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IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 05-11-2025

CORAM

**THE HONOURABLE MR JUSTICE S. M. SUBRAMANIAM
AND
THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ**

WP No. 7556 of 2008

1. Oswal Oil And Vanaspathi
Industries, Rep. By Its Authorised
Signatory, A.P. Jain No. 106, Cochrane
Basin Road, Chennai-21

Petitioner(s)

Vs

1. The Commercial Tax Officer
Washermenpet I Assessment Circle,
20, Kummalamman Koil Street,
Chennai-81

2.The Appellate Assistant
Commissioner (CT) VII, Chennai.

3.The Tamilnadu Sales Tax
Appellate Tribunal, (Additional Bench),
City Civil Court Building, High Court
Complex, Chennai-104

Respondent(s)

PRAYER

To call for the records on the files of the third Respondent herein in T.A.No.



567/01 dated 08.02.2008 and issue a Writ of Certiorari or any other appropriate Writ, order or direction under Article 226 of the Constitution of India, quashing the same.

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For Petitioner(s): Mr.N.Prasad

For Respondent(s): 1)Mr. Haja Nazirudeen Additional Advocate
General -I Asst By
Mrs. Vasanthamala
Govt. Advocate For R1 And R2
R3 Tribunal

ORDER

(Order of the Court was made by Mohammed Shaffiq J.)

The present writ petition is filed challenging the order of the Sales Tax Appellate Tribunal, insofar as it confirms the order of the Appellate Assistant Commissioner finding that the lease agreement entered into between the petitioner and M/s. Grace Oils Private Limited would constitute transfer of right to use goods, inside the State of Tamil Nadu, thereby attracting levy of sales tax under Section 3-A of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as TNGST Act, 1959)

2. BRIEF FACTS:

2.1. Petitioner is a public limited company and was registered under the TNGST Act, 1959. During the year 1997-98, petitioner entered into a lease



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agreement dated 01.04.1997 with M/s. Grace Oils Private Limited for the lease of a Vanaspathi factory. Subject matter of lease i.e., factory includes lands, building, factory, plant and machinery installed therein along with other movables. Agreement was executed at Ludhiana. Agreement is one single contract for lease of the factory as a whole including land, building, plant and machinery and other movables. Consideration is a lumpsum consideration and not divisible into one for land, building, immovable properties and other for movable properties.

3. Before proceeding further, it may be relevant to set out briefly the order of the lower authorities:-

3.1. Order of Assessing Authority, dated 29.10.1999:

3.1.1. The order of assessment proceeded to levy tax after finding that the plant and machinery have been given on lease and the petitioner had not proved that such plant and machineries had suffered taxes under TNGST Act earlier. The relevant portion is extracted herein under,

“The dealers have not proved that the plant and machinery given for lease have already suffered single point tax at earlier



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stages. Even though the lessor continues to be responsible for liabilities attaching on the leased property by virtue of the use of the property as alleged, they used to collect rental charge for using the plant and machinery given for leasing. Even though the said plant and machinery permanently affixed to the land for the purpose of operation, they cannot be said to be immovable properties which cannot be assessed under Section 3A of the Act. The plant and machinery listed out in the Annexure II of the agreement are only movable items and hence the rental charges collected for leasing these item will certainly attract levy of tax under Sec.3A of the Act.”

3.2. Order of First Appellate Authority, dated 16.05.2001:

3.2.1. First Appellate Authority, i.e., the Appellate Assistant Commissioner, found that the plant and machinery listed in Annexure II to the lease agreement, though permanently fixed to land, would only be movable in nature. The relevant portions are extracted hereunder:

“As rightly mentioned by the Assessing Office, even though the said plant and machinery are permanently fixed to land for the purpose of operation, they are liable to be removed at any point of time. Hence, the Plant and Machinery listed out in the Annexure II, of the Lease agreement are only movable items.



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There is no agreement between the Appellants and the Lessee. But the Appellants have collected rent towards leasing of plant and machinery. Therefore, the decision reported in 119 STC 182, cannot be applied in the case of Appellants.”

