The Tata Iron & Steel Co. Ltd.

Vs

The State of Bihar

Civil Appeals Nos. 412 and 413 of 1956

(CJI S. R. Dass, A. K. Sarkar, Vivian Bose, T. L. Venkatarama Ayyar, S. K. Das JJ)

19.02.1958

JUDGMENT

DAS C.J. -

These two appeals, which have been filed with the special leave granted by an order made by this Court on April 3, 1956, and which have been consolidated together by the same order, are directed against the judgment pronounced by the Patna High Court on October 17, 1955, in Miscellaneous Judicial Case No. 577 of 1953, deciding certain questions referred to it by the Board of Revenue, Bihar under s. 25 of the Bihar Sales Tax Act, 1947 (No. XIX of 1947) hereinafter referred to as the 1947 Act. The said references arose out of two orders passed by the Board of Revenue in revision of two sales tax assessment orders made against the appellant company.

The appellant company is a company incorporated under the Indian Companies Act. Its registered office is in Bombay; its factory and works are at Jamshedpur in the State of Bihar and its head sales' office is in Calcutta in the State of West Bengal. It has store yards in the States of Madras, Bombay, West Bengal, Uttar Pradesh, Hyderabad, Madhya Pradesh, Punjab and Andhra. It carries on business as manufacturer of iron and steel and is a registered dealer under the 1947 Act, the registration No. being S.C. 905. Its course of dealing is thus described in the judgment under appeal :-

> "The intending purchaser has to apply for a permit to the Iron and Steel Controller at Calcutta, who forwards the requisition to the Chief Sales Officer of the assessee working in Calcutta. The Chief Sales Officer thereafter makes a "works order" and for wards it to Jamshedpur. The "works over" mentions the complete specification of the goods required. After the receipt of the "works order" the Jamshedpur factory initiates a "rolling" or "manufacturing" programme. After the goods are manufactured, the Jamshedpur factory sends the invoice to the Controller of Accounts who prepares the forwarding notes, and on the basis of these forwarding notes, railway receipts are prepared. The goods are loaded in the wagons at Jamshedpur and despatched to various stations, but the consignee in the railway receipt is the assessee itself and the freight also is paid by the assessee. The railway receipts are sent either to the branch offices of the assessee or to its bankers, and after the purchaser pays the amount of consideration, the railway receipt is delivered to him. These facts are admitted and the correctness of these facts are not disputed by the State of Bihar."

The appellant company was separately assessed for two periods : (1) from July 1, 1947 to March 31, 1948, and (2) from April 1, 1948 to March 31, 1949. For the first period the appellant company

filed a return under s. 12(1) of the 1947 Act before the Sales Tax Officer showing a gross turnover of Rs. 12,80,15,327-8-5. From this gross turnover the appellant company claimed to deduct a sum of Rs. 2,88,60,787-13-0 being the amount of valuable consideration for the goods manufactured at Jamshedpur in the State of Bihar but sold, delivered and consumed outside that State on the ground that in none of the transactions in respect of the said sum did the property in the goods pass to the purchasers in the State of Bihar. The appellant company further claimed a deduction of Rs. 1,10,87,125-13-0 on account of railway freight, actually paid by it for the dispatch of the goods. The Sales-tax Officer, by his assessment order dated July 22, 1949, disallowed both the claims for education and on the other hand added a sum of Rs. 13,66,496-11-0, being the amount of sales tax realised by the appellant company from its purchasers, to its taxable turnover and assessed the appellant company to sales tax amounting to Rs. 15,31,374-5-9. For the second period the appellant company filed a return showing a gross turnover of Rs. 21,64,45,450-0-0. From this gross turnover the appellant company claimed a deduction of Rs. 10,71,66,233-11-0 being the amount of valuable consideration for goods manufactured at Jamshedpur in the State of Bihar, but sold, delivered and consumed outside that State on the same ground as hereinbefore mentioned. The appellant company also claimed a deduction of Rs. 40,89,973-9-0 on account of railway freight actually paid by it for the dispatch of the goods. The Sales Tax Officer by his assessment order dated September 24, 1949, disallowed both the claims and added the sum of Rs. 22,37,919-4-0, being the amount of sales tax realised by the appellant company from its purchasers, to its taxable turnover and assessed the appellant company to sales tax amounting to Rs. 28,30,458-6-0.

Against there two assessment orders the appellant company preferred two appeals under s. 4 of the 1947 Act to the Commissioner of Sales Tax of Chota Nagpur who, on April 29, 1950, dismissed both the appeals. The appellant company went up to the Board of Revenue on two revision applications against the two orders of the Commissioner. The Board of Revenue, by its order dated August 30, 1952, confirmed the orders of the Commissioner with certain modifications and remanded the cases to the Sales tax Officer. The appellant company applied under s. 25 of the 1947 Act to the Board of Revenue in Reference Cases Nos. 495 and 496 of 1952 for reference of certain questions of law to the High Court. By a common order dated October 5, 1953, made in the said two references the Board of Revenue referred the following questions of law to the High Court for its decision :

> "(1) Is the Bihar Sales Tax Act, 1947, as amended in 1948, ultra vires the Provincial Legislature in views of the extended meaning of the expression taxes on sale of goods given in the Act in the light of the provisions of the Government of India Act, 1935 ?
>
> (2) Are the provisions of section 2(g) of the 1947 Act ultra vires the Provincial Legislature ?
>
> (3) Is it legal to include sales tax in the taxable turnover of an assessee like the petitioner ?
>
> (4) Was the Bihar Sales Tax (Amendment) Act of 1948 legally extended to Chotanagpur ?
>
> (5) Were the levy and collection of sales taxes for periods prior to the 26th January 1950, under the Sales Tax Act then in force rendered illegal by the provisions of the Constitution ?

