The State of Kerala and Others

Vs

The Cochin Coal Company Ltd.

Civil Appeal No. 287 of 1958

(S.K. Das, M. Hidayatullah, K.C. Das Gupta, J.C. Shah, N. Rajgopala Ayyangar JJ)

31.10.1960

JUDGMENT

AYYANGAR J. -

This is appeal from the judgment of the High Court of Travancore-Cochin on a certificate of fitness granted by it under Art. 133(1) of the Constitution and raises for consideration the liability of the respondent - The Cochin Coal Company Ltd. - to sales-tax under the United State of Travancore and Cochin General Sales Tax Act, 1125 (1950).

The following are briefly the facts which it is necessary to state in order to appreciate the points in controversy in the appeal. The Cochin Coal Company Ltd. which will be referred to as the respondent Company are, as their name indicates, dealers in coal. The commodity, the sales of which have given rise to the dispute in this appeal is what is known as 'Bunker coal'. The company have their offices at a place called Fort Cochin which was formerly within the State of Madras. They import and keep stocks of "bunker coal" stacked at a place called Candle Island which at the date relevant to these proceedings was also within the State of Madras. Part of the activities of the respondent-company consist in the supply of "bunker coal" from their depots in Candle Island to steamers arriving in or calling at, the port of Cochin (in the State of Travancore-Cochin) for the outward voyage of the steamers from the said port. The usual procedure by which "bunker coal" was thus supplied by the respondent - company was briefly this : Before the arrival of the steamers, the steamer agents would enter into contracts with the respondent company for trimming coal into the bunker of the steamer. As soon as a steamer arrived in Cochin port, the steamer-agents would inform the respondent-company and these agents after securing the necessary papers from the customs and the port authorities for the loading of the coal into the steamer, would take these papers to the respondent company's office in Fort Cochin for enabling the latter to perform their part of the contract. The respondent-company would thereupon send the goods ordered to the steamer through their transport contractor. Delivery orders would be issued to the transport contractor on the strength of which goods would be released from their stock in Candle Island. Coal would then be taken to the steamer berthed in the port in Travancore-Cochin State waters. The Chief Engineer of the steamer would inspect the coal and when the same was to his satisfaction as regards quality, the coal would be permitted to be trimmed into the bunkers of the ships. The price of the coal would thereafter be paid to the respondent-company on bills drawn on the steamer-agent. The above being the nature of the transactions conducted by the respondent-company, sales-tax was claimed on the sales of bunker coal by the Travancore-Cochin State. The assessment years with which this appeal is concerned are 1951-52 and 1952-53, and the assessment therefore was completed on February 2, 1954, by the sales-tax officer, I Circle, Mattancherry. The respondent-company's contention that no sales-tax could be levied on the value of the "bunker coal" supplied, since the sale was either "in the

course of export", or "in the course of inter-State trade" and therefore exempted from taxation by the State under sub-cl. (1)(b) or (2) of Art. 286 was rejected by the assessing officer for the reason that the sales in question fell within the Explanation to Art. 286 (1)(a) and were therefore "inside" the State of Travancore-Cochin, since the delivery in pursuance of the sale took place within the State and the goods were delivered for the purpose of consumption within the State and that notwithstanding that there was an inter-State element involved in the sale, by the goods being moved from Candle Island, the same did not affect the power of the delivery State to levy the tax. The point urged by the company, that the same sales had been assessed to tax in Madras State as sales actually taking place there, was also reject as irrelevant. The respondent-company thereafter filed an appeal to the Appellate Assistant Commissioner who allowed the appeal of the company holding that the sales were "in the course of export" within Art. 286(1)(b), and that even if they were not such but were "inside" sales falling within the Explanation to Art. 286(1)(a) of the Constitution, still a notification by the State Government dated February 5, 1954, exempting such sales from tax, operated for the benefit of the assessee. Thereafter the Deputy Commissioner of sales-tax who was the Revisional authority took up the matter suo motu, called upon the assessee to show cause why the appellate order should not be set aside and the entire turnover assessed to sales-tax as the sales had taken place inside the State only. After hearing the assessee-company the order of the appellate Assistant Commissioner was set aside and that of the Sales Tax Officer restored. The respondent-company then moved the High Court of Travancore-Cochin under Arts. 226 and 227 of the Constitution to set aside the order in revision and the learned Judges of the High Court ordered accordingly. They, however, granted a certificate under Art. 133(1) of a the Constitution to enable the State Government to file an appeal to this Court and that is how the matter is now before us.