3.3. Order of Tribunal, dated 08.02.2008:

3.3.1. After finding that the entire factory was given on lease, it was found that there was an implied transfer of the right to use the machinery in the factory, thereby attracting levy of sales tax under Section 3A of the TNGST Act, on the premise that the transaction constitutes a transfer of use of the machinery. The relevant portion is extracted hereunder:

“Therefore the lessee's enjoying the plant and machinery in the factory, is the right to use, which is an implied transfer of the right to use goods. If the right was only to use the factory premises sans the machineries, the lessee ought not to have use the machineries, simplicitor. Since the entire factory, was leased out it was implied the plant and machinery within the factory came to be used by the lessee. Therefore in our case the right to use the machinery arose from out of a contract at a subsequent period of time to the written contract entered in Ludhiana, on that date when the lessee actually commenced the production of



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vanaspathy etc. using the machineries belonging to the assessee. Therefore applying the above principles of law laid down by the Apex Court in the above case law, the taxable event would arise on the actual delivery of goods. Admittedly the said delivery of goods (machineries) took place within the State of Tamil Nadu and this fact cannot be disputed. Therefore the lease contract executed at Ludhiana in the State of Punjab is not a criterion to be taken into consideration herein as the said lease agreement was only for factory, building etc. and not expressly for the machineries, as per the argument of the learned counsel. Therefore the principles laid down by the Apex Court in Para 35 (c) of the above cited judgment is not applicable to the case on our hand. Therefore, the State of Tamil Nadu is alone competent to levy of sales tax on the transfer of the right to use goods.”

4. Questions for consideration:-

4.1. Against the above background, question arises as to whether the lease agreement entered into between petitioner and M/s Grace Oils Private Limited, would constitute a transfer of right to use any goods within the meaning of Article 366(29A)(d) of the Constitution of India read with Section 3-A of the TNGST Act.



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5. Historical Background and object behind 46th Amendment to Constitution which inter alia enabled levy of Sales Tax on transfer of right to use goods by State:

5.1. To answer the above question, it would be relevant, rather necessary, to briefly trace the legislative and constitutional history relating to levy of sales tax on transfer of use of goods. Sales tax laws enacted in pursuance of the Government of India Act, 1935 as also the laws relating to sales tax passed after the coming into force of the Constitution proceeded on the footing that the expression "sale of goods", having regard to the rule as to broad interpretation of entries in the legislative lists, would be given a wider connotation. However, in *Gannon Dunkerley's case* (A.I.R. 1958 S.C. 560), the Supreme Court. While dealing with the scope of the expression 'sale', employed in Entry 48 of the Government of India Act, 1935, which is *pari materia* to Entry 54, List II to the VII Schedule of the Constitution of India, in the context of States competence to levy tax on an indivisible works contract, it was held that sale under Entry 48 of the Government of India Act, 1935, must be given the same meaning as contained in the Sale of Goods Act.¹

¹ *State of Madras Vs. Gannon Dunkerley & Co. (Madras) Ltd, reported in (1958) 9 STC 353*



5.2. Following the decision in Gannon Dunkerley, at least 5 other transactions including transfer of right to use any goods though resembled sale was held to be beyond the pale of the State legislative competence to levy tax under Entry 54, List II, VII Schedule to the Constitution, inasmuch as one or the other element necessary to qualify as “sale” in terms of Sale of Goods Act” was found to be missing.

5.3. With a view to plug the above loophole, 46th amendment to the Constitution was introduced, wherein the definition in Article 366 was amended by inserting Clause (29A) to the said Article. The amendment reads as under:

“4. Amendment of Article 366.-In Article 366 of the Constitution, after clause (29), the following clause shall be inserted, namely:-

‘(29-A) “tax on the sale or purchase of goods” includes-

(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 by 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;”

5.4. It is thus clear that consequent to the 46th amendment to the Constitution, power of the State to levy tax under Entry 54 of List II to VII Schedule to the Constitution of India stood enlarged to take within its fold, inter-alia, power to levy sales tax on transfer of right to use goods.



6. Before proceeding further, it may be relevant to note that following

facts are undisputed:

- a) Agreement was executed at Ludhiana.
- b) Agreement entered into is one indivisible contract for lease of land, building, plant and machinery and other movables.
- c) Consideration is a lumpsum consideration and not divisible into one for land, building, immovables and other for movables.