(6) Was the Commissioner, who passed orders, in appeal, after the Constitution came into force, bound to decide the appeal according to the provisions of the Constitution in respect of taxes levied or sought to be levied for periods prior to the 26th January, 1950, when the Constitution came into force ?"

Out of these six questions, question No. 3 was decided in favour of the appellant company and the respondent State has not preferred any appeal against that decision or questioned its correctness. Question No. 4 was not pressed before the High Court and does not survive before us. Questions Nos. 1, 2, 5 and 6 were decided against the appellant company and the two consolidated appeals are directed against the High Court's decision on these questions. It will be noticed that questions Nos. 1 and 2, in effect, raise the same problem, namely, as to the vires of the 1947 Act and questions Nos. 5 and 6 are concerned with the validity of the retrospective levy of sales tax by reason of the amendment of s. 4 of the 1947 Act.

The following points, as formulated by the learned Attorney-General appearing for the appellant company, have been urged before us in support of these appeals :

"(1) The tax levied under s. 4(1) read with s. 2(g), second proviso, cl. (ii), is not a tax on sale within the meaning of Entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935.

(2) The doctrine of nexus is not applicable to sales tax.

(3) In any event the nexus in the present case is not real and sufficient but is illusory.

(4) Having regard to the provisions of the law mentioned above, the tax levied is in the nature of duty of excise rather than a tax on sale.

(5) The retrospective levy by reason of the amendment of s. 4(1) destroys its character as a sales tax and makes it a direct tax on the dealer instead of an indirect tax to be passed on to the consumer."

In order to appreciate the arguments that have been advanced before us on the points noted above, it is necessary to refer to the relevant statutory provisions, which were in force at the material times. Section 99, of the Government of India Act, 1935, authorised a Provincial Legislature, subject to the provisions of that Act, to make laws for the Province or for any part thereof. Section 100(3) of that Act provided that, subject to the two preceding sub-sections, the Provincial Legislature had, and the Federal Legislature had not, power to make laws for any Province or any part thereof with respect to any of the matters enumerated in List II of the Seventh Schedule to that Act. The matter enumerated in Entry 48 in List II was as follows : "Taxes on the sale of goods and on advertisements." It is in exercise of this legislative power that the Provincial Legislature of Bihar passed the 1947 Act which received the asset of the Governor General on June 21, 1947, and came into force on July 1, 1947, by virtue of a notification made in the official gazette under s. 1(3) of the said Act. The relevant portion of s. 4(1) of the 1947 Act, which was the charging section, was, prior to its amendment hereinafter mentioned, expressed in the following terms :-

"Subject to the provisions of sections 5, 6, 7 and 8 and with effect from such date as the Provincial Government may, by notification in the official gazette, appoint, being not earlier than 30 days after the date of the said notification, every dealer whose gross turnover during the year immediately preceding the commencement of this Act

> on sales which had taken place both in and outside Bihar exceeded Rs. 10,000 shall be liable to pay tax under this Act on sales which have taken place in Bihar after the date was notified."

It should be noted that, although the 1947 Act came into force on July 1, 1947, by virtue of a notification published in the official gazette under s. 1(3) thereof, the charging section quoted above did not come into operation because, by its own terms, it required a further notification in the official gazette to bring it into effect. For some reason, not apparent on the record, the Provincial Government did not issue any notification as contemplated by s. 4(1). To cure this omission Ordinance III of 1948 was promulgated by the Governor amending s. 4(1)(a) of the 1947 Act. Section 4(1), as amended, read as follows :

> "Subject to the provisions of sections 5, 6, 7 and 8 and with effect from the commencement of this Act, every dealer, whose turnover during the year immediately preceding the date of such commencement, on sales which have taken place both in and outside Bihar exceeded Rs. 10,000, shall be liable to pay tax under this Act on sales which have taken place in Bihar on and from the date of such commencement."

On March 22, 1949, Ordinance III of 1948 was replaced by Bihar Sales Tax (Amendment) Act, 1948 (VI of 1949) hereinafter referred to as the amending Act. Section 16 of this amending Act provided that the substituted s. 4(1) should form part of the 1947 Act and should always be deemed to have formed part thereof with effect from its commencement, that is to say, from July 1, 1947, as hereinbefore mentioned. Two things should be noted, namely, (1) that the person sought to be charged was every dealer whose gross "turnover" during the specified period on "sales" which had taken place both in and outside Bihar exceeded Rs. 10,000 and (2) that the liability to pay tax was on "sales" which had taken place in Bihar on and from the date of such commencement. This takes us back to s. 2(g) which defines "sale". The material part of the definition of "sale", previous to the amendment made by the amending Act, read as follows :

> "'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 :
>
> #Provided.....##

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930 (III of 1930), the sale of any goods which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in section 4 of that Act is made, shall, wherever the said contract of sale is made, be deemed for the purpose of this Act to have been made in Bihar."

