

SUPREME COURT OF INDIA

State of Rajasthan

Vs.

Karamchand Thappar and Bros

C.A.No.702 of 1963

(K. Subba Rao, J. C. Shah and S. M. Sikri, JJ.)

09.10.1964

JUDGEMENT

SIKRI, J.:-

1. This is an appeal by special leave against the judgment of the Rajasthan High Court allowing the petition filed by the respondent, Messrs Karam Chand Thapar and Bros. (Coal Sales) Ltd. Jaipur (hereinafter referred to as the petitioner) under Art. 226 of the Constitution.

2. The facts relevant to the determination of the points raised before us are as follows. The petitioner carries on the business of supplying coal throughout India. It has a branch at Jaipur, which was registered as a dealer with the Sales Tax Officer, Jaipur. The branch does retail business in Jaipur and supervises the supply of coal made to consumers directly by collieries. On September 2, 1948, the petitioner secured a monopoly to sell the coal of collieries belonging to the Equitable Coal Company for certain areas including Rajputana. On April 28, 1955, the Company entered into a contract with the Government of Rajasthan for the supply of coal for one month to Jaipur Power House for the first time. Various similar agreements were entered into later for the regular supply of coal to the said power house at Jaipur and Kotah power house. The petitioner supplied coal under these agreements up-till May 1958. It is necessary to set out the terms of the agreement dated April 28, 1955, as the effect of the agreement has been the subject of much debate before us.

"Articles of agreement made this twenty eighth day of April, one thousand Nine-hundred and fifty five between His Highness the Rajpramukh of the State of Rajasthan, of the one part, and Messrs Karamchand Thapar and Bros. (Coal Sales) Ltd. of 5, Royal Exchange Place, Calcutta, hereinafter called the 'contractor' of the other part.

The contractor shall supply the coal to the Rajasthan Government Power House at Jaipur in accordance with the specifications and terms as follows, for a period of one month

1. Rubble Coal, selected grade A, double screened; size 3/4" to 1 1/2" fusion point of ash 1250" F, from Bejdih, Dhamomain and Jamuria West Collieries and as per coal analysis mentioned in their letter No. CS/4844 dated 11-2-1955.

2. The contractor shall deposit a sum of Rs.10,000/- (Rupees ten thousand only) as security for due performance of the contract which would be forfeited in the event of their failure to fulfil their part of the contract satisfactorily.

3. The test report given by the laboratory at Jaipur power house will be final.
4. The decision of the Chief Engineer, Electrical and Mech. Department, Govt. of Rajasthan, will be final, for all purposes.
5. The coal will be supplied F. O. R. colliery subject to the following
 - (a) Payment will be claimed only in respect of supplies actually received and admitted as per specifications at the Jaipur Power House.
 - (b) The contractor will arrange all the transport and safe delivery of coal at Jaipur Power House.
 - (c) First consignment is to reach Jaipur Power House within 10 days from the date of order and supplies will not be less than 150 tons per day for the first ten days.
6. Coal will be supplied at the controlled rate. Railway freight will be paid by the coal supplier in the first instance and reimbursement claimed afterwards on the strength of relevant vouchers along with the bill, for the admitted supplies of the coal in Jaipur Power House. "

3. It is common ground that at the time of the supply of coal the Colliery Control Order, 1945, governed the supply of coal from the collieries. Clause 4 enabled the Central Government to fix the price at which the coal may be sold. Clause 5 ensured that no colliery could sell at a price different from that fixed under clause 4. Clauses 6(1) and (2) read thus :

"6. (1) Where a colliery owner has signified to the Deputy Coal Controller (Distribution) in writing his willingness to sell direct to consumers and an allotment is made by the Deputy Coal Controller (Distribution) to a consumer with his consent for such direct sale, the coal shall be delivered to the consumer at the price fixed under clause 4, and no commission or other charges shall be paid in addition, except that where a broker is employed, brokerage not exceeding six annas per ton may be paid by the colliery owner to the broker.