7. It appears to us that, against the above factual and legal background, levy of tax under Section 3A may not be permissible for the following reasons.

7.1. Before proceeding further it may be relevant to refer to the following clauses in lease agreement:

"Clause (a) "The factory building leased consist of 10 (Ten) number of sheds having covered area of 10200 sq.ft. office buildings constructed on the above said land having covered area of 3400 sq.ft. 4 number of godowns constructed on the above said land having covered area of 15800 sq.ft. And 5 Metallic storage Tanks having total capacity of 354 M.T for storage of edible oils. A copy of layout plan, marking area in red outline to be given on lease is enclosed as per Annexure 11.



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Roads connecting the sheds, godowns and the office buildings with the Gate entrance consisting of 250 mtrs. Utilities consisting of water connection, Pipe lines, Drain pipes and sewerage tank etc.

Machinery and Plant having 30 MT/TPP capacity (as per annexure-II)

ELECTRIC CONNECTION

The factory building leased enjoys an industrial electric connection from the State Electricity Board of 150 H.P.L.T. connection along with necessary infrastructure consisting of transformer, switches, converters etc.

The LESSEE is authorised to use the factory shall building, plant and machinery etc. leased to them for manufacture and sale of vanaspati and all kinds of refined edible oils. The LESSEE shall not use the leased premises for any other kind of work or activities unless prior written permission for the same has been obtained from the LESSOR."

7.2. From a reading of the above clause in the lease agreement it would be clear that subject-matter of lease is the entire factory, which is an amalgam



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of immovable properties such as land, building, plant and machinery permanently fixed and movable properties. While there is a dispute as to whether plant and machinery would constitute movable property or immovable property, the above issue need not detain us. We say so, for the reason that the above agreement is for lease of the factory as a whole which, as stated supra, is an amalgam of immovable and movable properties. Pursuant to the 46th amendment to the Constitution, States are enabled to levy tax on six categories of mutant sales including “transfer of right to use goods”.

8. Keeping in view Article 366 (29A)(d), read with section 3A of TNGST Act, and a reading of subject lease agreement as a whole, it appears to us the subject contract is a single contract for lease of “Vanaspati Factory” for manufacture of Vanspati and other edible oils. Tax cannot be levied on the above lease agreement by treating it to be a transfer of right to use goods nor can the contract be divided into one for immovable and the other for movable property. Any levy of tax of what is admittedly a single composite contract for transfer of factory for manufacturing/processing of edible oils may require dissecting and disintegrating the same into one for movable and the other for



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immovable property. In other words, by a fiction, a single contract for lease of factory would have to be treated as a divisible contract for lease of movable and other for immovable property.

8.1. If so question arises as to whether it is permissible to treat a contract for lease of factory comprising of land, building, plant and machinery and other movables into a divisible contract, viz., one for transfer of movable and other for immovable property or to treat it as a Contract for transfer of right to use goods.

8.2. We would think the answer is got to be in the negative. We say so, for it would require creation of a fiction as in the case of indivisible works contract, which pursuant to the 46th amendment to the constitution was altered into a contract which is divisible into one for sale of goods and the other for supply of labour and services or o lease of factory as a contract for lease of goods. In this regard it may be relevant to refer to the judgement of Supreme Court in the case of Builders Association reported in (1989) 2 SCC 645, wherein the scope of fiction in Article 366 (29-A) (b) relating to works contract was explained as under:

“36. Even after the decision of this Court in the State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd. [AIR 1958 SC



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560 : 1959 SCR 379 : (1958) 9 STC 353] it was quite possible that where a contract entered into in connection with the construction of a building consisted of two parts, namely, one part relating to the sale of materials used in the construction of the building by the contractor to the person who had assigned the contract and another part dealing with the supply of labour and services, sales tax was leviable on the goods which were agreed to be sold under the first part. But sales tax could not be levied when the contract in question was a single and indivisible works contract. After the 46th Amendment the works contract which was an indivisible one is by a legal fiction altered into a contract which is divisible into one for sale of goods and the other for supply of labour and services.”