Though the respondent-company appear to have presented before the High Court several lines of argument in support of their contention that they were entitled to exemption from sales-tax in respect of "bunker coal" trimmed by them into steamers in the waters of Travancore-Cochin, the learned Judges rested their decision in favour of the respondent-company on practically a single ground. Their reasoning was briefly as follows : Following the Bengal Immunity case ([1955] 2 S.C.R. 603.), the learned Judges held that, the bans imposed by cls. 1(a) and 2 of Art. 286 were independent and that the sale of the coal by the respondent-company which was in the course of inter-State trade was covered by the ban contained in Art. 286(2) of the Constitution notwithstanding that the sale might satisfy the terms of the Explanation to sub-cl. 1(a). The learned Government Pleader, however, had submitted that if the exemption was derived from Art. 286(2), the same would not assist the assessee, since the validity of the tax was saved by the Sales-tax Law Validation Act, 1956. The learned Judges however held that the validation Act could not avail the State because on their construction of section 26 of the Travancore-Cochin General Sales Tax Act, 1125 (corresponding to section 22 of the Madras Sales Tax Act, 1939) no tax had been levied or was leviable on sales in the course of inter-State trade or commerce and that the Validation Act having validated only taxes already levied could not enable the State to levy a tax which had not been imposed by the State's Sales-tax Act.

There is no doubt that the transaction of sale in the present case was in the course of inter-State trade and would be covered by the ban on taxation imposed by Art. 286(2). But the view of the learned Judges of the High Court regarding the construction of section 26 of the Travancore-Cochin General Sales Tax Act must now be held to be incorrect in view of the decision of this Court in M. P. V. Sundararamier & Co. v. The State of Andhra Pradesh ([1958] S.C.R. 1422.). If therefore the assessee-company could rely only on Art. 286(2) for claiming relief, it must be held to be not available to them since the Sales Tax Validation Act, 1956, would have validated the levy.

Before us, however, learned Counsel for the respondent-company urged two grounds to sustain the decree of the High Court in its favour. The first was that as the coal trimmed into the steam-ships were meant to be carried outside the territory of India, the sale was "in the course of export" within Art 286(1)(b) of the Constitution and was therefore exempt from the levy of sales-tax by the State. This contention however has to be rejected in view of the decision of this Court in Burmah Shell Oil Storage & Distributing Co., of India, Ltd. v. The Commercial Tax Officer (C.A. 751 of 1957 & C.A. 10 of 1958 (Unreported.)). in which it was held that in the context and setting which the expression "export out of the territory of India" occurs in Part XIII of the Constitution, it was not sufficient that goods were merely moved out of the territory of India but that it was further necessary that the goods should be intended to be transported to a destination beyond India, so that they were in the course of "import" into some other locality outside India and accordingly that aviation spirit sold to an aircraft for enabling it top fly out of the country was not "exported" out of the country. The reason was that there was no destination at which it could be said that the spirit was imported and that a mere movement of the goods out of the country following a sale would not render the sale one "in the course of export" within Art. 286(1) (b) of the Constitution. In other words, the concept of export in Art. 286 postulates just as the word import, the existence of two termini as those between which the goods are intended to move or between which they are intended to be transported, and not a mere movement of goods out of the country without any intention of their being landed in specie in some foreign port.

The other point urged by learned Counsel was that, in any event, the sale fell within the Explanation to Art. 286(1)(A) inasmuch as the delivery of the coal was effected in the State of Travancore-Cochin for the purpose of consumption in that State. There is no doubt that the goods having originally been located in Candle Island in Madras State were moved out of that State by reason of the contract of sale into the territory of Travancore-Cochin. It had therefore an inter-State element which rendered the Explanation applicable. The delivery was admittedly effected in the State of Travancore-Cochin as a direct result of that sale and was trimmed into the steam-ships in the Cochin waters. If the purpose of the delivery was not export as we have held earlier, it must follow that in the circumstances of this case it was for the purpose of consumption in the State since the delivery was to the ultimate consumer who was to use the goods for his own purposes and not for the purpose of re-export or with a view to other transactions of a commercial character in the goods. It would be noticed that the ultimate buyer - the steam-ship company could, if it desired, consume the goods in the sense of exhaust the goods by consumption within the State or it could take it outside the State and consume it there, but that was a matter of its choice, dependent on its will and pleasure. This would not therefore detract from the delivery to it being to consumption within the State. Goods might be consumed either by destruction in a literal sense while other articles like clothing or furniture etc. are consumed by being used, though they are not destroyed by such use. If edible articles are sold and delivered to an ultimate consumer within a State, it is delivered for the purpose of consumption within the State, notwithstanding, that the buyer may not choose to consume the whole of his purchase within the State but takes part of it outside the State and consumes it there. If, for instance, a vehicle is sold to the actual user and the sale is not in the course of export or with a view to further commercial transactions in it by the purchaser by way of resale etc., the delivery to the user is for the purpose of his consumption within the State. The fact that such a purchaser might in the exercise of the enjoyment of his property - by way of use or "consumption" - drive the vehicle to other States does not detract from the original delivery to him falling within the Explanation to art. 286(1)(a). In the present case, the coal having been delivered into the ship for being consumed by it, it was open to the master of the vessel to use the coal while the ship was in the waters of Travancore-Cochin, or if he so chose take it outside those limits. The