> #....."##

Section 2 of the amending Act amended s. 2(g) of the 1947 Act by substituting anew proviso to cl. (g) for the original second proviso thereto. The material part of s. 2(g), thus amended, read as follows :

"'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 :

#Provided....."##

Provided further that notwithstanding anything to the contrary in the Indian Sale of Goods Act, 1930 (III of 1930), the sale of any goods -

(i) which are actually in Bihar at the time when, in respect thereof, the contract of sale as defined in section 4 of that Act is made, or

(ii) which are produced or manufactured in Bihar by the producer or manufacturer thereof, shall, wherever the delivery or contract of sale is made, be deemed for the purposes of this Act to have taken place in Bihar.

#....."##

The amending Act by s. 3 substituted for the old sub-s. (1) of s. 4 of the 1947 Act the following sub-section, namely :

"(1) Subject to the provisions of sections 5, 6, 7, and 8 and with effect from the commencement of this Act, every dealer whose gross turnover during the year immediately preceding the date of such commencement, on sales which have taken place both in and outside Bihar exceeded Rs. 10,000 shall be liable to pay tax under this Act on sales which have taken place in Bihar on and from the date of such commencement :

Provided that the tax shall not be payable on sales involved in the execution of a contract which is shown to the satisfaction of the Commissioner to have been entered into by the dealer concerned on or before the 1st day of October, 1944."

Although the amending Act received the assent of the Governor General on March 15, 1949, it came into force on October 1, 1948, as provided in s. 1(2) thereof. Section 16 of the amending Act, however, provided that the amendment made by s. 3 should form part and should be deemed always to have formed part of the 1947 Act as if the said Act had been enacted as so amended from the commencement thereof, that is to say, from July 1, 1947. The 1947 Act was further amended in 1951 by Bihar Act VII of 1951 and again in 1953 by Bihar Act XIV of 1953, but we are not, in the present case, concerned with those amendments.

Although the charging section, namely, s. 4(1), as amended, operates from July 1, 1947, the definition of "sale", as amended, became operative only from October 1, 1948. Therefore, the definition of "sale", as it stood prior to the amendment, was applicable to all sales made by the appellant throughout the first period hereinbefore mentioned, i.e., the period from July 1, 1947 to March 31, 1948 and also to those made during the period from April 1, 1948 to October 1, 1948, which was only a portion of the second period hereinbefore mentioned and the amended definition applied to all sales made by the appellant during the remaining portion of the second period, i.e., from October 1, 1948 to March 31, 1949.

Bearing in mind the relevant provisions of the 1947 Act as they stood both before and after the amendment and the period of their applicability we now proceed to consider the points urged before

us by the learned Attorney General appearing for the appellant company.

Re. Points Nos. 1 and 4 : It will be convenient to take up those two points together for they have been dealt with together by the learned Attorney General. The validity of s. 4(1) read with s. 2(g), second proviso, is challenged in two ways. In the first place it is urged that s. 100(3) of the Government of India Act, 1935 read with Entry 48 in List II of Seventh Schedule thereto authorised the Legislature of Bihar to make a law with respect to tax on the sale of goods."Sale of Goods", as a legal topic, has well defined and well understood implications both in English and Indian Law. The English Common Law relating to sale of goods has been codified in the English Sale of Goods Act, 1893. In India the matter was originally governed by the provisions of Chapter VII of the Indian Contract Act, 1872. Those provisions have since been replaced by the Indian Sale of Goods Act, Act III of 1930. Our attention has been drawn to s. 4 of the Indian Sale of Goods Act which clearly makes a distinction between a sale and an agreement for sale. It is pointed out that section groups "sales" and "agreements to sell" under the single generic name of "contract of sale", following in this respect the scheme of English Sale of Goods Act, 1893, and that it treats "sales" and "agreements to sell" as two separate categories, the vital point of distinction between them being that whereas in a sale there is a transfer of property in goods from the seller to the buyer, there is none in an agreement to sell. It is then urged, on the authority of a decision of this Court in the Sales Tax Officer, Pilibhit v. Messrs. Budh Prakash Jai Prakash [[1955] 1 S.C.R. 243, 247] that there having thus existed at the time of the enactment of the Government of India Act, 1935, a well defined and well established distinction between a "sale" and an "agreement to sell" it would be proper to interpret the expression "sale of goods" in Entry 48 in the sense in which it was used in legislation both in England and in India and to hold that it authorised an imposition of a tax only when there was a completed sale involving the transfer of title in the goods sold. Reference is then made to the decision of the Federal Court in the case of Province of Madras v. Boddu Paidanna and Sons [[1942] F.C.R. 90] where the Federal Court at page 101 observed that in the case of sales tax the liability to tax arose "on the occasion of a sale" which Patanjali Sastri C.J. in his judgment in the State of Bombay v. United Motors (India) Ltd. [[1953] S.C.R. 1069, 1088] described as "the taxable event." The argument is that the Bihar Legislature could only make a law imposing a tax on the sale of goods, that is to say, on a concluded sale involving the transfer of property in the goods sold from the seller to the buyer as contemplated by the Sale of Goods Act. The Bihar Legislature could not, by giving an extended definition to the word "sale", extend its legislative power under Entry 48 in List II of the Seventh Schedule to the Government of India Act, 1935, so as to impose a tax on anything which is short of a sale. For our present purpose on exception need be taken to the proposition thus formulated and indeed in Budh Prakash Jai Prakash's case [[1955] 1 S.C.R. 243, 247] this Court struck down that part of the definition of "sale" in s. 2(h) of the Uttar Pradesh Sales Tax Act, 1948, which enlarged the definition of "sale" so as to include "forward contracts". But is the position the same here ? We think not. It will be noticed that s. 4(1) imposed on the dealer the liability to pay a tax on "sale" as defined in s. 2(g). Both before and after the amendment of s. 2(g) the principal part of the definition meant the transfer of the property in goods. All that the second proviso did was not to extend the definition of "sale", but only to locate the "sale" in certain circumstances mentioned in that proviso in Bihar. The basis of liability under s. 4(1) remained as before, namely, to pay tax on "sale". The fact of the goods being in Bihar at the time of the contract of sale or the production or manufacture of goods in Bihar did not by itself constitute a "sale" and did not by itself attract the tax. The taxable event still remained the "sale" resulting in the transfer of ownership in the thing sold from the seller to the buyer. No tax liability actually accrued until there was a concluded sale in the sense of transfer of title. It was only when the property passed and the "sale" took place that the liability for paying sales tax under the 1947 Act arose. There was no

