?

B. Whether the sale of materials by the Company C to different contractors working for the company for which sales tax is sought to be assessed amounts to 'sale' within the meaning of s. 2(g) of the Act ?

C. Whether the accrual of some profit in the absence of any motive to make such profit can make the D assessee a 'dealer' under the Act and whether in the circumstances of the case, the Tribunal was justified in coming to a finding that there was profit making motive on the part of the Company ?

D. Whether in view of the definition contained in E s. 2, cl. (h) as it stood prior to the amendment of the provision by Act 18 of 1959, the supplies of materials can be treated as 'sale price' in the hands of the assessee ?

E. Whether in the facts and circumstances of the case, the amount received by the assessee in F respect of tender forms can be said to be 'sale price' ?

F. Whether the Tribunal is right in holding that penalties under s. 12(5) of the Act had been rightly levied and whether in view of the serious dispute of liability it cannot be said that there G was sufficient cause for not applying for registration ?"

The High Court answered the questions A, B, C, D and F in the affirmative and question E in the negative.

In these appeals filed with special leave substantially three matters fall to be determined :

1. Whether the Company sold building material to the contractors during the quarters in question ?

2. Whether the Company was a dealer in respect of building material within the meaning of the Orissa Sales Tax Act? A

3. Whether imposition of penalties for failure to register as a dealer was justified?

Solution of the first and third matters does not present much difficulty. At the relevant time 'sale' was defined by s. 2(g) of the Orissa Sales Tax Act as follows :— B

> " 'Sale' means, with all its grammatical variations and cognate expressions, any transfer of property in goods for cash or deferred payment or other valuable consideration, including a transfer of property in goods involved in the execution of contract, but does not include a mortgage hypothecation charge or pledge : C
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> . . . . . ."

The Company supplied building material to the contractors at agreed rates. There was concurrence of the four elements which constitute a sale—(1) the parties were competent to contract; (2) they had mutually assented to the terms of contract; (3) absolute property in building materials was agreed to be transferred to the contractors; and (4) price was agreed to be adjusted against the dues under the contract. No serious argument was advanced before us that the supply of building material belonging to the Company for an agreed price did not constitute a sale. D E

Under the Act penalty may be imposed for failure to register as a dealer : s. 9(1) read with s. 25(1)(a) of the Act. But the liability to pay penalty does not arise merely upon proof of default in registering as a dealer. An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a *bona fide* belief that the offender is not liable to act in the manner prescribed by the statute. Those in charge of the affairs of the Company in failing to register the Company as a dealer acted in the honest and F G H

genuine belief that the Company was not a dealer. Granting that they erred, no case for imposing penalty was made out.

Liability to pay sales tax is imposed by s. 4 of the Act. Every dealer whose gross annual turn over exceeds Rs. 10,000/- is liable to pay tax during the ten quarters in question. The expression "dealer" was defined at the relevant time as meaning :

> " 'Dealer' means any person who executes any contract or carries on the business of selling or supplying goods in Orissa whether for commission, remuneration or otherwise and includes any firm or Hindu Joint family, and any society, club or association which sells or supplies goods to its members.
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> Explanation . . . . . ."

A person to be a dealer within the meaning of the Act must carry on the business of selling or supplying goods in Orissa. The expression "business" is not defined in the Act. But as observed by this Court in *State of Andhra Pradesh* v. *Abdul Bakhi and Bros.*(1)

> "The expression 'business' though extensively used is a word of indefinite import, in taxing statutes it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure."

The sales tax authorities and the Tribunal have held that the Company was carrying on business of selling or supplying materials to the contractors and with that view the High Court agreed. The Company purchased bricks manufactured by its own contractors and sold the bricks to the building contractors at a flat 30% premium over the purchase price in the case of "second class bricks" and 25% premium in the case of "First class bricks". Steel, cement and other materials were initially supplied at 3½% premium over the purchase price paid by the Company. It was contended on behalf of the Company that merely because the price charged to the contractors exceeded the price paid by the Company for acquiring the materials, motive of the Company to carry on business in building materials for profit, cannot be inferred. The Company, it is true, maintained no separate accounts relating to the expenditure incurred by it for

(1) [1964] 7 S.C.R. 664.

overhead and other charges in respect of those materials. Before the sales-tax authorities counsel for the Company also conceded that the Company had not maintained separate accounts from which it could be proved that the transactions of supply of bricks, cement, steel and other commodities resulted in no profit. The High Court observed :

> "It is the Stores Department of the company as a whole which deals with the purchase, storage and sale of all the goods required both for acquisition and issue of materials to be used for the construction and operation work of the Company. .....the Company had to construct not only the buildings but also roads, railways, etc., acquire machinery and perform other multifarious activities connected with the establishment of steel plants and construction of the township. There is nothing in the statement to show that the Company had at any time even contemplated the allocation of the total expenditure incurred for the maintenance of its Stores Department between the expenditure incurred in respect of the goods namely bricks, cement, steel etc. and other goods. If such allocation was not even contemplated, it will be unreasonable to say that when these goods were sold to the building contractors at the prices mentioned above, the intention of the Company was merely to utilise the difference in price to meet the overhead charges in respect of these articles and that there was no profit making motive."