position might be different if the buyer obliged by contract or by law not to use or consume the goods sold within the State of delivery, i.e., where he has no choice to consume it there. In the case on hand, part of the coal delivered could and would certainly have been used by the ship during the period of her stay in the harbour for loading and if such stay were prolonged owing to unforeseen causes even the entire coal might have been exhausted and of course it would have to be used till the ship left the limits of the port and the limits of State territory. The crucial fact therefore was that the coal was delivered to the actual consumer who was at liberty consume it wherever he desired - the choice depending on his convenience and necessity.

In the circumstances, therefore, learned Counsel for the respondent was right in his submission that the sale of the "bunker coal" by the assessee-company fell within the Explanation to Art. 286(1)(a). If there were nothing more and the liability of the assessee had to be judged with reference to the charge imposed by the Sales-tax Act of the State, read in the light of the Constitution, the tax liability of the respondent-company would not have been open to doubt or dispute. But the submission of learned Counsel was that the State Government had power to exempt sales of any particular designated type from tax liability under section 6 of the Sales-Tax Act, and that the Government had by a notification dated February 5, 1954, and published in the official Gazette, exempted sales such as by the respondent-company in the present case from the levy of sales-tax during the assessment years now in question. The exemption under this notification was no doubt not referred to by the learned Judges of the High Court but had been one of the grounds on which the sales-tax appellate authority had set aside the tax imposition by the Sales-tax Officer and the point had been specifically urged in the petition filed in the High Court under Art. 226, and the respondent cannot, therefore, be denied the benefit of the notification if it applied.

Section 6 of the Travancore-Cochin Sales-tax Act enacts :

> "The Government may, by notification in the Gazette, make an exemption..... in respect of any tax payable under this Act :-
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> (i) on the sale of any specified class of goods at all points or at any specified point or points in the series of sales by successive dealers; or
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> (ii) of any specified class of persons in regard to the whole or any part of their turnover".

It is necessary to set out the rest of the section. In the Travancore-Cochin Gazette dated February 16, 1954, the following notification dated February 5, 1954, appeared :

> "According to the interpretation given by the Supreme Court to Art. 286(1) of the Constitution in their judgment in the State of Bombay v. United Motors India Ltd. certain categories of inter-State transactions come within the taxing powers of the State Government. While the judgment enables the Government of Travancore-Cochin to levy sales-tax on certain categories of non-resident dealers selling goods for delivery and consumption in Travancore-Cochin State from the 1st April 1951, the Government have, after due consideration, decided to levy sales-tax on such transactions only from the 1st April 1953 - the date immediately following that on which the Supreme Court delivered its judgment and to forego the levy prior to that date".

Then followed provisions detailing the interim arrangements for submission of returns, of declarations to be filed and the manner in which the tax should be assessed and paid. Though the learned counsel for the appellant-State urged that the notification could not have the statutory effect of granting exemption, we are clearly of the opinion that this was and must be deemed to be one issued in exercise of the power conferred on the State Government by section 6(1) whose relevant terms we have already extracted. Besides, this is rather a curious submission to make in view of what had transpired earlier. The appellate Assistant Commissioner who set aside the assessment of the respondent-company stated in his order "Even if it is considered that the sale is for consumption in this State, the company been not pay tax on the turnover since Government have exempted from payment of tax on the sales which took place before April 1, 1953." When this appellate order was set aside by the Deputy Commissioner acting suo motu in revision, there is no reference made to the notification in the order and it was not stated that it had no statutory effect. In its petition to the High Court under Art. 226, the respondent-company claimed the benefit of the exemption granted by the notification dated February 5, 1954, and published in the Gazette of February 16, 1954, relating to the assessment for the period April 1, 1951 to April 1, 1953 and it added that the assessment in question came within the exemption contained in the Gazette notification. In answer to this a counter-affidavit was filed by the sales-tax officer who said : "The notification referred to the petitioner's affidavit has no application to the case as the sales in question did not come within their orbit". In other words, the objection was not that the notification was not a statutory exercise of the power under section 6(1) and effective to grant an exemption to the cases covered by it, but that the transactions of the respondent-company were not covered by the notification. The extract we have quoted from the notification shows that it is specially designed to afford relief to cases of non-resident dealers engaged in inter-State transactions which were held to be intra-State transactions by reason of the application of the Explanation to Art. 286(1)(a) to such sales by the decision of this Court in the United Motors case. As the respondent company's transactions in question clearly fall within the notification by reason of their nature as well as the assessment years concerned, the respondent-company would be entitled to the benefit of the tax exemption conferred by the notification.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

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