PETITIONER:
PREMIER BREWERIES ETC.

Vs.

RESPONDENT:
STATE OF KERALA

DATE OF JUDGMENT: 18/12/1997

BENCH:
S.P. BHARUCHA, SUHAS C. SEN

ACT:

HEADNOTE:

JUDGMENT:
THE 18TH DAY OF DECEMBER, 1997
Present:
Hon'ble the Chief Justice
Hon'ble Mr. Justice S.P. Bharucha
Hon'ble Mr.Justice Suhas C.Sen

A.S.Nambiar, Sr. Adv., Sunil Gupta, Ms.A.K. Verma, C.N.Sreekumar, G.Prakash, Ms. Bina Gupta, P.P. Vineeth, K.M.K.Nair and Vipin Nair, Advs. with him for the appearing parties.

J U D G M E N T

The following Judgment of the Court was delivered:
(With C.A. Nos. 4871-74/91, 232/92, 6683-85/95, 6732-36/95 and SLP (C) Nos. 6063-65/91).

Sen, J.

Premier Breweries Limited, the appellant herein, is a dealer in Indian Made Foreign Liquor. The liquor is sold in bottles packed in cardboard cartons. The dispute in this case arose in course of sales tax assessment for the year 1982-83. Before the Assessing Officer the assessee's case was that the cardboard cartons will have to be taxed at the rate of 8% under Entry 97 of the First Schedule of the Kerala General Sales Tax Act, 1963 and not at the rate of 50% applicable to sale of liquor. The appellant's case was that it had charged its customers separately for the liquor and the cartons. Thee was no reasons to include the value of the cartons in the value of the liquor for the purpose of levy of tax. Initially, the assessee's stand was accepted by the Assistant Commissioner of Sales Tax and an assessment order was passed accordingly.

Later on the Deputy Commissioner, Palghat, thought that an error has been committed in the assessment order and in exercise of his revisional power under Section 35 of the Act he set aside the assessment order. The Deputy Commissioner was of the view that the Assessing Authority had erroneously levied tax at the rate of 8% on packing material viz. cardboard cartons. As per Section 5(5) of the Kerala General Sales Tax Act, where goods sold were contained in containers or were packed in any packing material, the rate of tax and the point of levy applicable to such containers or packing materials, as the case may be, should, whether

the price of the containers or the packing materials was charged separately or not, be the same as that applicable to goods contained or packed. In determining turnover of the goods, the turnover in respect of the containers or packing materials will have to be included therein.

Thereafter, the assessment was revised in the manner indicated by the Deputy Commissioner. The view of the Deputy Commissioner was uphled by the Tribunal and also the High Court.

According to the appellant, the High Court has overlooked the fact that the containers were separately charged on the invoices raised by the appellant and the customers paid separately for the liquor and the containers. There is a specific Entry in the First Schedule under which tax has to be levied at the rate of 8% on the containers. It was not open to the Assessing Authority to include the value of the containers in the value of the liquor for the purpose of calculating the assessee's turnover. Secondly, it has been contended that the cardboard cartons, in any event, are secondary containers provided for protection of the bottles in which the liquor was sold. The bottles were the primary containers of beer. The cartons were provided to ensure that the beer bottles were not broken in transit. Therefore, the turnover of the cartons could not in any way be included in the turnover of the beer sold by the appellant. Lastly, a point was taken that under the Kerala General Sales Tax Act, a single point duty is leviable on the cardboard cartons. This duty has already been paid on these cartons by the manufacturers. Further levy on these cartons at the point of time when was sold will be contrary to law. A large number of decisions were cited on behalf of the appellant as well as the respondents in support of their contentions.

Before examining the decisions, it will be useful to refer to the relevant provisions of the Kerala General Sales Tax Act. Tax on sale or purchase of goods has been imposed by Section Act. Tax on sale or purchase of goods has been imposed by Section 5 of the act. Sub-sections (5) and (6) of Section 5 of the Act provide:

> "5(5). Notwithstanding anything contained in sub-section (1) or Sub-section (2), but subject to sub-section 6 where goods sold are contained in containers or are packed in any packing materials, the rate of tax and the point of levy applicable to the containers or packing materials, as the case may be, shall, whether the price of the containers or packing materials is charged separately or not, be the same as those applicable to goods contained or packed, and in determining turnover of the goods, the turnover in respect of the containers or packing materials shall be included therein.
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> 5(6). Where the sale or purchase of goods contained in any containers or packed in any packing materials in exempt from tax, then the sale or purchase of such containers or packing materials shall also be exempt from tax."