enlargement of the meaning of "sale" but the proviso only raised a fiction on the strength of the facts mentioned therein and deemed the "sale" to have taken place in Bihar. Those facts did not by themselves constitute a "sale" but those facts were used for locating the situs of the sale in Bihar. It follows, therefore, that the provisions of s. 4(1) read with s. 2(g), second proviso, were well within the legislative competency of the Legislature of the Province of Bihar.

The vires of s. 4(1) read with s. 2(g), second proviso, is also questioned on the ground that it is in reality not a tax on the sale of goods but is in substance a duty of excise within the meaning of Entry 45 in List 1 of the Seventh Schedule to the Government of India Act, 1935, with respect to which the Provincial Legislature could not, under s. 100 of that Act, make any law. Our attention is drawn to cl. (ii) of the second proviso which contemplated a sale of the goods by the producer or manufacturer thereof. It is urged that, according to this clause, tax was not imposed on all sales of goods produced or manufactured in Bihar, but was imposed only on those goods produced or manufactured in Bihar which were sold by the producer or manufacturer. It is pointed out, as and by way of an illustration, that if the goods produced or manufactured in Bihar were taken out of the Province of Bihar and then gifted away by the producer or manufacturer to a person outside Bihar and that person sold the goods, he would not be liable under the proviso. This argument, however, overlooks the fact that under cl. (ii) the producer or manufacturer became liable to pay the tax not because he produced or manufactured the goods, but because he sold the goods. In other words the tax was laid on the producer or manufacturer only qua seller and not qua manufacturer or producer as pointed out in Boddu Paidanna's case [[1942] F.C.R. 90]. In the words of their Lordships of the Judicial Committee in Governor General v. Province of Madras [(1945) L.R. 72 I.A. 91, 103], "a duty of excise is primarily a duty levied on a manufacturer or producer in respect of the commodity manufactured or produced. It is a tax on goods and not on sales or the proceeds of sale of goods." If the goods produced or manufactured in Bihar were destroyed by fire before sale the manufacturer or producer would not have been liable to pay any tax under s. 4(1) read with s. 2(g), second proviso. As Gwyer C.J. said in Boddu Paidanna's Case [[1942] F.C.R. 90] at page 102 the manufacturer or producer would be "liable, if at all, to a sales tax because he sells and not because he manufactures or produces; and he would be free from liability if he chose to give away everything which came from his factory." In our judgment both lines of the argument advanced by the learned Attorney General in support of points 1 and 4 are untenable and cannot be accepted.

Re. Point No. 2 : The theory of nexus has been applied in support of tax legislation in more cases than one, not only in this country but also in Australia and England. In Wanganui-Rangitikei Electric Power Board v. Australian Mutual Provident Society [(1934) 50 C.L.R. 581, 600] Dixon J., observed :

> "So long as the statute selected some fact or circumstance which provided some relation or connection with New South Wales, and adopted this as the ground of its interference, the validity of an enactment.....would not be open to challenge."
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> The same learned Judge in Broken Hill South Ltd. v. Commissioner of Taxation (N.S.W.) [(1937) 56 C.L.R. 337], said at page 375 :
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> "If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers. As in other matters of jurisdiction or authority courts must be exact in distinguishing between ascertaining that the circumstances over which the power extends exist and examining the mode in which the power has been exercised. No doubt there must be some relevance to the circumstance in the exercise of the

> power. But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connection."
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> Even the dissenting Judge Rich J., accepted the theory of nexus at page 361 :
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> "I do not deny that once any connection with New South Wales appears, the legislature of that State may make that connection the occasion or subject of the imposition of a liability. But the connection with New South Wales must be a real one and the liability sought to be imposed must be pertinent to that connection."

The Estate Duty Assessment Act 1914-1928 which charged estate duty on movable properties situate abroad which had passed from a deceased person domiciled in Australia by gift inter vivos made by him within a year of his death was not struck down for extra territoriality but was upheld as constitutional in The Trustees Executors and Agency Co. Ltd. v. The Federal Commissioner of Taxation [(1933) 49 C.L.R. 220].