(2) Where a consumer purchases coal through a del credere agent such agent shall not, on the sale of such coal, charge or receive from the consumer a margin over the price fixed under clause 4 which exceeds:-

- (a) one rupee per ton in the case of coal; or
- (b) one rupee eight annas per ton in the case of soft coke; or
- (c) two rupees eight annas per ton in the case of hard coke."

4. It will be noticed that Para 1 of clause 6 enables a colliery owner falling within this para to give brokerage to a broker not exceeding six annas per ton. The petitioner claims that it was getting this brokerage from the Equitable Coal Company, whose coal was supplied to the Jaipur Power House. Clause 8 empowered the Central Government to give directions to a colliery "regulating the disposal of his stock of coal. . . . including directions as grade, size and quantity of coal which may be disposed of and persons of class or description of persons to whom coal shall or shall not be disposed of... . ." If a direction is given, the colliery owner is obliged by clause (9) to dispose of coal in accordance therewith.

5. Clause 12-E directs that-

"No person shall acquire or purchase or agree to acquire or purchase any coal from a colliery and no colliery owner or his agent shall despatch or agree to despatch or transport any coal from the colliery except under the authority and in accordance with the conditions contained in a general or special authority of the Central Government."

6. The actual procedure adopted for the supply as stated by the petitioner and not disputed by the appellant before the High Court was as follows:

"The Chief Engineer, Electrical and Mechanical Department, Government of Rajasthan, Jaipur informed the Deputy Coal Controller, Calcutta, for a monthly ad hoc allotment of coal through the petitioner. A copy was marked to the petitioner's office at Jaipur. The petitioner through its head office at Calcutta would submit a programme to the Deputy Coal Commissioner (Distribution) Calcutta, for the supply of coal from the collieries who issued a sanction according to the programme and sent copies of such sanction to the Railway Allotment authorities so that adequate wagons might be allotted and the supplies made. On receipt of the sanction from the Deputy Coal Commissioner (Distribution), Calcutta, the collieries supplied coal directly to the Executive Engineer of the Power House concerned, in Rajasthan, and the Railway Receipt was sent to the consignee, through the petitioner, so that he might take the delivery of the coal from the Railways. The bill for the sale of coal supplied to the State of Rajasthan along with the copies of Railway Receipts through the petitioner's head office at Calcutta reached their Jaipur office and the latter office collected the sale price from the State for the supply made to the State of Rajasthan by the collieries."

7. One comment is made by the learned counsel for the appellants as to the said procedure. He says that in the counter-affidavit of the State it is stated that whatever documents the Company submitted were only by way of vouchers to its own bills and otherwise the Government had nothing whatever to do with the Equitable Coal Company.

8. In connection with this procedure it is necessary to refer to a letter of the Deputy Coal Commissioner, dated November 19, 1956, for it contains a direction under cl. 8 of the Colliery Control Order. After sanctioning priority for the supply of wagons and the quantity and grade of coal to be supplied by certain collieries belonging to the Equitable Coal Company, the Deputy Coal Commissioner directed that "the grade and size and quantity of coal to be supplied should strictly conform to the specification given above. " Copies of this letter were forwarded, among others, to the Managing Agents of the Equitable Coal Company, and the petitioner.

9. The petitioner submitted its returns for the year 1955-56 to the Sales Tax Officer and showed therein supplies made to the power house under the heading "Turnover of goods without fee". By order dated February 12, 1957, the Sales Tax Officer, Jaipur City, included the sales to power houses amounting to Rs. 7,11,941-13-3 in the taxable turnover. The petitioner complained in the petition that the Sales Tax Officer did not dispose of its contention raised before him that the sales to the power houses could not be included in the taxable turnover. The Company did not file any appeal but approached the Government and the Sales Tax Commissioner for relief but without success. It appears that though on December 30, 1957, the Council of Ministers passed a resolution exempting sales of coal to the Electric and Mechanical Department this could not be implemented because the papers were not submitted through the Finance Department. This decision was, however, orally communicated to the petitioner. In the meantime the petitioner submitted the returns

for the assessment year 1956-57, showing therein the supply of the coal to the power houses under the head. "Turnover of goods exempt without fee on Form STV". The Company alleged that it feared that the Sales Tax Officer would tax the, said turnover as before.