The language of sub-section (5) and (6) of Section 5 is

clear and unambiguous. These two Sub-sections deal with the method of valuation of packed goods and the rate of tax payable thereon. The rules laid down are: (1) Where goods sold are contained in a container or packed in any packing material, the rate of tax payable on the containers shall be the same as that applicable to the goods contained or packed. (2) This will be the position even if price of the containers or packing materials is charged separately, (3) The turnover of the goods will include the turnover in respect of containers or packing materials in which the goods are contained or packed. (4) The point of levy of the tax on the containers or the packing materials will be the same as applicable to the goods contained or packed. (5) If the sale or purchase of goods contained in a container or packed in a packing material is exempted from tax then no tax shall be payable on the sale or purchase of the containers or packing materials in which the goods are sold.

The underlying idea behind these rules is that packed goods are to be taxed as composite units. In calculating the turnover of the goods, the turnover of the containers will have to be included. The appropriate rate of tax will be the rate payable on the goods. It will not make any difference, if the containers are shown to have been sold and charged separately. The logical corollary to this principle is that when the goods are exempted from tax, no tax s leviable on the containers. This will be the position even when the goods and the containers are sold and charged separately.

Various rates of tax have been fixed by the Act of sale or purchase of various types of goods. If the goods are sold in packages or containers then for the purpose of imposition of tax, the turnover of goods will have to be calculated by the including therein the turnover of the packages or the containers. The rate of tax applicable to the turnover so calculated will be the rate payable on the goods contained in the containers, the tax payable on beer will be the appropriate rate of tax payable on the turnover calculated in the manner stated hereinabove. It has not been found by any of the authorities who heard the case that the carton were specially provided for protection of the bottles and bottled beer usually was not delivered in cartons even in cases of bulk sales. The argument based on secondary packing is misconceived.

On behalf of the appellants, it has been contended that sub-sections (5) and (6) of Section 5 are based upon an inarticulate premise that actual sale of the containers or packing has been made along with the goods contained therein. These provisions will not apply if the goods and the containers are actually sold view of the clear language f the statute. When packed goods are sold, provisions of sub-sections (5) and (6) will apply. There will be one rate of tax and one point of levy for such packed goods. This rule will apply "whether the price of the containers or packing is charged separately or not". In view of this, there is no scope for any assumption that sub-section (5) was based on an inarticulate premise that the provisions of that sub-section will not apply if the goods and the containers are sold and charged separately.

Mr. Sunil Gupta, on behalf of the appellant referred us to two decisions of this Court in support of his contention that if the containers were shown to have been sold separately, then the provisions of sub-section (5) of Section 5 will not apply. The first case relied upon for this proposition is the judgment of this Court in the case raj Steel & Ors. vs. State of A.P. & Ors. 91989) 3 SCC 262

where the question of validity of Section 6-C of the Andhra Pradesh General Sales Tax Act was examined by this Court. Section 6-C of the Act provided:

> "6-C. Levy to tax on packing material
> Notwithstanding anything in sections 5 and 6A, where the goods packed in any materials are sold or purchased, the materials in which the goods are so packed shall be deemed to have been sold or purchased along with the goods and the tax shall be leviable on such sale or purchase f the materials at the rate of tax, if any, as applicable to the sale or, as the case may be, purchase of goods themselves."

That was also a case where bottled beer was sold in cartons and cement was sold in gunny bags. R.S.Pathak, C.J. Pointed out in that case that there could be three types of cases :

> "It is commonly accepted that a transaction of sale may consist of a sale of the product and a separate sale of the container housing the product with respective sale considerations for the product and the container separately; or it may consist of a sale of the product and a sale of the container but both sales being conceived of as integrated components of a single sale transaction; or, what may yet be a third case, it may consist of a sale of the product with the transfer of the container without any sale consideration therefor."

Dealing with the deeming provision of Section 6-C, Pathak, C.J. observed :

> "Turning to Section 6-C of the Act, it seems to envisage a case where it is the goods which are sold and there is not actual sale of the packing material. The section provides by legal fiction that the packing material shall be deemed to have been sold along with the goods. In other words, although there is no sale of the packing material, it will be deemed that there is such a sale. In that event, the section declares, the tax will be leviable on such deemed sale of the packing material at the rate of tax applicable to the sale of the goods themselves. It is difficult to comprehend the need for such a provision. It can at best be regarded as a provision by way of clarification of an existing legal situation."

