

# **SUPREME COURT OF INDIA**

Rohtas Industries Ltd.

Vs.

State of Bihar

C.A.Nos.312-317 of 1960

(S. K. Das, M. Hidayatullah and J. C. Shah, JJ.)

18.07.1961

## **JUDGEMENT**

**SHAH, J.:**

1. Rohtas Industries Ltd., a public limited company registered under the Indian Companies Act having its registered office at Dalmia Nagar in the State of Bihar, is engaged in the manufacture, amongst other commodities, of cement, and is registered as a "dealer" under the Bihar Sales-Tax Act, 1944. In proceedings for assessment of sales-tax, the company denied its liability under the Act to pay tax in respect of cement supplied, delivered or consigned pursuant to orders issued by a company called the Cement Marketing Company Ltd; hereinafter called the Marketing Company, in the following six quarters ending : September 30,1945, June 30, 1946, September 30,1946, December 31,1946, March 31,1947, and June 30,1947, on the plea that there was no sale by the appellatant company to the Marketing Company. The plea of the company was disallowed by the Sales-Tax Officer : also by the Commissioner, Sales Tax, Patna Division and by the Board of Revenue, Bihar. At the instance of the company, the following question was referred by the Board of Revenue to the High Court of Judicature at Patna for its opinion:

"Whether on the construction of the agreement dated the 4th June, 1942, between the assessee Messrs. Rohtas Industries Ltd., Dalmia Nagar (along with 3 other manufacturing Companies) and the Cement Marketing Company of India Ltd., the cement delivered, despatched or consigned by the assessee to the Cement Marketing Company of India Ltd., or to their order on in accordance with their directions are sales to the latter within the meaning of the Bihar Sales Tax Act (Bihar Act VI of 1944)."

2. The High Court answered the question "against the company."

3. Section 4 of the Bihar Sales Tax Act imposes liability to pay tax upon every dealer whose gross turnover exceeds Rs.5,000. The tax under the Act is leviable at prescribed rates on the taxable turnover, i.e., that part of a dealer's gross turnover during any period, which remains after deducting there from turnover on sales specified in S. 5 sub-sec. (2). The expression "turnover" is defined in S(2)(i) as meaning the aggregate of the amounts of sale price received and receivable by a dealer in respect of a sale or supply of goods or carrying out any contract effected or made during a given period. "Sale Price" is defined in S. 2(h), as meaning the amount payable to a dealer as valuable consideration for (1) the sale or supply of any goods..... "Sale" is defined in S. 2(g) as meaning - omitting parts which are not material - any transfer of property in goods for cash or deferred payments or other valuable consideration including a transfer of property in goods involved in the execution of a contract.

4. It is common ground that the company had supplied goods pursuant to the directions received from the Marketing Company. The company pleaded before the taxing authorities and the High Court that cement supplied to the order of the Marketing Company under the covenants contained in an agreement dated June 4, 1942, was not sold but was entrusted for sale to the Marketing Company and according the amounts received by the company from the Marketing Company under the terms of the agreement not being sale price were not liable to be included in its taxable turnover. In these appeals filed with special leave, the question for determination is as to the true effect of the agreement dated June 4, 1942, to which the company and the Cement Marketing Company were parties.

5. The parties to the agreement were five companies - The Associated Cement Companies Ltd., the Patiala Cement Company Ltd., the Rohtas Industries Ltd., (the company), the Dalmia Cement Company Ltd., and the Cement Marketing Company Ltd. (the Marketing Company). In the agreement, the Associated Cement Companies Ltd. and the Patiala Cement Company Ltd. were collectively referred to as the Associated Group and the Dalmia Cement Company Ltd., and the Rohtas Industries Ltd., were collectively referred to as the Dalmia Group. These two Groups were engaged in the manufacture of cement, but the Marketing Company was a trading Corporation having concern with the manufacture of cement. It is common ground that there was for some time unhealthy competition between different companies manufacturing cement, and with a view to avoiding competition and securing adequate return on investments, the Marketing Company was

floated as a distributing company engaged in the sale of cement.