The nexus theory was applied in full force in Governor General v. Raleigh Investment Co. [1944] F.C.R. 229]; Wallace Brothers and Co. Ltd. v. Commissioner of Income Tax, Bombay City [[1948] F.C.R. 1] and A.H. Wadia v. Commissioner of Income Tax, Bombay [[1948] F.C.R. 121]. In Raleigh Investment Co.'s case [[1944] F.C.R. 229] the assessee company was a company incorporated in England. Its registered office was in England. It held shares in nine Sterling Companies incorporated in England. Those nine Sterling Companies carried on business in British India and earned income, profits or gains in British India and declared and paid dividends in England to its shareholders including the assessee company. The assessee company was charged to Income-tax under s. 4(1) of the Indian Income-tax Act. It should be noted that the assessee company was not resident in British India, carried on no business in British India and made no income, profits or gains out of any business carried on by it in British India. It invested its money and acquired shares in England in the nine Sterling Companies which were English Companies. It was only when those nine Companies declared and paid dividends in England that the assessee company really earned its income, profits or gains, out of its investments in England in shares of nine Sterling Companies. The circumstance that the nine Sterling Companies derived their income, profits or gains, out of business carried on by them in British India out of which they paid dividends to the assessee company was regarded as sufficient nexus so as to fasten the tax liability on the assessee company in respect of the income, profits or gains, it derived from the nine Sterling Companies. Even such a distantly derivative connection with the source of income was held as a sufficient nexus to enable the British Indian tax authorities to charge the assessee company with income-tax. The conclusions reached by Spens C.J. in Raleigh Investment Co.'s case [[1944] F.C.R. 229] are formulated thus at page 253 :

> "If some connection exists, the legislature is not compelled to measure the taxation by the degree of benefit received in particular cases by the taxpayer. This affects the policy and not the validity of the legislation".
>
> In Wallace Brothers case [[1948] F.C.R. 1] the connection of the assessee company with British India was not so remote as in Raleigh Investment Co.'s case [[1944] F.C.R. 229], for in the former case the assessee company was a partner in a firm which carried on business in British India but that connection was held to be sufficient nexus to bring to British Indian tax not only the income, profits or gains made by the assessee as a partner in the firm but also its income, profits or gains

which accrued without British India in the previous year. In Wadia's case [[1948] F.C.R. 121], also an Income-tax case, it was held that a law imposing a tax cannot be impugned on the ground that it is extra territorial, if there is a connection between a person who is subjected to a tax and the country which imposes that tax. The connection must, however, be a real one and the liability sought to be imposed must be pertinent to that connection. At page 140 Chief Justice Kania observed :

"Generally, States can legislate effectively only for their own territories, but for purposes of taxation and similar matters, a State makes laws designed to operate beyond its territorial limits."

The learned Attorney General points out that the three last mentioned cases in which the nexus theory was applied were Income-tax cases and submits that that principle cannot be extended to sales tax laws. He points out that in Bengal Immunity Co. Ltd. v. The State of Bihar [[1955] 2 S.C.R. 603] this Court expressly left open the question, whether the theory of nexus applied to legislation with respect to sales tax. The passage at page 639 relied upon by the learned Attorney General only refers to the fact that the different State Legislatures considered themselves free to make a law imposing tax on sales or purchases of goods provided the State concerned had some territorial nexus with such sales concerned had some territorial nexus with such sales or purchases and went on to say that the question whether they were right or wrong in so doing had not been finally decided by the courts. That passage, properly understood, can hardly be said to indicate that the theory of nexus does not apply to sales tax legislation at all. The drift of the meaning of the passage was that the sufficiency of the different next relied on by the different States had not been tested by the courts. The passage strongly relied upon by the learned Attorney General is to be found at page 708 where Bhagwati J. after referring to the earlier cases, observed :

"It is a moot point whether this theory of territorial connection or nexus which has been mainly applied in Income-tax cases, is also applicable to sales tax legislation, the sphere of Income-tax legislation and sales tax legislation being quite distinct. Whereas in the case of Income-tax legislation the tax is levied either on a person who is within the territory by exercising jurisdiction over him in personam or upon income which has accrued or arisen to him or is deemed to have or arisen to him or has been derived by him from sources within the territory and it is, therefore, germane to enquire whether any part of such income has accrued or arisen or has been derived from a source within the territory, in case of sales tax legislation it is the sale or purchase of goods which is the subject-matter of taxation and it cannot be predicated that the sale or purchase takes place at one or more places where the necessary ingredients of sale happen to located. The theory of territorial connection of nexus was not put to the test at any time prior to the enactment of the Constitution and it is not necessary also for us to give a definite pronouncement on the subject."

Apart from the fact that the concluding words in the passage quoted above may be read as indicating that the observations were obiter, it appears to us to be too late in the day to contend that the theory of nexus does not apply to sales tax legislation at all. Indeed an examination of the decisions of this Court will clearly show that the applicability of the theory of nexus to sales tax legislation has been clearly recognised by this Court.