Pathak, C.J. ultimately concluded:

> "We find it difficult to accept the

> contention of the appellants that a rate applicable to the packing material in the Schedule should be applied to the sale of such packing material in a case under Section 6-C, when in fact there was no such Section 6-C, when in fact there was no such sale of packing material and it is only by legal fiction, and for a limited purpose, that such sale can be contemplated. In the circumstances, no question arises of Section 6-C being constitutionally discriminatory, and therefore invalid."

It has to be borne in mind that a deeming clause may be used in a statute for very many purposes. It was observed by Lord Radcliffe in St.Aubyn (L.M.) vs. A.G. (No.2) (1952) AC 15.

> "The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

Pathak, C.J. was of the view that in Section 6-C the deeming clause should be given a restricted meaning and at best, should be regarded as a provision by way of clarification of an existing legal situation. In other words, the deeming clause merely restated what was otherwise obvious.

Pathak, C.J. by giving a restricted meaning to the deeming clause ruled out the possibility of taxing the packing material or the containers in cases where only the goods were sold but the packing material or the containers were not actually sold.

This observation of Pathak, C.J. does not help Mr. Gupta's case in any way in the facts of this case. In the case before us, not only the beer but also the cardboard cartons wee actually sold. In fact, the assessee was willing to pay tax on the containers at the rate of 8%. The grievance of the assessee was that he was called upon by the Deputy Commissioner to pay tax at 50% which is the rate of tax payable on the beer itself. As we have noted earlier, the provisions of sub-section (5) of Section 5 of the Kerala General Sales Tax Act are quire clear in this regard and the Deputy Commissioner's decision was in accordance with the law.

The next contention of Mr. Gupta was that Pathak. C.J. was also of the view that if the containers or the packing materials were shown to have been sold separately, two separate transactions may have taken place. In such a case the containers or the packing materials may not be taxed along with the goods contained or packed without further investigation into the facts to decide whether the two transactions were really one integrated transaction.

This difficulty arising out of the restricted meaning

given to the deeming clause in Section 6-C of the Andhra Act has been obviated by specific provisions of Section 5(5) of the Kerala Act by providing that the turnover of the goods will include the turnover in respect of the packing materials or the containers. The containers or the packing materials will be taxed at the same point and at the same rate at which the goods are to be taxed. This rule will apply "whether the price of the containers or the packing materials is charged separately or not." Therefore, even in case where the containers are separately sold, the turnover of the goods will include the turnover of the containers and the appropriate rate of tax on such turnover will be the rate of tax payable on the goods.

Mr. Gupta next drew our attention to the case of Vasavadatta Cements vs. State of Karnataka & Anr. (1996) 2 SCC 88, where another Bench of this Court has followed the principle laid down by Pathak, C.J. in the Raj Steel's case. In that case a Bench of two Judges of this Court dealt with Section 5(3-D) of the Karnataka General Sales Tax Act, 1957. The provisions of Section 5(3-D) of the Karnataka General Sales Tax Act and the Provisions of Section 5(5) of the Kerala General Sales Tax Act are similar. The provisions of the Karnataka General Sales Tax Act were as under:

> "5 Levy of tax on sale or purchase of goods
>
> (3D). Notwithstanding anything contained in the Act where goods sold or purchased are contained in containers or are packed in any packing materials liable to tax under this Act, the rate of tax and the point of levy applicable to turn over of such containers or packing materials, as the case may be, shall whether the containers or the packing materials have already been subjected to tax under this Act or not or whether the price of the containers or of the packing materials is charged separately or not, be the same as those applicable to goods contained or packed.
>
> Provided that no tax under this sub-section shall be leviable if the sale or purchase of goods contained in such containers or packed in such a packing materials is exempt from tax under this Act."