9. Importantly, Supreme Court in **BSNL and Another Vs. Union of India and Others** has found that splitting and dissecting of contract is permissible even pursuant to 46th amendment to Constitution only in Article 366 (29A) (b) and (f) of the Constitution. The relevant portion of the judgement is extracted as under,

“45. Of all the different kinds of composite transactions the drafters of the 46th Amendment chose three specific situations, a works contract, a hire-purchase contract and a catering contract to bring within the fiction of a deemed sale. Of these three, the



first and third involve a kind of service and sale at the same time.

Apart from these two cases where splitting of the service and supply has been constitutionally permitted clauses (b) and (f) of clause (29A) of article 366, there is no other service which has been permitted to be so split.”

(emphasis supplied)

10. The judgement of the Apex Court in Builders Association, referred supra would show that a contract which is otherwise one single contract can be dissected/disintegrated by fiction. It is trite that creation of fiction falls within the exclusive domain of the legislature and it is not permissible for the Court to create a fiction. In this regard, it is relevant to refer the following judgements:

(i) MancheriPuthusseri Ahmed v. Kuthiravattam Estate Receiver²,

“.....Rule of construction of provisions creating legal fictions is well settled. In interpreting a provision creating a legal fiction the court is to ascertain for what purpose the fiction is created, and after ascertaining this, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. But in so construing the fiction it is not to be extended beyond the purpose for which it is created, or beyond the language of the section by which it is created. It cannot also be extended by importing another fiction. In this

2. (1996) 6 SCC 185



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connection we may profitably refer to two decisions of this Court. In the case of *CIT v. Shakuntala* [AIR 1966 SC 719 : (1961) 43 ITR 352] a three-Judge Bench of this Court speaking through S.K. Das, J., made the following pertinent observation in paragraph 8 of the Report:

CIT v. Moon Mills Ltd. [AIR 1966 SC 870 : (1966) 59 ITR 574] another three-Judge Bench of this Court speaking through Subba Rao, J., observed in paragraph 8 of the Report in connection with the provision creating such legal fiction as under:

“The fiction is an indivisible one. It cannot be enlarged by importing another fiction....”

(emphasis supplied)

(ii) *Karimtharuvi Tea Estate Ltd. v. State of Kerala*³, and *Varkisons*

Engineer Vs. State of Kerala and another, is extracted hereinafter:

“11 “A legal fiction must be limited to the purposes for which it has been created and cannot be extended beyond its legitimate field. The turnover of the previous year is fictionally made the turnover of the year of assessment : it is not the actual or the real turnover of the year of assessment. By the imposition of a different tariff in the course of the year, the incidence of tax liability may competently be altered by the legislature, but for effectuating that alteration, the legislature must devise machinery for enforcing it against the tax payer and if the legislature has

3. 1965 SCC OnLine SC 233 & *** 2009 16 SCC 120



failed to do so, the court cannot resort to a fiction which is not prescribed by the legislature and seek to effectuate that alteration by devising machinery not found in the statute.

(iii) State of Tamil Nadu Vs. A. Rafeeq Ahamed&Co⁴,

“Neither the assessing authority nor any other body dealing with the question of assessability of a dealer under the Act has the power to create fictions of their own, and foist fiscal liabilities on the basis of those fictions.”

11. It also needs to be borne in mind that levy of sales tax on transfer of right to use the goods is a result of fiction, whereby a transaction which otherwise does not constitute a “Sale” in terms of Sale of Goods Act is deemed to be a sale but what is brought within the taxing net even after 46th Amendment as found supra is a transfer of right to use “goods” plain and simple. Power to levy Sales tax on transfer of right to use goods, would not take within its ambit, levy of sales tax on lease of factory which is an amalgam of land, building, plant and machinery and also movable property. We say so, inasmuch as even after the 46th amendment the power of State is expanded to levy tax on transfer of right to use “goods” simpliciter. Importantly, even after

4. (1983) 52 STC 281



46th amendment to Constitution definition of “goods” has not undergone any change. In this regard, it may be relevant to refer to the decision of the Hon'ble Supreme Court in the case of ***BSNL and Another Vs. Union of India and Others***⁵.