10. The petitioner contested its liability to be taxed in respect of the supply of coal to the power houses on three grounds. First, that the petitioner acted merely as a broker and was not a dealer within the definition of the word 'dealer' in the first para of S. 2(f) of the Rajasthan Sales Tax Act, 1954, as far as the supplies in question are concerned. Secondly, that the sales took place in the course of inter-State trade and, thirdly, that the sales took place outside the State of Rajasthan. Mr. Vishwanatha Sastri, relying on the decision of this Court in *M/s. New India Sugar Mills Ltd. v. Commr. of Sales, Tax, Bihar*, (1963) Supp 2 SCR 459 : (AIR 1963 SC 1207) has sought to raise an additional ground, namely, that as the supply of coal was made under the provisions of the Colliery Control Order, it, did not amount to a sale.

11. The High Court accepted the first contention of the petitioner but did not deal with the second and the third contentions. The learned counsel for the appellants, Mr. Tewari, submits that the High Court was wrong in holding that the Company acted as a broker. According to him, the sales were made directly by the petitioner. In the alternative, he contends that the petitioner was an agent within the Explanation to S.2(f) of the Rajasthan Sales Tax Act (Rajasthan Act XXIV of 1954), Section 2(f) defines a 'dealer' thus :

"2(f) "dealer" means any person who carries on the business of buying or selling or supplying goods in the State, whether on commission or for remuneration or otherwise, and, includes the Central Government, a State Government or any of their departments in respect of any such business, a Hindu undivided family, and a society, club or any other association which buys goods from or sells or supplies goods to, its members;

Explanation: Where a dealer who resides outside the State carries on the business of buying, selling or supplying goods in the State through a manager or agent, the manager or agent shall, in respect of such business, be deemed to be a "dealer" for the purpose of this Act."

12. Mr. Tewari says that there was no privity of contract between the Equitable Coal Company and the Government. He points out that under the agreement dated April 28, 1955, it is the petitioner which had to supply the coal and payment could only be claimed in respect of supplies which were accepted as per specifications at the Jaipur Power House. The petitioner had to arrange transport and safe delivery of coal and pay railway freight in the first instance. The security of Rs. 10,000/- was deposited by the petitioner to secure due performance of the contract. Mr. Sastri in reply submits that this agreement is to be read in the light of the Colliery Control Order, and if there is inconsistency between the contract and the Colliery Control Order, 1945, the latter will prevail. According to him, no property in the coal ever passed or could pass to the petitioner and it was a case of a direct sale by the colliery to the State Government. This is evident, he says, from cl. (6) and the direction given by the Coal Controller under cl. (8) of the Colliery Control Order. Under the direction coal could only be supplied to the State of Rajasthan.

13. It seems to us that the petitioner is not a dealer within the definition of the word 'dealer' in the first para of S. 2(f), set out above. The petitioner did not sell or supply coal. What it did was to procure the supply of coal. Under the direction issued under cl. (8) of the Colliery Control Order, it is the Equitable Coal Company that supplied the coal directly to the Rajasthan Government. No property in the coal ever passed or could pass to the petitioner. If the agreement dated April 28,

1955, contemplated a sale by the petitioner to the Rajasthan Government, the agreement could not be carried out in view of the provisions of the Colliery Control Order, at least as far as supplies from collieries are concerned, because the collieries could not but obey directions issued under clause (8). Therefore, we must reject the contention of Mr. Tewari that the petitioner fell within the first para of S. 2(f).