The Karnataka General Sales Tax Act takes notice of the fact that where the goods are sold in containers or packing materials such packing materials may have already been subjected to tax under the Act. But the provisions of Section 5(3-D) will apply even (1) when the containers or packing materials have already borne tax; and (2) containers or packing materials were charged separately. Sub-section (3-D) lays down that where the goods were sold or purchased in containers or packing materials liable to tax under that Act, the rate of tax and the point of levy applicable to turnover of such containers or packing materials, as the case many be, shall be the same as applicable to the goods contained or packed. These provisions are very similar to the provisions of sub-section (5) of Section 5 of the Kerala Act. There is also a proviso to the Karnataka Act which is very similar to sub-section

(6) of Section 5 of the Kerala Act. It lays down that no tax shall be leviable if the sale or purchase of goods contained in the containers or packed in the packing materials was exempt from tax under the Act. In other words, when the goods contained in the containers were exempt from tax, then no tax can be levied on the containers under sub-section (3-D) of Section 5 of the Karnataka Act. Section 6-C of the Andhra Act does not contain any such specific provisions.

Mr. Gupta contended that in spite of these specific provisions of the Karnataka Act, this Court had no difficulty in Vasavadatta's case in applying the principles laid down by Pathak, C.J. in the case of Raj Steel. Therefore, this present case, which is to be decided on similar provisions of the Kerala Act, must be decided on the same basis.

We are of the view that in Vasavadatta's case, this Court overlooked the marked dissimilarity between Section 6-C of the Andhra Act and Section 5(3-D) of the Karnataka General Sales Tax Act. We are also of the view that sub-sections (5) and (6) of the Kerala General Sales Tax Act will have to be construed uninfluenced by the decision of the Court in Raj Steel's case where Pathak, C.J. construed the deeming provisions in Section 6-C of the Andhra Act in a narrow sense. Section 6-C did not contain any specific provisions for including the turnover of the goods. There were also no specific provisions in the Andhra Act to levy tax on the packing materials and the containers at the rate applicable to the goods even in a case where the price of the containers or the packing materials were charged separately. We are also of the view that the mere fact that the containers and the goods were sold separately or charged separately will not make any difference in the matter of computation of the turnover of the goods and determination of tax or the rate of the tax and the point at which the tax will be levied under Section 5(5) of the Kerala Act.

Section 5(3-D) of the Karnataka Act, if anything, is more specific than Section 5(5) of the Kerala Act which deals with cases where the goods sold or purchased are contained in containers or are packed in any packing material. It specifically provides that the rate of tax and the point of levy applicable to turnover of such containers or packing materials will be the same as those applicable to the goods contained or packed. This rule will apply even in a case where the containers or the packing materials had already been subjected to tax under the Act, It also provides that the rule will apply "whether the price of the containers or the packing materials is charged separately or not". In view of these clear provisions of Section 5(3-D) of the Karnataka Act and the corresponding provisions of Section 5(5) of the Kerala Act there is no basis for the argument that if the price of the goods and the price of the containers or packing materials are separately charged, the provisions of the aforesaid two sections will not be applied at all. In the context of these provisions, there was no scope for invoking the principle laid down in Raj Steel's case for making any inquiry as to whether the containers or packing materials were sold along with the goods or separate bills were made in respect of them or whether they were separately charged. The law is quite clear that when the goods contained in containers or packed in packing materials are sold the containers and the packing materials will have to be taxed at the same rate at which the goos are liable to be taxed. It will not make any difference if the price payable for the containers or packing materials are shown

separately in the bills raised by the seller.

We shall now deal with another point urged on behalf of the appellant. It has been contended that the cardboard cartons have already borne tax under the Entry "paper, other than the newsprint, cardboard and their products" in the First Schedule of the Act. It is a single point tax. The cardboard cartons cannot be taxed once again when sold along with the beer.

There are two answers to this contention. Sub-section (5) of Section 5 specifically provides that the rate tax and point of levy applicable to the goods sold. Therefore, even if the cartons have already been subjected to tax by virtue of specific provisions of Section 5(5) they will be liable to tax at the same point and at the same rate as the goods contained therein.

Moreover, the packing materials as such are not being taxed under sub-section (5) of Section 5 of the Act. The subject-matter of tax are the goods packed in the containers. In calculating the turnover of the goods, packing materials will have to be taken into account. The packing materials will be taxed at the same rate and at the same point as the goods contained in the packing material. This is because the goods are sold packed in containers and are charged accordingly. This is a rule of computation of the turnover of the goods. If no tax is ultimately found leviable on the goods then no tax can be levied on the containers in which the goods are contained.

In view of the above, the appeals are dismissed.

There will be no order as to costs.

(C.A.Nos. 4871-74/91, 232/92, 6683-95, 6732-36/95 and SLP (C) Nos. 6063-65/91)

In view of the above decision in Civil Appeal No. 4870 of 1991, these appeals and special leave petitions are also dismissed