“43. Gannon Dunkerley [State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353 : AIR 1958 SC 560 : 1959 SCR 379] survived the Forty-sixth Constitutional Amendment in two respects. First with regard to the definition of “sale” for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Article 366(29-A) operate. By introducing separate categories of “deemed sales”, the meaning of the word “goods” was not altered...”

(emphasis supplied)

11.1. It may be useful to refer to the judgment of the Bombay High Court reported in ***Commissioner of Sales Tax Vs. Bombay Sound Service***⁶, wherein, while dealing with the lease of a studio comprising movable and immovable property, it was held that levy of sales tax by treating the transaction/agreement as one relating to transfer of right to use goods may

5. (2006) 3 SCC 1

6. 1999 112 STC 290



not be permissible for it is not a transfer of right to use goods but one of transfer of right to use the studio. The relevant portion of the said judgment is extracted hereunder:

"It is clear from the above definitions that if any property is embedded to the earth or attached to the earth in a manner essential for the beneficial user of the immovable property, it would be an immovable property. The real criteria to examine whether a property is movable property or immovable property is whether the movable property which is embedded or attached to the earth can be used without so attaching and the attachment is only for the proper and smooth functioning of particular movable property or equipment or it is for the beneficial user of the immovable property if a thing is embedded to the earth or attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached, then it is part of the immovable property. On the other hand, if the attachment is mainly for the beneficial enjoyment of the movable property itself, then it remains movable property even though fixed for the time being for proper enjoyment thereof. In the instant case, there can be no dispute about the fact that the recording of songs, background music and dubbing of sound can be done only in studios which are fully equipped for that purpose. It is not possible to undertake these activities anywhere and everywhere



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even with the aid of the very same machines or equipments which are fitted or installed permanently in the studios. In fact, what is really required is the studio and the instruments for recording of songs, etc., are essential part of the studio. There cannot be any studio without such equipments. The construction of studio is a very sophisticated task and what is taken on hire is the studio and not the recording machines and instruments installed there. The various instruments for recording music, etc., are annexed or embedded to the earth for the purpose of beneficial enjoyment of the studio which is an immovable property and not for the beneficial enjoyment of those instruments. The instruments are essential fixtures of studios. There cannot be a studio without those instruments and equipments. In view of the above, we are of the clear opinion that hiring of studios for the purpose of recording songs, background music and dubbing of sound does not amount to transfer of right to use any movable property and hence such transactions do not fall within the definition of "sale" as contained in clause (10) of section 2 of the Act.

12. From the above discussion we have no doubt that the subject matter of lease is for Vanaspati factory as a whole and thus levy of tax treating the same as transfer of right to use goods is impermissible. It is also relevant to



bear in mind that Section 3A of TNGST Act is a charging provision and thus, ought to be strictly construed.⁷

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13. For all the above reasons, we find that the order of the Tribunal levying tax on the contract for lease of factory, which is essentially one for lease of immovable property, viz. Factory as a whole cannot be sustained. Thus, the order passed in T.A.No. 567/01 dated 08.02.2008 is set aside. Accordingly, the writ petition is allowed. No costs. Consequently, the connected miscellaneous petitions, if any, are closed.

(S.M.SUBRAMANIAM J.)(MOHAMMED SHAFFIQ J.)

05-11-2025

gd/spp

Index:Yes/No

Speaking/Non-speaking order

Internet:Yes

Neutral Citation:Yes/No

7. "Cape Brandy Syndicate v. IRC, (1921) 1 KB 64, p. 71 (ROWLATT, J.); referred to in Canadian Eagle Oil Co. Ltd. v. R., (1945) 2 All ER 499, p. 507 (HL); Gursahai v. CIT, AIR 1963 SC 1062, p. 1064 : 1963 (3) SCR 893; Banarsi Debi v. ITO, AIR 1964 SC 1742, p. 1744; Commissioner of Central Excise Pondicherry v. ACER [Footnote Nos. 30 & 31 Contd.]"



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1.The Commercial Tax Officer

Washermenpet I Assessment Circle,
20, Kummalamman Koil St,. Chennai-
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2.The Appellate Assistant

Commissioner (ct) Vii, Chennai.

3.The Tamilnadu Sales Tax

Appellate Tribunal, (additional Bench),
City Civil Court Building, High Court
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