6. The question whether there was a sale attracting liability to pay sales-tax depends upon a construction of the agreement between the Marketing Company and the manufacturing companies. If property in the cement passed to the Marketing Company in return for price and the Marketing Company sold the cement on its own, then sales-tax must be paid by the manufacturing companies. An examination of the various clauses of the agreement discloses that such was in fact the case. The true nature of a transaction evidenced by a written agreement has indeed to be ascertained from the covenants and not merely from what the parties chose to call it. The words of an agreement must be carefully scrutinized in the light of the surrounding circumstances. The appointment of the Marketing Company under cl. (2) of the agreement to be the sole and exclusive Sales Manager of the manufacturing companies for sale of cement does not indicate an intention to constitute it an agent of the manufacturing companies. There is no covenant in the agreement that the manufacturing companies were to sell their goods through the Marketing companies: the manufacturing companies merely appointed the Marketing Company to be the "sole and exclusive sales manager" for sale of cement. The preamble which has been strongly relied upon merely recites that the Marketing Company is by its constitution, authorised to act as the selling agent or agent of any company manufacturing or dealing in cement. But even in the preamble, there is nothing to indicate an intention that the manufacturing companies were appointing the Marketing Company their agent for sale of cement. It is expressly recited therein that the Marketing Company was appointed to regulate the business and for the more efficient and economic working of the business, and to sell the products of the manufacturing companies. By paragraph 3, the manufacturing companies contracted not to sell directly or indirectly any cement to any person save and except through the Marketing Company. By this covenant, the manufacturing companies appointed the Marketing Company the sole sellers of cement manufactured by them, i.e., the Marketing Company was made the sole purchasers of cement from the manufacturing companies. By paragraphs 22 and 23, the Dalmia Group agreed to wind up their entire selling organization, and the two Groups undertook not to maintain any selling organization and selling organizations in existence on the date of the commencement of the contract were taken over by the Marketing Company. Clause 14 which authorised the Marketing Company to appoint and to continue its agents and stockists on such terms and conditions as they thought fit and to supply such stockists with such quantity of cement as they might regularly require, raises a strong inference that the Marketing Company was constituted monopoly purchasers of the cement manufactured by the manufacturing companies during the subsistence of the agreement. Clause 5 of the agreement strengthens the view that the relation between the manufacturing companies and the Marketing Company was that of sellers and buyers. By that clause, the Marketing Company agreed, in respect of ordinary cement, to pay to the manufacturing companies at the rate of Rs. 24 per ton supplied at Works, and for special cements, such amounts above the basic rate of Rs. 24 per ton as the directors of the Marketing Company in their discretion, having regard to the difference between the selling prices of such cement and the ordinary cement, deemed proper. The rate fixed by cl. 15 was again liable to be revised from time to time by the director of the Marketing Company. By that clause, the Marketing Company reserved to itself the right to modify from time to time the terms by unilateral decisions of its directors, and the manufacturing companies agreed to accept such modifications. A covenant of this nature strongly indicates a relation of vendor and purchaser and the party authorised to modify unilaterally the agreement cannot be an agent.

7. By cl. 30, provision was made for payment of interest by the Dalmia Group if they desired immediate payment in cash for any supplies for which credit had been given by the Marketing Company. It is implicit in the terms of cl. 30 that the manufacturing companies had no control over the terms on which cement was to be sold or otherwise disposed of by the Marketing Company. But ii the Dalmia Group desired immediate payment when the Marketing Company gave credit to its agents and stockists, they were liable to pay interest to the Associated Group.

8. Clause 6 of the agreement supplies another cogent indication about the relationship between the manufacturing companies and the Marketing Company. By that clause, the Marketing Company was authorised to sell cement at such price or prices and on such terms as it might in its sole discretion think fit. The Marketing Company was ordinarily required to fix the prices having regard to the cost of all production, but it was entitled to fix the price at which cement was to be sold, and such price could be even less than the costs of manufacture.

9. By cl. 7, the manufacturing companies undertook to deliver, despatch or consign cement in accordance with the orders and instructions from the Marketing Company and from the factories or works specified by the Marketing Company. Such contracts were to be made only by the Marketing Company in its own name and for itself. The manufacturing companies had no control over the terms of the contracts : they merely undertook to deliver the goods as instructed by the Marketing Company.

10. By cl. 9, the manufacturing companies undertook to keep themselves in readiness to supply cement manufactured by them in accordance with orders and instructions of the Marketing Company and according to the "quotas" set out in cl. 8.