In The State of Bombay v. The United Motors (India) Ltd. [[1953] S.C.R. 1069, 1088], this Court had to interpret the true meaning of the explanation to Art. 286(1)(a) of the Constitution. That explanation created a fiction locating the situs of a sale or purchase in the State in which the goods had actually been delivered as a result of such sale or purchase for the purpose of consumption in that State notwithstanding the fact that, under the general law relating to sale to goods, the property in the goods had, by reason of such sale or purchase, passed in another State. This Court by a majority then held that in view of the fiction created by the explanation the sale which was in reality an inter-State sale became an intra-State sale and consequently the delivery and consuming State had the right to impose tax on that sale. It is true that decision has been departed from in the Bengal Immunity Co.'s case [[1955] 2 S.C.R. 603] on the question of the interpretation of Art. 286 of the Constitution, but on the point we are now discussing that decision clearly implies a recognition of the applicability of the nexus theory to the imposition of sales tax. The observations of Patanjali Sastri C.J. on the question of nexus in that case cannot, therefore, be said to be unnecessary for the decision of that case. In Poppatlal Shah v. The State of Madras [[1953] S.C.R. 677] Mukherjea J., delivering the unanimous judgment of the Constitution Bench of this Court definitely applied the theory of nexus to sales tax legislation. Support for that conclusion was found directly in the decision of the Judicial Committee in Wallace Brothers and Co. Ltd. v. Commissioner of Income Tax, Bombay City [[1948] F.C.R. 1] which, it was said, had been applied by this Court to sales tax legislation in the United Motors' case [[1953] S.C.R. 1069, 1088], but it is quite clear that the decision had, independently of the United Motors' case [[1953] S.C.R. 1069, 1088], adopted the principle of Wallace Brothers and Co.'s case [[1948] F.C.R. 1] to sales tax legislation. In a recent case, The State of Bombay v. R.M.D. Chamarbaugwala [[1957] S.C.R. 874, 901], which was concerned with tax on cross-word competition, this Court applied the theory of nexus and upheld the legislative competency of the Bombay Legislature to impose tax on the gambling competitions. At page 901 this Court said :

"The doctrine of territorial nexus is well established and there is no dispute as to the principles. As enunciated by learned counsel for the petitioner, if there is a territorial nexus between the person sought to be charged and the State seeking to tax him the taxing statute may be upheld. Sufficiency of the territorial connection involve a consideration of two elements, namely, (a) the connection must be real and not illusory and (b) the liability sought to be imposed must be pertinent to that connection. It is conceded that it is of no importance on the question of validity that the liability imposed is or may be altogether disproportionate to the territorial connection. In other word, if the connection is sufficient in the sense mentioned above, the extent of such connection affects merely the policy and not validity of the legislation."

Applying these principles to the facts of that case this Court came to the conclusion that they constituted sufficient territorial nexus which entitled the State of Bombay to impose a tax on the gambling that took place within its boundaries and that the law could not be stuck down on the ground of extra-territoriality. It is not necessary for us on this occasion to lay down any board proposition as to whether the theory of nexus, as a principle of legislation, is applicable to all kind of legislation. It will be enough, for disposing of the point now under consideration, to say that this Court has found no apparent reason to confine its application to income-tax legislation but has

extended it to sales tax and to tax on gambling and that we see no cogent reason why the nexus theory should not be applied to sales tax legislation.

The learned Attorney General submits that the theory of nexus cannot be applied to sales tax legislation because such legislation is concerned with a tax on the transaction of sale, that is to say, a completed sale and to break up a sale into its component parts and to take one or more of such parts and to apply the theory to it will mean that the State will be entitled to impose a tax on one or more of the ingredients or constituent elements of the transaction of sale which by itself or themselves will not amount to a sale. This argument overlooks the fact that the provisions of sales tax legislation we are considering limit its charging section to "sale". In order to attract the charging section there must be a completed sale involving the transfer of property in the goods sold from the seller to the buyer. The nexus theory does not impose the tax. It only indicates the circumstance in which a tax imposed by an act of the Legislature may be enforced in a particular case and unless eventually there is a concluded sale in the sense of passing of the property in the goods no tax liability attaches under the Act. One or more of the several ingredients constituting a sale only furnished the connection between the taxing State and the "sale". The learned Attorney General also said that one the same transaction of sale may be taxed by different States by applying the nexus theory and there will be multiple taxation which will obstruct the free flow of inter-State trade. There is no force in this argument, for Art. 286(2) of the Constitution, as it stood originally, was a complete safeguard against such eventuality and after the amendment of that Article of the relevant entries in the Legislative List such contingency will not arise. In our opinion the arguments advanced by the learned Attorney General on this point cannot be accepted.

Re. point No. 3 : The learned Attorney General next contends that in any case the nexus must be real and pertinent to the subject-matter of taxation. He contends that the presence of the goods in Bihar referred to in the old second proviso, which is reproduced in cl. (i) of the second proviso as amended, is of no consequence. The production or manufacture, according to him, has no connection with and never enters into the transactions of sale. He relies on the observations of Chief Justice Gwyer in Boddu Paidanna's case [[1942] F.C.R. 90], at page 102, namely, that "a sale had no necessary connection with manufacture or production." That observation was made by the learned Chief Justice in order to emphasise the fact that the tax levied on the first sale by the manufacturer or producer was a tax imposed on him qua seller and not qua manufacturer or producer. The question whether the fact of production or manufacture of goods may legitimately form a nexus between the transaction of sale and the taxing State was not in issue in that case at all. It is unnecessary in this case to lay down any hard and fast test and to the sufficiency of nexus which will enable a State a impose a tax or to enumerate the instances of such connection. For the purpose of the present case it is sufficient to state that in a sale of goods the goods must of necessity play an important part, for it is the goods in which, as a result of the sale, the property will pass. In our view the presence of the goods at the date of the agreement for sale in the taxing State or the production or manufacture in that State of goods the property wherein eventually passed as a result of the sale wherever that might have taken place, constituted a sufficient nexus between the taxing State and the sale. In the first case the goods are actually within the State at the date of the agreement for sale and the property in those goods will generally pass within the State when they are ascertained by appropriation by the seller with the assent of the purchaser and delivered to the purchaser or his agent. Even if the property in those goods passes outside the State the ultimate sale relates to those very goods. In the second case the goods, wherein the title passes eventually outside the State, are produced or manufactured in Bihar and the sale wherever that takes place is by the same person who produced or manufactured the same in Bihar. The producer or manufacturer gets his sale price in respect of goods which were in Bihar at the date when the important event of agreement of sale was