14. Mr. Tewari put his alternative point thus: The High Court has omitted to notice the explanation to S. 2(f). The petitioner is an agent within the explanation because the Equitable Coal Company had sold or supplied goods to the Rajasthan Government through the petitioner, under the agreement dated September 2, 1948. The Colliery Control Order does not prohibit collieries from securing orders through agents. Under the said agreement, the petitioner had to arrange despatches to cover monthly quantities of coal reserved on its account. Therefore, the petitioner was carrying out its obligations to the Equitable Coal Company when it entered into the agreement dated April 28, 1955.

15. It seems to us that there is considerable force in his contention. Clause (1) of the said agreement mentions the collieries from which the coal is to be supplied and these collieries belonged to the Equitable Coal Company. The petitioner charged no remuneration from the Rajasthan Government. It had to supply coal at the controlled rate and, therefore, the only profit which the petitioner could make was from the brokerage it received from the Equitable Coal Company. Therefore, it seems reasonable to conclude from these facts that the petitioner was acting as the agent of the Equitable Coal Company. The fact that the remuneration it received was called brokerage is not conclusive. Whether the petitioner is an agent or not must depend on the facts of each case. Therefore, it is not necessary to discuss the decisions of this Court in *G. Gilda Textile Agency v. State of Andhra Pradesh*, (1963) 2 SCR 248 and *Firm Shivratn G. Mohatta v. Sales Tax Officer, Jodhpur*, AIR 1964 Raj 5 relied on by Mr. Tewari. Mr. Sastri contends that the petitioner was also an agent of the Government, but we are unable to agree with him. Apart from the fact that the petitioner was charging no remuneration from the Government, the agreement dated April 28, 1955, read as a whole is clearly between two principals. Accordingly, we hold that the petitioner is an agent within the explanation to S.2(f), and therefore, he is deemed to be a 'dealer' for the purposes of the Act. We may mention that Mr. Sastri has not contended that assuming that the supply of coal amounted to sale the Equitable Coal Company was not carrying on the business of selling or supplying goods within Rajasthan.

16. We may now deal with the point raised by Mr. Tewari that the High Court should not have granted relief under Art. 226. He does not dispute that the High Court had the jurisdiction, but he says that on the facts of the case, the High Court should not have interfered. We are unable to agree with him. The High Court has given good reasons for interfering. The High Court observed that "the petitioner had challenged the authority of the State of Rajasthan to enact a law whereby tax on the sale of goods outside the State of Rajasthan could be levied and the application of the law itself to the circumstances of the case. The petitioner has also averred in its petition that it has a fundamental right of free trade and any such imposition infringes this right of the petitioner. We cannot, therefore, entertain the plea in bar."

17. Regarding delay, the High Court excused the delay on the following ground:-

"The petitioner has also in our opinion adequately explained the delay in seeking relief from this Court. The petitioner has alleged, and this allegation has not been controverted, that the Secretary of the Government Public Works Department, submitted a proposal to the Council on 30th December, 1957, recommending that the transactions under dispute be exempted from the levy of sales tax. The

council passed a resolution to that effect on 10th January, 1958, but since the papers were not submitted through the Finance Department, the decision of the Council could not be implemented. This decision was verbally communicated to the petitioner and, therefore, the petitioner did not move this Court earlier. In our opinion, in view of these uncontroverted facts, the petitioner was justified in not rushing to this Court."

18. In the result the appeal must succeed, but as the High Court did not deal with the question of the situs of sale or whether the sale was made in the course of inter-State trade, the case must be remitted to the High Court. Although Mr. Tewari has opposed the raising of the question at this stage whether the supply of coal amounted to sale, we are inclined to allow this point to be raised because the question is one of law which can be decided on the material on the records of the case, in the light of the decision of this Court in (1963) Supp 2 SCR 459 :(AIR 1963 SC 1207) which was decided after the judgment of the High Court in this case. We express no opinion whether the said decision covers the present case or not.

19. Accordingly, the appeal is accepted and the case remitted to the High Court, which will dispose of the case in accordance with law. Costs incurred in this Court will be costs in the case.

Appeal allowed.

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