It is unfortunate that in submitting the statement of case the Tribunal stated no facts at all, and merely submitted the question which was submitted by the Company and the question which, in the view of the Tribunal, arose out of the order. Even in the order deciding the appeal, the facts found on which the conclusion was based were not clearly set out. The Tribunal observed that though the primary object of the Company was to establish a steel plant, the Memorandum authorised the Company to carry on "any trade or business" that it thought would be conducive to its interest. Observed the Tribunal :

> "Judged in this light one cannot find anything wrong if in the initial stages when construction works were going on, the Company thought it prudent that instead of keeping its employees idle and bearing the cost of maintenance without any return, utilised them in some subsidiary business which would promote the interest of the Company and bring some return. With that end

A in view the company could as well have brought contractors to manufacture bricks in its lands, purchased the same from them, purchased cement, coal and other materials from dealers, opened a stores department and kept those materials so procured in its stores and thereafter effected sales of the materials to outsiders including its contractors. The Company knew that for speedy construction of its buildings and factory the contractors would require these materials and so the Company would not lose if it entered into such business. Rather that business would be in the interest of the Company. If the Company had no idea to enter into any business, there was no reason why it should have brought contractors to manufacture bricks, purchased the entire stock from them, stocked the same and thereafter sell the same to its building contractors."

But in so observing a very important piece of evidence appears to have been ignored by the Tribunal. Annexed to the form of the tender submitted by the contractors there are certain "general rules and directions for the guidance of contractors." Paragraph-8 stated :

> "The memorandum of work tendered for, and the schedule of materials to be supplied by the H. S. Ltd. and their issue rates, shall be filled in and completed in the office of the Divisional Officer before the tender form is issued. If a form is issued to an intending tenderer without having been so filled in as completed he shall request the office to have this done before he completes and delivers his tender."

Then follow the conditions of contract of which condition No. 10 is material; it states—

> "If the specification or estimates of the work provides for the use of any special description of materials to be supplied from the Engineer-in-Charge's store, or if it is required that the contractor shall use certain stores to be provided by the Engineer-in-Charge (such materials or stores, and the prices to be charged therefor as hereinafter mentioned being so far as practicable for the convenience of the contractor, but not so as in any way to control the meaning or effect of this contract specified in the schedule or memorandum hereto annexed), the contractor shall be supplied with such materials and stores as required from time to time to be used by him for the purpose of the contract only, and the value of the full quantity of materials and stores so

supplied at the rates specified in the said schedule or memorandum may be set off or deducted from any sums then due, or thereafter to become due to the contractor under the contract, or otherwise or against or from the security deposit. All materials supplied to the contractor shall remain the absolute property of the Company, and shall not on any account be removed from the site of the work, and shall at all times be open to inspection by the Engineer-in-Charge. Any such materials unused and in perfectly good condition at the time of the completion or determination of the contract shall be returned to the Engineer-in-Charge's store, if by a notice in writing under his hand he shall so require; ....."

Attached to the tender form is the schedule which recites :

"Recovery of rates of materials to be supplied by H.S.L., for the work of :

(1) Construction of brick masonry compound wall around plant area. Northern section Length 2.4. miles.

(2) Construction of brick masonry compound wall around plant area. Southern section Length 2.30 miles.

(3) Construction of brick masonry compound wall around plant area. Marshalling yard section Length 4.15 miles."

It is followed by a table which sets out the Serial No. of the articles to be supplied, description of materials unit, rate and place of delivery.

It is clear from the terms of the tender and the schedule annexed thereto that the Company was to charge certain rates for the materials to be supplied by it. One of the contracts which has been produced before this Court states under the head "Rate" : Rs. 5.94+3½% storage charges against "cement in bags," Rs. 800.00+3½% storage charges against "structural steel and M.S. rods", and "Rs. 41.25 for 1000 bricks" against "first class bricks". Apparently 3½% over the specified rate was agreed to be paid by the contractors as storage charges in respect of cement and structural steel and M. S. rods. No specific percentage was set out in respect of the bricks and an inclusive price was made chargeable.

Relying upon the terms of the schedule, counsel for the Company contends that the contractors and the Company expressly

A agreed that 3½% over the agreed price of the goods was chargeable as storage charges. It is common ground that the rate mentioned against cement and structural steel is the price at which the goods were purchased by the Company. If the Company was charging a fixed percentage on the price paid by it for procuring such goods for storage and other incidental charges, it would be difficult to resist the conclusion that the Company was not carrying on the business of selling cement and structural steel. There is of course no statement in the schedule that the price charged by the Company in excess of the price paid by the Company to its contractors for bricks was in respect of storage charges.

C But neither the Tribunal nor the High Court has referred to this important piece of evidence and we are unable to decide these appeals unless we have an additional statement of facts in the light of the relevant evidence as to whether the excess charged over and above the price which the Company paid for procuring cement and steel (expressly called storage charge) and bricks was intended to be profit. If the Company agreed to charge a fixed per-
D centage above the cost price, for storage, insurance and rental charges, it may be reasonably inferred that the Company did not carry on business of supplying materials as a part of business activity with a view to making profit.

The Tribunal's statement of case is bald and in recording its
E findings the Tribunal has ignored a very important piece of evidence. To enable us to answer the questions referred, it is necessary that the Tribunal should be called upon to submit a supplementary statement of the case on the questions whether the Company charged any profit apart from the storage charges for supplying cement and structural steel, and whether the difference between the price charged to the contractors and the price paid
F by the Company to its suppliers for bricks was not in respect of storage and other incidental charges. The Tribunal to submit the supplementary statement of case to this Court, within three months from the date on which the papers reach the Tribunal.

V.P.S. *Directions given.*