made or which were produced or manufactured in Bihar. These are relevant facts on which the State could well fasten its tax. If the facts in the Raleigh Investment Co.'s case [[1944] F.C.R. 229], were sufficient nexus there is no reason why the facts mentioned in the proviso should not also be sufficient. Whatever else may or may not constitute a sufficient nexus, we are of opinion that the two cases with which we are concerned in this case are sufficient to do so.

Re. point No. 5 : The argument on this point is that sales tax is an indirect tax on the consumer. The idea is that the seller will pass it on to his purchaser and collect it from them. If that is the nature of the sales tax then, urges the learned Attorney General, it cannot be imposed retrospectively after the sale transaction has been concluded by the passing of title from the seller to the buyer, for it cannot, at that stage, be passed on to the purchaser. According to him the seller collects the sales tax from the purchaser on the occasion of the sale. Once that time goes past, the seller loses the chance of realising it from the purchaser and if it cannot be realised from the purchaser, it cannot be called sales tax. In our judgment this argument is not sound. From the point of view of the economist and as an economic theory, sales tax may be an indirect tax on the consumers, but legally it need not be so. Under the 1947 Act the primary liability to pay the sales tax, so far as the State is concerned, is on the seller. Indeed before the amendment of the 1947 Act by the amending Act the sellers had no authority to collect the sales tax as such from the purchaser. The seller could undoubtedly have put up the price so as to include the sales tax, which he would have to pay but he could not realise any sales tax as such from the purchaser. That circumstance could not prevent the sales tax imposed on the seller to be any the less sales tax on the sale of goods. The circumstances that the 1947 Act, after the amendment, permitted the seller who was a registered dealer to collect the sales tax as a tax from the purchaser does not do away with the primary liability of the seller to pay the sales tax. This is further made clear by the fact that the registered dealer need not, if he so pleases or chooses, collect the tax from the purchaser and sometimes by reason of competition with other registered dealers he may find it profitable to sell his goods and to retain his old customers even at the sacrifice of the sales tax. This also makes it clear that the sales tax need not be passed on to the purchasers and this fact does not alter the real nature of the tax which, by the express provisions of the law, is cast upon the seller. The buyer is under no liability to pay sales tax in addition to the agreed sale price unless the contract specifically provides otherwise. See Love v. Norman Wright (Builders) Ltd. [L.R. (1944) 1 K.B. 484]. If that be the true view of sales tax then the Bihar Legislature acting within its own legislative field had the powers of a sovereign legislature and could make its law prospectively as well as retrospectively. We do not think that there is any substance in this contention either.

For reasons stated above none of the contentions urged by the learned Attorney General in support of these appeals can be sustained. The result, therefore, is that these appeals must be dismissed with costs.

BOSE J. -

With great respect I cannot agree. It will not be necessary to elaborate my point of disagreement at length because this is pre-Constitution legislation and much of what we decide in this case will not affect post-Constitution Acts. Put very shortly, my view is this. First, a State can only impose a tax on the sale of goods. It has no power to tax extra territorially, therefore it can only tax sales that occur in the State itself. With great respect I feel it is fallacious to look to the goods, or to the elements that constitute a sale, because the power to tax is limited to the sale and the tax is not on the goods or on the agreement to sell or on the price as such but only on the sale. Therefore, unless the sale itself takes place in the State, the State cannot tax.

That brings me to the next point, the situs of a sale. Now I know that this is a matter on which many different views are possible but what is clear to me is that a sale cannot have more than one situs. It is not a mystical entity that can be one in many and many in one and the same time, here, there and everywhere all at once : nor is it a puckish elf that pops up now here, now there and next everywhere. It is a very mundane business transaction, of the earth, earthy. It can have only one existence and one situs. Opinions may differ on where that is and how it is to be determined, but it is our duty, as the supreme authority on the law of the land, to choose one of those many views and say that that is the law of our land and that in India the situs is determined in this way or that and, having determined it, make it uniform for the whole country.

I am conscious that the selection must be arbitrary, but for all that, it must be made. Left to myself, I would have preferred Cheshire's view about the proper law of the contract set out by him in Chapter VIII of his book on Private International Law, 4th edition. I referred to this in The Delhi Cloth and General Mills Co. Ltd. v. Harnam Singh [[1955] 2 S.C.R. 402, 418]. I quote him again :

> "The proper law is the law of the country in which the contract is localised. Its localisation will be indicated by what may be called the grouping of its elements as reflected in its formation and in its terms. The country in which its elements are most densely grouped will represent its natural seat."