11. On a review of these terms of the agreement, it is manifest that the manufacturing companies had no control over the terms of the contracts of sale by the Marketing Company and that the price at which cement was sold by the Marketing Company could not be controlled by the manufacturing companies; that the manufacturing companies were entitled, for ordinary cement, to be paid at the rate of Rs. 24 per ton at Works, or at such other rate as might be decided upon by the directors of the Marketing Company, and in respect of special cements at such additional rates as the directors of the Marketing Company might determined that sale by the Marketing Company was not for and on behalf of the manufacturing companies but for itself and the manufacturing companies had no control over the sales nor had they any concern with the persons to whom cement was sold. In fine, the goods were supplied to the order of the Marketing Company which had the right, under the terms of the agreement, to sell on such terms as it thought fit, and that the manufacturing companies had the right to receive only the price fixed by the Marketing Company. The relationship in such cases can be regarded only as that of a seller and buyer and not of principal and agent.

12. Mr. Viswanatha Sastri appearing on behalf of the company contented that the Marketing

Company was expressly designated "agent" in the agreement. That, however, is not strictly accurate. As has been already pointed out, by cl. 2 the Marketing Company was constituted "the exclusive sales manager, and the preamble merely recited that the Marketing Company was authorised by its constitution to act as selling agents, but on the terms of the agreement, it was to sell "the production and regulate the sale of the manufactures of the various companies. There is nothing in the preamble or cl. 2 which even indirectly refers to the Marketing Company as an agent. Undoubtedly, the Marketing Company had no storage facilities; it merely transmitted the orders for sale of goods received from the purchasers. By cl. 14, the Marketing Company was entitled to appoint its agents and stockists, and by cl. 13, to give them credit for cement supplied. By merely consigning or supplying cement pursuant to orders received from the Marketing Company, the manufacturing companies were not selling cement to the persons to whom it was directed to be supplied.

13. Strong reliance, however, was placed upon paragraph 24 of the agreement under which the Marketing Company agreed after deducting its expenses for advertisements, propaganda and all operational and working charges, and appropriations for depreciation and the employees provident fund to distribute in proportion to the number of tons of cement of every variety and kind supplied by the manufacturing companies, the whole of the net profit less 6% on its paid-up capital. This, it was urged, imposed a liability to account for the profits and that the manufacturing companies received not merely the basic payment fixed under cl. 3 of the agreement, but payment varying with the price received by the Marketing Company. It was urged that a person, who by the terms of an agreement, is entitled to retain all the profits as his remuneration above an agreed rate on his undertaking to guarantee payment at that rate, may still be regarded as an agent if the circumstances disclosed that intention. Here, it was contended that the only benefit to the Marketing Company was that it was entitled to debit the operational expenses and 6% on its total capital and it was bound to distribute the balance amongst the manufacturing companies in proportion to the number of tons of cement supplied by them. But this covenant, does not support the plea that there subsisted between the manufacturing companies and the Marketing Company the relation of principals and agent. Under the agreement, the price at which cement was to be sold by the Marketing Company depended solely in the discretion of the Marketing Company, and by cl. 24, the manufacturing companies do not get the difference between the price at which an individual consignment is sold and the basic price fixed under cl. 5. The right under cl. 24 is to share in the overall profit in proportion to the number of tons of cement supplied by each company. There is therefore no relation between the share of the profits received under cl. 24 and the profits or loss incurred in the individual transactions. There is no covenant, again rendering the manufacturing companies liable in the event of the transactions of the Marketing Company resulting in loss. The Marketing Company enters into contracts on its own behalf and not on behalf of the manufacturing companies: it supplies goods as its own, and not as those of the manufacturing companies and it is not entitled to be indemnified for loss suffered by it. The mere covenant for sharing the overall net profits after deducting 6% on the paid-up capital of the Marketing Company, does not convert the relationship into one of principal and agent. The liability to account for the sale proceeds, is not for the purpose of paying over to the manufacturing companies a share of the profits in each individual transaction. The liability to account, if any, is only for enforcement of the covenant contained in cl. 24.

14. We therefore agree with the view of the High Court that cl. 24 does not qualify the legal effect of the other important clauses of the agreement, and that the cement delivered, despatched or

consigned by the manufacturing companies to the Marketing Company or to its orders or in accordance with its directions was sold by the manufacturing companies to the Marketing Company and the sale was liable to be taxed under the Bihar Sales Tax Act 1944.

15. The appeals therefore fail and are dismissed with costs, one hearing fee.

Appeals dismissed.