He is not dealing with this question. He is dealing with International Law and the difficulties that arise in dealing with contacts whose elements are grouped in different States with different, and often conflicting, laws. He is developing the theme that for any one contract there should be but one law to govern it in all its stages and that the most logical conclusion is to select the law of the country in which the contract has its natural seat. But whether his view is accepted or any of the others that he discusses, he stresses the need for one objective rule and contends strongly that the choice should not be left to the parties to the deal, even as I say that it should not be left to the States. He quotes an American Judge, at page 203 of his book, who says that -

> "Some law must impose the obligation, and the parties have nothing whatsoever to do with that, no more than with whether their acts are torts or crimes."

Now none of that is of immediate application here but it contains the germ of an idea and points to the embarrassment and folly of letting differing laws run amuck in governing a single transaction. Following up that thought I would say that we are dealing here with a Constitution Act that speaks with on voice and authority throughout the land. It tells the various States, as one day some international voice that will rule the world will say to the peoples in it, "you may do this and may not do that;" and "this" and "that" mean, but one thing everywhere. One writ runs throughout the land and it has but one meaning and one voice. "When I say that you may only legislate for your own territory and that you may tax certain sales, you must realise that the meaning that I give to 'sale' is the meaning that my Supreme Court shall give to it and that it cannot mean differing things in different areas; and you must realise that the only sales that you may tax are the ones that lie in your own territory. My Supreme Court shall determine where a sale is situated and once that is determined it cannot be situated anywhere else. If it does not happen to be in your territory you cannot tax it."

Our present Constitution did not adopt Cheshire's view. It made another choice. In the old Explanation to Art. 286 (now repealed) it selected the place where the goods are actually delivered, as a direct result of the sale or purchase, as the situs. Well, so be it. That is as good as any other and

I would have been as happy to select that as any of the other possibilities. But what I do most strongly press is that a Constitution Act cannot be allowed to speak with different voices in different parts of the land and that a mundane business concept well known and well understood cannot be given an ethereal omnipresent quality that enables a horde of hungry hawks to swoop down and devour it simultaneously all over the land : "some sale; some hawks" as Winston Churchill would say.

I would therefore reject the nexus theory in so far as it means that any one sale can have existence and entity simultaneously in many different places. The States may tax sale but may not disintegrate it and, under the guise of taxing the sale in truth and in fact, tax its various elements, one its head and one its tail, one its entrails and one its limbs by a legislative fiction that deems that the whole is within its claws simply because, after tearing it apart, it finds a hand or a foot or a heart or a liver still quivering in its grasp. Nexus, of course, there must be but nexus of the entire entity that is called a sale, wherever it is deemed to be situate. Fiction again. Of course, it is fiction, but it is a fiction as to situs imposed by the Constitution Act and by the Supreme Court that speaks for it in these matters and only one fiction, not a dozen little ones.

My point is simple. If you are allowed to tax a dog it must be within the territorial limits of your taxable jurisdiction. You cannot tax it if it is born elsewhere and remains there simply because its mother was with you at some point of time during the period of gestation. Equally, after birth, you cannot tax it simply because its tail is cut off (as is often done in the case of certain breeds) and sent back to the fond owner, who lives in your jurisdiction, in a bottle of spirits, or clippings of its hair. These is a nexus of sorts in both cases but the fallacy lies in thinking that the entity is with you just because a part that is quite different from the whole was once there. So with a sale of a motor car started and concluded wholly and exclusively in New York or London or Timbuctoo. You cannot tax that sale just because the vendor lives in Madras, even if the motor car is brought there and even assuming there is no bar on international sales, for the simple reason that what you are entitled to tax is the sale, and neither the owner not the car, therefore unless the sale is situate in your territory, there is no real nexus. And once it is determined objectively by the Constitution Act or in Supreme Court how and where the sale is situate, its situs is fixed and cannot be changed thereafter by a succession of State legislatures each claiming a different situs by the convenient fiction of deeming.

The only question is whether it is too late in the day to take this view because of our previous decisions and those of the Federal Court. I say not, for, though there is a consensus of opinion that there must be a territorial nexus and that it must not be illusory, no decision that I know of says that when you are given the right to tax a certain thing which is a composite entity, quite separate and distinct from the various elements of which it is composed, you may tear that whole a part and seize on some element that is quite a different things from that which you are entitled to tax and hold that the taxable entity is in your State simply because at some relevant point of time one of the ingredients that went to make up the whole but which is a separate and distinct thing from the whole, as different from it as chalk is from cheese, happened to be within your clothes. I do not intend to analyse the cases on this point because it is pointless to pursue a matter that will only be of academic interest. All I will do therefore is to say that the question of nexus has been referred to in the following cases and that none of them reaches a decision on this particular point. These cases are Governor-General in Council v. Raleigh Investment Co. Ltd. [[1944] F.C.R. 229, 247, 253], A.H. Wadia v. Commissioner of Income-tax, Bombay [[1948] F.C.R. 121, 153, 154, 165], Poppatlal Shah v. The State of Madras [[1953] S.C.R. 677], State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory [[1954] S.C.R. 53, 101], and The Bengal Immunity Co. Ltd. v. The State of Bihar [[1955] 2 S.C.R. 603, 708, 768, 769].

I would allow the appeals.

ORDER OF THE COURT.

In view of the opinion of the majority, the appeals are dismissed with costs.

Appeals dismissed.

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